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Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS.

WILLIAM BEACH LAWRENCE

(IN EQUITY)

VS.

R. H. DANA, JR., ET ALS.

CLOSING ARGUMENT FOR THE COMPLAINANT ON
THE QUESTION OF PIRACY.

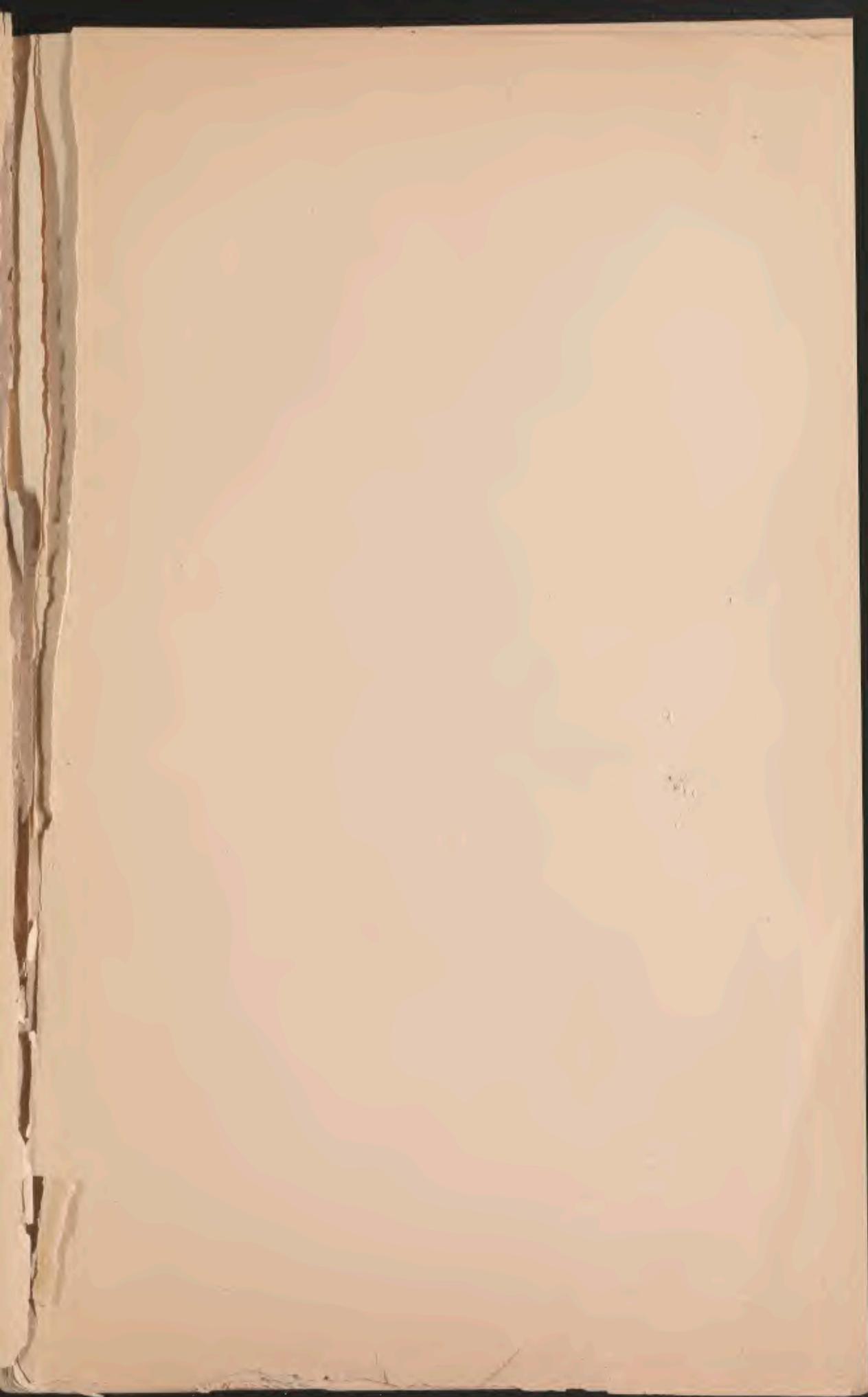
B. R. CURTIS,

J. J. STORROW,

FOR THE COMPLAINANT.

84 SCHOOL STREET.





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CLOSING ARGUMENT FOR THE COMPLAINANT ON THE QUESTION OF PIRACY.

ADDITIONAL REPLY ON NOTICE TO MR. DANA OF MR. LAWRENCE'S CLAIMS.

The respondent's argument opens with a charge that the complainant's counsel have misstated or misrepresented the evidence in a certain particular.

§ 1. The evidence is that, at an interview between Mr. Lawrence and Mr. Dana, in November, 1865, after considerable conversation as to the rights and relations of the parties, Mr. Dana "referred him to the owners and the publishers" (Dana, 22 ans. p. 333). "The duties of other persons towards him I distinctly declined to go into, and referred him to them" (Dana, 26 ans. p. 336). Mr. Dana then testifies: "I described the scene to the Wheatons and Professor Parsons, . . . leaving them to suppose that they might hear from him" (27 ans. p. 336). Shortly after this interview Mr. Lawrence wrote to Mr. Parsons a long letter, to which Mr. Parsons replied as follows (Exhibit 94, p. 549):

Dear Sir,— I read enough of the document received by me by mail to know its subject and then sent it to Mr. Dana.

I am not the lawyer or counsel of any party in this question. And you will, I am sure, see that, in a matter of so much importance, I should do wrong to offer any advice, or even form an opinion without thorough investigation and careful examination. And that my engagements make impossible.

Whatever were the precise contents of the letter, it is clear that it related to the rights and obligations of the parties, and was such that Mr. Parsons thought that Mr. Dana ought to see it. He sent it to Mr. Dana with a note which is not preserved, but which seems to have been similar to the letter to Mr. Lawrence, and by which Mr. Dana learned that Mr. Lawrence had been informed of the disposition Mr. Parsons made of it. (Mr. Dana, 29 ans., p. 337.) Mr. Dana says, "I rolled it up [Mr. Lawrence's letter] immediately, and, abstaining of purpose from seeing

a word of it, I sent it back to Mr. Parsons." Evidently he did this because he believed it to be the letter relating to Mr. Lawrence's claims which he understood was to be written to the Wheatons or Mr. Parsons.

Mr. Dana had testified, not that he never knew *what* Mr. Lawrence wrote about it, but that he never knew that he wrote anything about it; he says: "I never heard that he brought the matter to the consideration of the other parties" (p. 336).

The complainant's brief, p. 96, contains the following:

On p. 336, he says that, after his interview with Mr. Lawrence, he "never heard that he brought the matter to the consideration of the other parties," and yet, at the close of the interview, he understood that Miss Wheaton or Mr. Parsons would probably hear from Mr. Lawrence, and so informed them, (27 ans. p. 336,) and he afterwards actually had in his hands the letter which Mr. Lawrence did so write. (Exhibit 94, p. 549; Dana, 29 ans. p. 337.)

We submit that we were quite within bounds in simply characterizing as singularly careless and inaccurate his statement that he *never heard* that Mr. Lawrence brought the matter to the attention of the other parties.

§ 2. The eighth point in our brief (p. 28) is an argument to show that the respondents are not within the protection which courts of equity extend to innocent purchasers without notice.

As has been seen, Mr. Lawrence wrote a letter upon the subject of his rights to the person to whom Mr. Dana advised him to address himself. That letter was placed in Mr. Dana's hands, and Mr. Dana knew that Mr. Lawrence was informed that it had been so placed. It must be taken also as a fact that the claims made in that letter, in January 1866, were the same that are now made, for the letter remained in the respondents' control, and, if it contained anything inconsistent with the case now presented by Mr. Lawrence, they would have produced it. Now, in considering this defence, it is a most material question whether Mr. Lawrence held his peace, knowing of their actings, so that Mr. Dana could truly testify that he never heard that Mr. Lawrence brought the matter to the notice of the other parties, or whether, as was the fact, and as was known to Mr. Dana, Mr. Lawrence, the moment he heard of their intentions, took every possible step to make his claims known, and

only desisted when he was informed that he had succeeded in placing a written statement of them in the hands of all the parties,—and he could do no more.*

It is not too much to say that Mr. Dana *purposely* refrained from learning any details about Mr. Lawrence's rights in the premises. He refused to allow Miss Wheaton to explain to him the relations of the parties. (Answer, p. 67; 29 ans., p. 338.) He tries to escape the effect of Mr. Lawrence's verbal communications by saying that he did not quite understand them. When, finally, a written statement is put into his hands as a paper which, even in Mr. Parsons' opinion, he ought to read, he "abstains of purpose from seeing a word of it" (p. 337), tells us something about not being willing to read letters addressed to other gentlemen, and quotes us a phrase from Shakespeare. He adds: "His subsequent letters, which I have been told appeared in other papers, I did not read. I wish to say that I read but little that appears in the press" (p. 338). "I felt satisfied that whatever he might say against me it was not necessary for me to reply to" (p. 393). †

Under these circumstances it is entirely immaterial, so far as Mr. Lawrence's rights were concerned, whether Mr. Dana read the letter or not. It is enough that it came to his hands; that, with his knowledge, Mr. Lawrence was so informed, and that his subsequent refusal to read it was never communicated to Mr. Lawrence.

* Mr. Lawrence had an interview with Mr. Dana in November 1865, the moment he heard of what they were doing; and, about the same time, through his attorney, Mr. Sheffield, wrote to Little, Brown & Co. Shortly afterwards he had an interview with Mr. Parsons. In January he wrote to Mr. Parsons a long letter which, he was informed, had been sent to Mr. Dana; at the same time he sent a copy of a material portion of it to Little, Brown & Co., which they forwarded to Miss Wheaton. (Record, p. 271; brief, p. 29.)

† "*Sneer*. Then his affected contempt of all newspaper strictures." . . .

"*Sir Fretful PLAGIARY*. The newspapers! . . . not that I ever read them, — no — I make it a rule never to look into newspapers." — *The Critic*, Act i. Se. 1.

PART I.

REPLY TO VARIOUS MATTERS IN THE RESPONDENT'S ARGUMENT WHICH ARE PRELIMINARY TO THE MAIN QUESTION OF PIRACY.

To relieve the Court from the necessity of examining three pamphlets, — our brief, the report of our opening oral argument, and this closing argument, — we have combined the substance of the brief and former argument with what it seemed necessary to say now, so that the Court may consider that the argument now presented contains all that we desire to say on behalf of the complainant upon the question of piracy.

From statements made to your Honors by the respondent, Mr. Dana, as the reasons for an extension of the time for filing his argument from Jan. 13 to Feb. 13, and otherwise, we are authorized to assume that the printed "argument for the respondent, Mr. Dana," is the work of that respondent himself, except that counsel prepared those portions relating to the respondent's character, attainments, and merits, which a natural delicacy would have excluded had they not been, in the opinion of counsel, matters important to be introduced.

I. THE VALUE AND ESTABLISHED REPUTATION OF MR. LAWRENCE'S BOOK — MR. DANA'S EXPECTATIONS ABOUT HIS OWN WORK.

§ 1. Some remarks are made in the respondent's argument about the proof of the value of Mr. Lawrence's book presented by certain schedules in the Record, pp. 84-86, 88-95. The respondents had attacked its literary character in their answers, and, as Mr. Lawrence could not be sure when the testimony in his behalf was taken, that, as the event proved, they intended to leave these charges unsupported, it was proper to meet them. This was not done by Mr. Lawrence's own statements as to his merits, but by showing, by means of citations and extracts, the extent and the manner in which the leading writers refer to his book

(his edition of 1855, as well as that of 1863), and upon this he rests his reputation. The evidence seems to have produced at least one effect. Mr. Dana, carefully informing us that he did it "at the request of his counsel and not of his own desire" (p. 308), has given quite a sketch of his life and career to which the argument devotes several pages, stating (p. 16) that "Mr. Dana, before undertaking this work, by birth, association, and still more by his own labor and merit, held a rank among the leading men of the day."

§ 2. The respondent's argument says (p. 31) that Mr. Lawrence's "name does not appear, that we are aware, in the encyclopedias and dictionaries of authors," and for evidence upon certain points in Mr. Dana's personal history we are referred (p. 18) to "American Enc., title 'R. H. Dana, Jr.'" There are several matters connected with the literature of international law which the writer of the respondent's argument does not always seem to be aware of. Appleton's Encyclopedia is a work useful in its sphere, but hardly to be taken as a measure of literary rank or attainments upon the subject of international law. The names of Mr. Lawrence, Dr. Phillimore, Dr. Twiss, Hautefeuille, Massé, Ortolan, Fœlix and Heffter, are not found in it; while it devotes to Betty, the "young Roscius," more space, and to Alexandre Dumas, more than twice as much space as it does to Mr. Dana. His name is mentioned twice in that work: it appears from the list at the end of that encyclopedia, that Richard H. Dana, Jr. Esq., of Boston was a contributor, and that his contributions were devoted to American biography, though precisely which of the biographies contained in the book were written by him is not stated in that list, nor in the article referred to, nor in the argument. We do not mean to say that he wrote the sketch of himself, because we have no knowledge or means of knowledge on the subject, but, under the circumstances, a notice of Mr. Dana was not likely to be omitted. So far as appears, Mr. Lawrence did not contribute directly to that work, though the article on Mr. Wheaton has very properly a considerable quotation from Mr. Lawrence's memoir.

§ 3. As the books upon which Mr. Dana's fame rests, and which are of the only class much referred to in dictionaries of contemporary authors, had been of a considerably different kind of literature, he could not found his reputation on the acknowledged merit of any work exhib-

iting learning or the fruits of study; the argument therefore is rather an attempt to show the character and value of his present work by proof of what he and his friends hoped it would be, instead of by a reference to opinions which have been expressed about his book. Indeed the university honors which are mentioned were the result of those great expectations, for he received them *before*, and not after his book was published and the manner in which it was prepared had been made known.

§ 4. The writer of the argument for Mr. Dana seems to have perceived that this was unsatisfactory, and therefore has permitted himself to go outside of the record, and, having undoubtedly searched the recent publications down to the time of writing, he states that Bluntschli, in a recent work, has made twenty-nine references to D.'s notes, three to Wheaton's text, and only seventeen to all other modern writers in the English tongue. Unfortunately (or fortunately), he does not tell us whether all or nearly all of those references are to matter in D. which is copied from L. The facts stated, that Bluntschli has nearly twice as many references to D. as to all other writers in the English tongue, and that, unlike all recent writers (except D.), he never refers to L., would almost justify the inference that his knowledge of English writers was limited to a perusal of a presentation copy of D. sent him by Mr. E. T. Dana, who was for many years a student in the university with which Bluntschli is connected.

Mr. E. T. Dana, though too ill to have his deposition regularly taken, was able to make a short statement (cross-examination being waived), by which the respondents have established the important fact that "the degrees conferred at Heidelberg upon the regular students of the university are given after a thorough and bona-fide examination, and are carefully discriminated into four ranks, according to the result of the examination. My degree was of the highest rank." (E. T. Dana's dep., p. 557.)

§ 5. If we might take the same liberty of going outside the record, we could mention that De Burgh's "Elements of Maritime International Law," London, 1868, has many citations of modern writers, and among them are thirteen of Lawrence's Wheaton, of which eight are to L.'s notes, five to Wheaton's text, while no allusion is made to Mr. Dana's

edition. (De Burgh, pp. 112, 121-2, 123, 127, 132, 147, 150, 214.) *

§ 6. Some allusions are made in the respondent's argument to the correspondence with Mr. Brockhäus called into the case by the respondents. Mr. Brockhäus has undoubtedly been disappointed at the delay in the preparation of the French edition, and probably not the less so because Mr. Lawrence's time and attention have been occupied in protecting himself against those who received the full consideration for that and all other editions. The moment Mr. Brockhäus found that the time occupied by Mr. Lawrence was greater than had been anticipated several courses were open to him. If his whole object in negotiating was to make payment for past editions, and to procure the right to translate the edition of 1863, at his own expense, he had procured that by the letters of Miss Wheaton and Mr. Lawrence of June 14 and June 16, 1863. If he thought that the advantages to be derived from Mr. Lawrence's new work were less than the evils of delay, he could at once exercise the right which he had purchased. But at an early day he had the MS. of a considerable portion of the new edition, and his estimate of the improvements made by Mr. Lawrence was such that he was willing to

* A letter from Dr. Abdy, Regius Professor of Laws in the University of Cambridge, and Law Professor at Gresham College, England, author of "Abdy's Kent," was enclosed in some correspondence called into the case by the respondents. It contains the following (Record, p. 541):

I take up my pen, first to thank you for your very kind and flattering expressions about my work, and secondly to say that if it meets with any success it will be because of the name of the great American jurist Kent, under whose protection it appears, and because of the large assistance rendered to me and all modern labourers in the science of International Law by yourself, — the able editor of that other great American jurist Wheaton. I have read the report of the pleadings and arguments in your suit against Mr. Dana, and I have also looked at his edition of Wheaton, and I must say that of all the cool proceedings in the shape of literary piracy I have read or heard of that is the coolest. I do most cordially hope that ere this comes to hand you will have received substantial justice for the injury inflicted upon you. And I think I may say, as far as this side of the Atlantic is concerned, that there is very little prospect of any other edition of Wheaton's International Law being known to fame than that by William Beach Lawrence. Sympathizing strongly with you in the trouble and annoyance you have been put to, and wishing you a triumphant issue, believe me,

Yours very truly,

J. T. ABDY.

return that MS. for completion at the risk of great delay. Throughout the whole correspondence your Honors will find that there is no attempt on his part to recede from the agreement that the translation should be made here, no request that the 6,000 francs should be repaid, but constant appeals to Mr. Lawrence not to abandon the work, and to perform it quickly, and finally it is put to press. That is the whole drift and substance of his letters.

II. THE RESPONDENTS' ATTACK ON MR. POTTER.

§ 1. The respondents' argument devotes a very large space to a labored attack on Mr. Lawrence and Judge Potter. Mr. Potter's deposition is a statement, in detail, that certain matters are in D., in L., and are or are not to be found in certain other books; in every instance he specifies the volume and page referred to, so that his work can be verified, except in the case of a few general statements where all that it is either possible or necessary to do is to give some details by way of examples, and these he gives. Now the question is whether his statements are correct, and it will be found that Mr. Morse carefully examined every one of them (15 ans., p. 406), and that his scrutiny leaves them substantially untouched. The attack on Mr. Potter is therefore an attempt to raise a false issue, and we invite the attention of the Court to the manner in which it is made.

§ 2. Some remarks about Mr. Potter, wholly outside the case, make it proper to say that, besides his study and practice of the law since he was graduated at Cambridge, Mr. Potter acted as a special commissioner for Rhode Island at Washington to settle the difficulties growing out of the Dorr Rebellion, and performed those duties in such a manner that, immediately upon his return, he was sent to congress as Representative to fill the chair which his father had long occupied before him. Since then, besides constant service on the Judiciary and other important committees in the State Legislature, he has had charge of the public education of Rhode Island for eight years as School Commissioner. Since the oral arguments in this case, he has been elected Judge of the Supreme Court of Rhode Island, by the unanimous vote of a republican governor and legislature, and, as he has been during his whole public life so identified with the opposite party as to have been, at one election,

their candidate for governor, perhaps no higher compliment could be paid to his learning and integrity. It was very natural that, when Mr. Lawrence was governor of Rhode Island, these gentlemen should make each other's acquaintance and that a community of studies should lead to considerable intercourse between them.

§ 3. The alleged errors in his deposition will be examined in our examination of each note hereafter; a few of the charges may be here alluded to.

In his direct examination (p. 232), Judge Potter gave a list of sixty-eight "notes of which the whole (statements and authorities) *except* some mere citation or some trifling or comparatively unimportant matter, is to be found in the corresponding notes in L." Afterwards, in obedience to a cross-interrogatory, he enumerates forty-eight notes, and says that they include "that part of the notes put in class first, [the sixty-eight] in the direct examination, which I regard as *wholly* from L" (17 cross ans. p. 243). Certainly there is no inconsistency here: sixty-eight are from L, with some additions; of these forty-eight contain no additions, leaving the remaining twenty as those to which the exception applies. The respondent proceeds to examine these twenty notes and points out as to most or all of them that D. has made some small addition, and then produces the fact of an addition as the basis on which to charge Mr. Potter with falsifying. In one case (p. 113) he claims that he has looked at a recent U. S. treaty to which L. had referred him, and made a slight change in the manner of describing it, and supports his charge against Judge Potter by quoting from that gentleman's deposition with quotation marks, thus: "the whole . . . is to be found in L. . . . the whole could be written from L.," *leaving out the words in the same sentence "except some"* etc., and making no allusion to the fact that on p. 213 Mr. Potter *expressly* said that in this note "D. appeared to have looked at the volume of U. S. Statutes referred to by L." See n. 111, *infra*.

D. n. 112, p. 266. The argument (p. 113) begins as follows: "All that Potter says of this, in his dep. p. 213, is 'all the facts and authorities are in L. n. 110, pp. 234-237.'" The fact is that, instead of that being *all* that Mr. Potter says on p. 213, he devotes half a page to it, and points out actual proof of copying which is perfectly unanswerable, and which the argument, having thus put out of sight, makes no attempt to

answer. In this case also the argument shows that D. looked at a U. S. treaty cited by L., and then confronts with this fact what it gives in quotation marks and italics as Mr. Potter's statement on p. 213, "*all the facts and authorities* are in L.'s note 110," omitting the qualification which Mr. Potter puts in the same sentence "though D. has looked at a recent U. S. treaty mentioned by L."

D. n. 55, p. 151. In this note D. gave a *statement* of the Sussex Peerage case, pretending that he took it from Westlake, § 348. Judge Potter, p. 167, said that Mr. Dana copied this *statement* from L.'s note attached to the same word, and he said: "that matter is not *stated* in Westlake." Afterwards it appeared that Westlake simply *cited* the case, and gave no statement of it and no comments on it. So that Mr. Potter's account of the matter is true and accurate in form and substance, and contains the only material fact, namely, that D. could not have got his *statement* from Westlake. Yet the respondents' argument [top of p. 42], for the express purpose of attacking Mr. Potter's credit, says:

Again in his deposition (p. 167), he says that this "matter" is not found in Westlake, while it is found in L.'s note at the same place." (The quotation marks are from the argument.)

The whole alleged contradiction is created by the respondents, by changing Mr. Potter's statement that it is not "*stated*," which is true, into an assertion that it is not "found" which is not true, and which was never made by Mr. Potter,—and they do this as if giving Mr. Potter's language.

The argument then accuses Mr. Potter of having said that the case was not *referred to* in that section of Westlake when he knew it was cited in the *note* to the section. Mr. Potter never said that it was not "referred to." He did say, and said truly (p. 206) "neither that section, nor any other part of Westlake, contains any statement of the Sussex case." The disingenuous distinction between section and note to the section, originated entirely with the respondents; not only does Mr. Potter's deposition give no foundation for it, but it distinctly excludes it in the passage above quoted.

Having invented this distinction and styled it a "verbal trick," on p. 42, they took advantage of it in another case on p. 69 of their argument. They there say that "Mr. Potter says that D. n. 14 is wholly

taken from L.'s note 15, p. 37. . . . His note *does not refer to Harcourt and Gaillard* which is all that is in D.'s note." [The italics are theirs.] What Mr. Potter said (p. 195) was that this case was "in L. p. 977, addenda to n. 15," and this is true, as the argument directly afterwards admits.

Again, on p. 73, their argument is very severe on what they call "the reprehensible attempt of Mr. Potter to give the impression that the Sussex Peerage case is not *noticed* in Westlake." The only reprehensible matter is their assertion that he made such a statement. On the contrary, Mr. Potter voluntarily said that "Westlake *states* the royal marriage act, and *merely refers* to the Sussex Peerage case, and gives no particulars of it" (p. 245). See the special examination of n. 55, *infra*.

D. n. 19, p. 52. Mr. Potter pointed out that D. took this note from L., p. 177, and for the most conclusive proof of this we refer to the special examination of this note *infra*. D. cites the tripartite treaty of "October 1861." To disprove our charge, and as the foundation for an attack on Mr. Potter, the respondent's argument says: "*he [L.] does not give the date of the treaty*" (p. 46); "D. gives the date of the treaty, by year, month, and day, which is not in L."; "the admission is extorted from Mr. Potter that L. does not give the date of the treaty, while D. does give it" (p. 103).

All this is entirely incorrect. The fact pointed out by Mr. Potter, but suppressed in the argument, is that L., not giving the date of the treaty *on that page*, speaks of this treaty as a matter the reader "will recollect," and expressly refers back to his note twenty pages before, where the date is given, and from which Mr. Dana had just been making the most wholesale copying in his note 41. See n. 19, *infra*.

On p. 45 they make charges which we shall hereafter show, in connection with our "proof from identity of order" to be entirely unfounded, and they give a long sentence in quotation marks which is strong enough to support any charge. *It is all taken from their own cross-interrogatory*, and they do not quote, but entirely misstate the answer to it.

D. n. 233, p. 674. They say (p. 48), that, to support his assertion that this is copied from L., Mr. Potter, in his affidavit (p. 95), "cites detached passages of L. between pp. 533 and 863." "To support the

statement Mr. Potter is obliged, as we have seen, to dip into parts of L. within a range of three hundred and thirty pages."

Mr. Potter's dep., p. 228, said: "It is all in L. n. 235, p. 827, attached to the same word, and the supplement thereto, p. 46, except one or two despatches of Mr. Seward, and perhaps one speech." Our examination of this note *infra* will show that this is true. All the sources he pointed out for it on p. 95 of the affidavit are L. pp. 828-831; sup. 45; pp. 833, 835, 829-832, 828, 836; these are all included in L. n. 235.

It is possible that the respondent may have been led into error by the fact that, in the affidavit, Judge Potter's remarks about *other* notes are in the same paragraph with this; but these mistakes are not excusable in matters brought up solely as the basis of an attack on Mr. Potter's credit. Besides, the writer refers to the deposition, and there is no possibility of any mistake there, and neither in the deposition nor *anywhere* on p. 95 of the affidavit is there any citation of L. p. 863.

Again, on p. 53, they exclaim against Mr. Potter for being so absurd as to make a charge of copying from parts in L. "eight hundred pages apart," the passages being the foot notes and the appendix therein referred to. There are other similar cases.

D. n. 62, p. 165. The respondents' argument, p. 51, states that "Mr. Potter says (p. 207) that '*there is no such book*' as the one D. cites in his note, viz: 'Rev. Fr. et Etr. ix.'" Mr. Potter did say so, and the fact he stated is not denied. It then intimates that he has knowingly suppressed the fact that there is a "Rev. Etr. et Fr. ix," which is the book to which D.'s citation refers. In the very next sentence to the one they quote, Mr. Potter stated that there was a "Rev. Etr. and Fr.," and that this was the book referred to. He also shows that D.'s error arose from copying from L. and from his ignorance of the fact that these Reviews, of which he constantly copied citations, were distinct works. All this part the defendant's argument suppresses, and it makes no attempt to meet this proof of copying citations of books he never looked at.

The next paragraph, on p. 51 of the argument, asserts that Mr. Potter charged Mr. Dana with having given the wrong name to certain journals, in that he called the Times the London Times, and the Ann. Reg. the British Ann. Reg., and it intimates that no right minded person would notice these distinctions. There is not a word about these two

names in Mr. Potter's deposition. It is all in the deposition of Mr. Morse, Mr. Dana's expert. See *infra* "errors and peculiarities." This charge is repeated on pp. 92, 140.

D. n. 223. The argument (p. 56) attacks Mr. Potter for having said that this note was copied from L. "where nothing else appears than that in D.'s note of six and a half pages, and L.'s two notes of seventeen pages, in statements of public historical matters, three dates, two proper names, and three collocations of two or three short words are the same," and it refers to his cross-examination, p. 254. In effect this is not a correct statement even of what appeared on that cross-examination. But would your Honors suspect that, so far from this being *all* that appears, the evidence discloses a most remarkable instance of wholesale copying? (See this note *infra*.) Or would you suspect that this cross-examination, here referred to as showing *all* that appears, was *expressly* restricted to one short paragraph of five lines, and that every attempt by Mr. Potter even to illustrate his statements by reference to other proof of copying in the same note was promptly objected to as not responsive by the respondents' counsel? Yet this is the fact. (See Record, cross-ints. 52, 63; objections to ans. 56, 63, pp. 251-254.)

§ 4. Some remarks in the respondents' argument p. 50 (21) make it proper to say that none of the interrogatories to Mr. Potter were prepared by him, in substance or in form; on the contrary on one occasion counsel opened a line of inquiry which involved an investigation Mr. Potter had been asked, but had accidentally omitted to make, and which he afterwards made. (See 24 ans., p. 233.) His deposition was taken exactly as it appears to be by the record, that is to say the parts produced all written out were marked as schedules, and the remainder of the testimony was given orally, with, of course, such memoranda of the results of his investigations as were necessary, and with his affidavit, certain portions of which were reproduced. The writer of the respondents' argument is in error on this point, though the error is undoubtedly unintentional, as he was not present when any of our depositions were taken. It was not supposed, however, that the respondents would make it a ground of observation that an important witness had written out his own interrogatories. For the matter of the text, see p. 20 *infra*.

III. THE RELATIONS OF THE PARTIES AND THE RESPONDENTS' ATTACK ON MR. LAWRENCE.

§ 1. The respondent's argument, pp. 183-185, contains some observations, the propriety of which the Court will judge of. Considering the state of public feeling at the time, and the official position and duties of its author, no more serious and grievous charge than the one preferred by Mr. Dana against Mr. Lawrence could have been made. It should not have been put forth unless the author of it was assured, by a careful study of Mr. Lawrence's published opinions, that it was well founded. Mr. Lawrence replied to it, disclaiming the opinions imputed to him, showing that he had publicly expressed the contrary opinion in his book of 1863, and that another critic (M. Henri Vignaud, in the *Mémorial Diplomatique*) had regarded Mr. Lawrence's article in question as an able argument against the "dangerous and wicked doctrine that the Southern States are out of the Union, and could only re-enter it as conquered provinces." (Record, p. 280.) With these remarks it is sufficient to refer your Honors to the ninth point, on pp. 30-39 of our brief, and to Mr. Lawrence's deposition, p. 280.*

* The following is from that portion of our brief:

There is a constant attempt in the answers, and in the testimony of Mr. Dana and Mr. Little to throw discredit on the character of Mr. Lawrence's work; and the pretence is made that it was so bad as to bring disgrace on Mr. Wheaton's reputation. It is alleged that this reason, and the fraudulent and oppressive conduct of Mr. Lawrence, especially with regard to the matter of the title-page, had produced such an effect on the Wheatons, that *they* had resolved that they could neither have any further association with Mr. Lawrence, nor permit him to be in any way connected with the book, and that, in June 1863, he was perfectly aware of this determination. (Answer of Miss Wheaton, p. 27; Dana, p. 57.) Miss Wheaton's letter to Mr. Lawrence of June 1, 1863 (Exhibit 49, p. 513), distinctly disproves this. It shows clearly both their favorable opinions of his work, that their only dissatisfaction was with the conduct of Mr. Little, and that their regret was for the annoyance Mr. Lawrence has suffered; (and the other letters herein alluded to are equally conclusive.) When it is considered, that in June 1863, Mrs. Wheaton's mental condition was such that Mr. Lawrence could not see her (pp. 26, 88, 282), that even Mr. Dana admits that they derived their opinions from others, and that he "cannot discriminate the instances they named to him from those he himself knew" (p. 360), that the persons who surrounded them were Mr. Little, Mr. Dana (4 ans. p. 308) and Mr. Parsons (3 ans. p. 301), and when it is seen how decided were the opinions of those gentlemen with regard to Mr. Lawrence, both as to the character of his work, and

There seems to be an attempt to put forward Miss Wheaton as the defendant principally concerned, and to represent the issue as between her pecuniary interests and Mr. Lawrence's. It appears, however, that

the propriety of his being superseded (Dana, 18 ans. p. 328; 20 ans. p. 329; 9 cross-ans. p. 362), it is not difficult to see the origin of those objections which the name of the Wheaton family is vouched in to support.

"Mr. Dana, having said that the Wheatons formed their opinions from what was said to them by others, states that, while his employment as editor was under consideration, he wrote a pamphlet, which charged Mr. Lawrence with being 'an advocate of secession.' He makes a statement two and a half pages long, which exhibits feelings and sentiments so strong against Mr. Lawrence, that they must have had an overpowering influence on persons who were as intimate with him as the Wheatons were. (Dana, 4 ans. p. 308.) Mr. Dana was not able to recollect that Mr. Lawrence had replied to his pamphlet, denying that he entertained the views attributed to him (40 cross-ans, p. 372); but it appeared, on Mr. Lawrence's re-examination (p. 280), that he immediately published a reply, stating, that "by disconnecting a sentence in a private letter from the matter which precedes and follows it, and by retaining an obvious typographical error, which substitutes 'individual locality' for 'individual loyalty,' I am presented as an advocate of secession." That reply goes on to show that others have drawn from Mr. Lawrence's letter conclusions directly opposite to those presented by Mr. Dana, and that Mr. Lawrence's views are fully stated on certain pages of his book.

From these two specific instances, the only ones so made that they can be met, the weight of the general charges can be estimated. And from the repetition of this last charge by Mr. Dana, not only after Mr. Lawrence's refutation of it, but its repetition on his re-examination (p. 390) ten days after his attention had been expressly called to that refutation (p. 372), exhibits the disposition of these persons to throw odium on Mr. Lawrence by charges which they either knew to be untrue, when first made, or persist in when they ought to retract them.

As Miss Wheaton's own deposition does not even affirm *her belief* in these charges, it may be inferred that she and Mrs. Wheaton had the same connection with them, that they had with matters between Mr. Lawrence and Mr. Little in 1861, evidently put forward by the latter as the act of the Wheatons, and as to which Miss Wheaton wrote that she "was relieved to find that Mr. Lawrence did not suppose us likely to take the step of which he had just cause to complain." (Exhibit 25, p. 489.) But a conclusive proof that no such objections were entertained by any one who had that pride in Mr. Wheaton which his wife and daughters had, is found in the fact that at the very time in question, instead of cancelling the whole edition as they should have done, they actually contracted with Mr. Lawrence and Mr. Brockhaus to print 3,000 copies for continental circulation; and a day or two afterwards, merely to save what might be the extra expense of translation above the amount asked from Brockhaus as sufficient, they, upon Mr. Parsons' advice, transferred to Mr. Lawrence the entire and absolute control over both of Mr. Wheaton's books for the whole of Europe, forever; his avowed object in asking for the concession as to the "History" being that it would enable him to publish an elaborate annotated edi-

her only interest in this edition will be to receive a certain sum for leave to print it, and even that she is to share equally with Mr. Dana. (Respondent's Exhibits 3, p. 552; 25, p. 556.) She has no moral right even now to profits from the use of Mr. Lawrence's notes, which she once sold to him, and of which she still retains the price. She does not desire them. She contracted with Mr. Dana for new and original notes, and she gave him such instructions that he understood it to be his duty "to build up a new and original body of notes on the basis of the text of Wheaton, and to leave out all the original contributions of the complainant." (Answer of Mr. Dana, p. 67.) Mr. Dana knew that this was for the express purpose of "preventing any question being made by Mr. Lawrence" (p. 343). She has not yet paid Mr. Dana (record, pp. 311, 364), and the Court must assume that any trouble or expense which may arise from Mr. Dana's breach of his contract, and disregard of these instructions will not fall on Miss Wheaton.

It is to be observed in this connection, that, up to June 1863, the only pecuniary transactions between any member of the Wheaton family and Mr. Lawrence had been for them to receive the profits of his gratuitous services. When the occasion first arose for anything in the nature of a bargain between them, Mr. Lawrence, with a delicacy which of itself rebuts the idea of any attempt even at hard dealing with them, addressed himself to Mr. Little; after Miss Wheaton had expressly requested him to communicate with her *directly* (Exhibit 49, p. 513, at bottom), instead of talking to her, he wrote a very full letter and begged her to consider the matter before replying. His only conference with her was at her request, and it consisted merely in his yielding at once to what he was told were her mother's wishes, the whole business negotiation being with Mr. Parsons.

With regard to the value of the rights secured by the agreement of June 1863, Mr. Lawrence testified, p. 85, that he believed that no one could be found to supply within any reasonable time what would be equivalent to the annotations which his studies and experience and his peculiar

tion in French and English, in connection with the Messrs. Banks who had always owned the copyright of it. (Exhibits 19, 53 b, 13, pp. 518-521.)

It is very remarkable how all these objections which profess to come from the Wheatons, are stated in their most offensive form by Mr. Dana and Mr. Little, but are not attempted to be supported in the deposition of Miss Wheaton herself.

position had enabled him to prepare, provided the agreement not to use his notes was literally complied with, and we submit that this case shows that his belief was well founded. He also testified that the text of Mr. Wheaton was practically worthless without his notes or an equivalent. This is now confirmed by Mr. Dana, who says, as a reason, however, for not suppressing his own notes, even if they are copied, that "no publisher would undertake an edition of Wheaton's text simply." (Argument, p. 185.)

Some remarks are made on pp. 34, 35 of the respondent's argument for the professed purpose of impeaching Mr. Lawrence's credit as a witness. With regard to the sentence on p. 34, for which *Mr. Dana's* 23 ans. is cited as authority, we submit to your Honors that there is not a word in the record which affords any foundation whatever for the charges there made. Had that sentence been in Mr. Dana's deposition we could have sifted it to the bottom by cross-examination. Certainly the exigency must be great in which they are obliged to rely (as they do on p. 35) on the mere fact that, in this suit, *they* have made serious charges against Mr. Lawrence, which he strenuously denies, and which your Honors have yet to pass upon, as a ground for attacking his credit. They have not stopped there. One vital question in this case is as to the meaning and effect of the correspondence of October and November, 1863. Mr. Lawrence gave one account of it; all the respondents gave an entirely different account of it. Now, *ante litem motam*, while the matter was fresh, Miss Wheaton deliberately recorded her understanding of that transaction. That memorandum, in her handwriting, has found its way into the case, and your Honors have not forgotten what a struggle there was to exclude it. It exactly agrees with the account Mr. Lawrence gave from memory, a month before he knew of the existence of that memorandum. We had not supposed that, since the oral argument, the difference between Mr. Lawrence's statement and the respondents' statement would be brought up to impeach *his* credit. Yet so it is, and they make no allusion whatever to Miss Wheaton's memorandum.

PART II.

MR. LAWRENCE'S RIGHTS TO THE REVISED TEXT PREPARED BY
HIM AND EXACTLY REPRINTED BY THE RESPONDENTS.

§ 1. The respondents' argument, p. 50, suggests that, after the defendants' pleadings and evidence had admitted the reproduction of L.'s revised text, Mr. Lawrence and Mr. Potter "persist in making a show of comparisons between the text" "to keep up a show of imposing details of copying," and it refers to the tables in our affidavits and depositions. If the writer of the argument ever took the trouble to think before attacking us on points where he feels that his case requires a little diversion, he would have remembered that our affidavits were filed months *before* their pleadings even, and when all that we had before us was Mr. Dana's statement in his preface that "this edition contains nothing but the text of Mr. Wheaton according to *his* last revision," etc.; he would have remembered that when our evidence was closed we had before us only that statement, and the statements in the answers. Those answers admitted the reproduction of the text of 1863, but denied that Mr. Lawrence was the author of any part of it (record, p. 23), and averred that if Mr. Dana had known that Mr. Lawrence had altered or translated so much as a single sentence of it he would at once have restored or retranslated the same. (Answer of Mr. Dana, p. 60.) He would have remembered also that we had Mr. Parsons' admission of Mr. Lawrence's right to his changes in the text (Mr. Lawrence, he says, was to have "anything he had done for her husband's book," p. 302), while the admission subsequently made in Mr. Dana's testimony, so different from his answer, that they reproduced L.'s text *because* of the revision was not made until after our evidence (*propter hoc*, as well as *post hoc*), had been closed.

§ 2. Mr. Lawrence said: (pp. 115, *et seq.*)

What I did do is to be found stated at the 184th page of the Introductory Remarks to the edition of 1855. . . . I state, referring to

the then edition of 1855, that, "in the preparation of the present edition, that of Leipsic, of 1848, which had received the latest corrections of the author, has been adopted as the standard, though matter contained in previous editions, and there omitted as being especially applicable to the United States, is now retained. No liberty has been taken with the original text, except to translate and insert such additions as were made to the French publication, and of which no English manuscript could be found."

I omitted about thirty pages that were in the edition of 1846, and retained some pages which were in that edition, but which he had omitted in the French edition. I translated from the French edition of 1848 about thirty pages never published in English, and I inserted them in their proper places in the book, as will appear in the following detailed statement. . . .

It is in referring to the changes here made that Dr. Twiss remarks: "It is most satisfactory to find that in the last (sixth) edition of Wheaton's Elements, (Boston 1855,) edited after his death by Mr. William Beach Lawrence, the objectionable doctrine which has been discussed in the preceding sections is no longer maintained." . . .

Of the propriety of the text, as prepared by me, I have never heard any question made. Certainly not by the defendants in this suit, who have paid me the high compliment of following it implicitly without even the correction of a comma, — an error of that kind having been inadvertently made in my first edition, and continued in my second. [Sec D. n. 244.]

§ 3. The first duty of a conscientious editor is to make himself familiar with the history of the text he is to annotate. Neither Mr. Dana nor Mr. Lawrence were bound by their contracts to attend to the text, but Mr. Lawrence, with a faithfulness which made him prodigal of work for the sake of perfecting the book, even where he could get no special credit for it, bestowed no less pains upon this than upon other parts, whereas Mr. Dana does not even seem to have informed himself sufficiently about the matter to have known that the propriety of printing sixty pages of it depended on Mr. Lawrence's judgment.

There can be no question but that this revision of the text is the subject of copyright. As mere translation alone — thirty pages of the text of 1855 and of 1863 were translated by Mr. Lawrence — it would be within the protection of the law. This translation, however, was the smallest part of what Mr. Lawrence did. Much that was in the American edition of 1846 was omitted from the French edition of 1848; sometimes the omitted sections were rewritten and appeared in a new form; sometimes new sections of a different scope, and expressing different views

were substituted for them; sometimes entirely new sections were added, having no counterpart in the American edition. Mr. Wheaton did not give the reasons for these changes; some might be made because he thought them merely improvements; some because he had changed his views; some because he wished to adapt his book particularly for the European market. In making up a new text, in 1855, for an American edition, Mr. Lawrence had to consider which of those changes should be adopted, and he had to determine this with reference both to his own views of what the text ought to be, and his knowledge of Mr. Wheaton's views: in this latter aspect his revision has a stamp of authenticity which is especially valuable and which no other editor can give. Mr. Lawrence points out about fifty-eight different passages where changes have been made by him, some containing one, and some many changes. He has in these inserted about thirty pages from the edition of 1846, which are selected from what Mr. Wheaton omitted in 1848, and he has translated about thirty pages which he selected from the new matter prepared by Mr. Wheaton in French for the edition of 1848.

The agreement of June 1863 was informal in its terms, but amply sufficient in a court of equity to cover Mr. Lawrence's revision of the text. They were negotiating about copyrights, and specifically about the copyrights of 1855 and 1863. What Mrs. Wheaton was unwilling to part with was the only copyright that remained to her of her husband's works, — that was the copyright of the text of 1836 and that of 1846, if they had been valid as she probably supposed they were. What Mr. Lawrence was to have was "anything he had done for her husband's book." (Mr. Parsons' dep. p. 302.) The memorandum was *drawn by Mr. Parsons as embodying those terms*. The phrase used in the memorandum is "notes." The phrase used by Mr. Parsons in his letter of June 19, 1863 (p. 524), which forms part of the agreement, is "matter which you have written." They must be construed to be co-extensive with the copyrights of 1855 and of 1863, because otherwise Mrs. Wheaton would hold a copyright due to something Mr. Lawrence had done to her husband's book in addition to what she inherited from Mr. Wheaton. Upon our construction she would have the same right which she always had, to prepare a revised text, and copyright it, — though she could not avail herself of Mr. Lawrence's work.

The words used in the memorandum have received a judicial construc-

tion in the case of *Little vs. Gould*, 2 Blatch, pp. 366-368. In that case, under the laws of the United States and of the State an exclusive copyright in the "notes or references made by the Reporter" to the third volume of Comstock's reports, was vested in the plaintiff. The defendants contended that this phrase included only the foot notes, such as Judge Cowen and Mr. Wheaton have occasionally added to their reports, and which amount to short treatises of considerable value. But Mr. Justice Nelson held that these words were to be construed with reference to the subject matter, the situation of the parties, and the general purposes which they intended to effectuate. Upon these considerations, he said, "I do not think that the language used in the Act, although it is obscure and not well chosen to express the intent of the Legislature, necessarily leads to such a construction. If not, such a construction should certainly not be admitted." "On looking at the course of the legislation of the State on this subject, I have come to the conclusion that the phrase 'any notes or references,' in the connection in which it is found, may be fairly construed as embracing the head notes and marginal notes of the Reporter, together with the arguments of counsel and the cases cited therein." "It vests the copyright of any notes or references made by the reporter to said reports, in the Secretary of State, thus securing to the State the labors of the reporter, which he might otherwise have secured to himself under the Copyright Act, as the author."

In the case at bar the words used are sufficient to include, and must be construed to include whatever Mr. Lawrence has done in his capacity as editor, — and nothing more properly forms part of the duty of an editor than a judicious revision of the text.

PART III.

THE CHARACTER OF THE COMPLAINANT'S AND RESPONDENTS' BOOKS,
THE NATURE OF THE PIRACY CHARGED, AND OF THE DEFENCE
ATTEMPTED.

I. DIFFERENCE OF MENTAL CHARACTERISTICS BETWEEN MR. LAWRENCE AND MR. DANA, WHICH WOULD BE EXHIBITED IN THEIR BOOKS IF BOTH WERE ORIGINAL.

It is important, throughout this case, to bear in mind the great difference of character between Mr. Lawrence and Mr. Dana. This cannot be better stated than by a quotation from Mr. Dana's deposition.

"An incompatibility between us as writers and thinkers." (31 ans. p. 339.)

"His mode of examining into a subject, his analysis of matter before him, the manner in which the writings or acts of others impressed him, especially his mode of communicating his ideas in written style; in fact, his entire organization, as far as it affects him as an author or annotator, as well as his mental habits for a lifetime, are probably as unlike my own as it is well possible to conceive. To a great extent, also, what I may call the drift of his inclinations, his tendencies on international law and kindred topics, as far as regards the philosophy of the same, and the mode of dealing with materials, were equally different from mine." (Dana, 18 ans. p. 327.)

It will be seen especially from this that their opinions of the writings and acts of others, the principles which they would think proved by each act or writing, and the selection they would make from those which they examined, would generally differ as widely as the extent of the field allowed of differences.

II. THE NATURE OF THE MATERIALS, AND OF THE WORK TO BE DONE, AND THE DIFFERENCES BETWEEN THE RESULTS ARRIVED AT BY INDEPENDENT WRITERS SHOW WHERE INTELLECTUAL EXERTION IS REQUIRED AND WHERE ORIGINALITY HAS ITS SCOPE. IDENTITY IN THESE RESPECTS BETWEEN TWO WRITERS SHOWS WANT OF ORIGINALITY AND IS PROOF OF SUBSTANTIAL COPYING.

§ 1. The nature of the work to be done, and the enormous field open

to the writers, show the occasion for intellectual exertion; as a necessary consequence, they show that the preparation involves originality in the highest sense, and that its result will exhibit those marked differences which always follow independent thought. And also, substantial differences, — as for example differences in the historic facts and the authorities referred to, — between respectable writers upon the same general topic, show substantial mental labor employed in that part of the work where these differences exist; consequently the fact that these differences generally exist, shows that any new book upon the subject will require intellectual exertion on the part of the author in these portions of his work, and will differ from his predecessor's work, in these respects, according to the difference of mental character, training and opportunities that exists between the writers.

It is proved in this case, as will be shown more fully hereafter, that there is no substantial identity between different writers, in their selections of facts and authorities for example; if, therefore, it shall appear that the book of Mr. Dana resembles the book of Mr. Lawrence in these particulars, it will be thereby proved that the resemblance is in substantial matters involving originality and where each writer ought to be independent; and it will be proved that, in all these particulars, the two books are the product of one mental process, and of the intellectual labor of one man — Mr. Lawrence.

§ 2. In a case much simpler than this (*Gray vs. Russell*, 1 Story, 16). — the case of Mr. Gould's notes to Adam's Latin Grammar, which were a collection and compilation from previous authors, — and without the proof which we have in this case of the enormous field, and consequent difficulty of selection, and of the actual difference between authors, Judge Story said: "Now certainly the preparation and collection of these notes from their various sources *must* have been a work of no small labor and *intellectual exertion*;" and in that and another case (*Emerson vs. Davies*, 3 Story, 785) he made it plain in a most striking manner that a work, though it may be said to be a compilation, yet calls for originality in the highest sense. This is very clearly put in *Greene vs. Bishop* in this court, a decisive case which will be hereafter considered.

§ 3. It used to be believed in our profession that the argument of a question of law at the bar, and the opinion pronounced thereupon from

the bench, required that kind of exertion which enlarges the intellect, and yet both argument and opinion are sound only in so far as they rest upon or apply those principles which previous decisions have proved to be the law of the land.

When, however, we come to the ground covered by these annotations new difficulties arise. Besides text-books and judicial decisions, we have the political and constitutional history of two hundred years and more before us and all discussions relating to it, without index or digest, except so far as previous text writers have presented certain matters, — and we hope to do something more than reproduce what has been done already. Instead of a report, and an opinion carefully prepared for the purpose of exhibiting the principles involved, we have a volume of diplomatic correspondence, or a volume of speeches, and contradictory accounts of every material fact and transaction, and your Honors know what intelligence it requires to master a long negotiation so as to be able to understand its merits, or to carry it to a conclusion.

III. THE TRUE CHARACTER OF A TREATISE ON INTERNATIONAL LAW, AND OF THE MATTER COPIED BY MR. DANA FROM MR. LAWRENCE'S BOOK.

§ 1. A treatise on international law is not like a chronicle or an annual register, presenting all facts (so far as its limits will allow) because they are facts. Nor is it like a book of poetry, or a treatise of pure mathematics, evolved from the writer's own mind or feelings. It must state the law as it is, drawn from the practice of nations, the decisions of courts, and the opinions of jurists. With this, it must give, by narrative, quotation, abstract or otherwise, such statements of international transactions, of judicial decisions, of the opinions of writers and thinkers and statesmen of authority, as will prove the law to be what it is stated to be.

§ 2. To prepare notes to Mr. Wheaton's books, the writer, before undertaking his work, must therefore have a large general knowledge of the subject, in order, when reading the text, to be able to know what passage requires annotation, what there is of fact or principle not noticed in the text, and in order to know when further study is likely to be fruitful, and where to direct it.

From the extent of the field, and the inaccessibility of many of the

materials, no man can acquire the learning necessary to the success of this work, except by many years of devotion to the subject, and ample opportunities, coupled with a constant and intelligent observation of the diplomatic events of his own time, and a thorough study of the political history of the past.

§ 3. Having these qualifications to start with, he must then, so far as he has not done it already, make a careful study of each historical fact, each negotiation, each discussion, the existence of which he can discover and which he suspects may be valuable for the purpose in hand, so as to ascertain precisely the real principle involved in it and proved by it, examining the treaties, despatches, debates, etc., in the books where they are to be found, so as to form his own opinion of them. It is not the least advantage of this work, that each search for one object brings to light, if he be intelligent and observant, matters he would not otherwise have known of.* He must examine the text-writers, and, to appreciate the value of their opinions, he needs a knowledge of the different schools, and their different characteristics and tendencies, as well as the general merits of each author. This requires, of course, a familiarity with the principal modern languages.

From this study he must determine precisely what is the rule of law; after this, *and as the result of it*, he must select those matters, and those authorities and references for them which he thinks most suitable to be presented as proving or illustrating that rule. This is what Mr. Lawrence did. (25 cross-ans. p. 135.) †

* "The true method of experience, on the contrary, first lights the candle, and then by means of the candle shows the way; commencing as it does with experience duly ordered and digested, not bungling or erratic, and from it educing axioms, and from established axioms again new experiments."—*Novum Organon*, I. lxxxii.

† The following is from Mr. Lawrence's deposition, p. 135:

Cross-Int. 25. Will you please to point out any one original note composed by you, and printed in either of your editions of Wheaton which has been literally copied by Mr. Dana, and printed in his edition of Wheaton?

Ans. I do not know what you mean by "original note." I mean to say that it has been my great effort, that every phrase in my annotations should be based on authority, should state not what I wished the law of nations to be or what I thought it ought to be, but to give the exact language of those text-writers and of those judicial opinions which were everywhere recognized in the cabinets of Christendom and in the Courts of Admiralty, as being binding authorities upon nations. I did not intend to indulge in a single speculation of my own, nor should I have consid-

§ 4. The value of a note depends upon the previous qualifications, and upon the fidelity and ability which are brought to bear upon this labor. No natural genius can dispense with it, for the principles of

ered myself justifiable had I done so. On every proposition I have examined every authority within my reach bearing on either side of any proposition; those I have given, and I have given them in the very words of the authorities. I don't wish to be understood that I gave extracts *en masse*. So far from it, in many cases I have read twenty, perhaps fifty pages in order to obtain the matter which probably in my annotations does not occupy the one-third of a page. But in all such cases whatever does appear are the words of the author: if in the English language without change, if taken from French, Italian, Spanish, German or Latin (for all of these languages have been translated by me), I have given as literal a translation as I was capable of doing. I mean to say that in looking through the discussion of a subject, there are always a few pointed sentences which will give the pith of the whole matter. These sentences I transferred, either literally or by translation, as I have stated. I have many times passed two or three weeks engaged ten hours a day in eliciting in this manner matter which would not occupy in my book half a page. In giving substance in this form, I have not deemed it necessary to make breaks, to show that it was not continuously written in the form in which I presented it by the author, and it may be noted in this connection, that one of the strongest proofs of Mr. Dana's piracy is to be found in the fact that he appropriates all my labor, giving a reference to the author, as if he had copied it direct and unchanged.

. . . I was led to pursue this course as it was strictly in continuation of that which was pursued by Mr. Wheaton, from whose plan, however gratifying it might have been to my personal vanity to have made use of his work to put forth crude speculations utterly regardless of the doctrines of the text, I did not feel myself at liberty to deviate. Though historical facts may have been stated in his own language, I am not aware that there is a single doctrine or principle in the whole of Mr. Wheaton's work which is not given in the language of the authorities at the foot of the page. For this course both he and I had the precedents set for us by Grotius, and, I believe, followed by every other writer on the law of nations who professes to give the law of nations as it is, and not to expound his own views. . .

. . . [Mr. Lawrence then explains that Hantefenille and, to a certain extent, Ortolan, professedly proceed at times upon a different plan, always however distinguishing their views of what the law ought to be, from statements of what the authorities show it to be.] I am not aware that there is a single page of original matter, — if by that is meant matter which originates in the brain of the author, not deduced from authorities, — to be found in Phillimore, in Twiss, in Klüber, or in Martens. . . . My original matter consists in the working of my brain for the last ten years, and even more than that in the preparation of this book in the form in which it was presented; and nowhere else, except as taken by subsequent writers from me, are there to be found those expository of jurists and decisions of tribunals which are thus published. . . .

Cross-Ans. 26. There are very many notes in Dana taken from me which notes have been composed in the mode stated in my preceding answer. It has not been the course of Mr. Dana, and it is that which most unequivocally establishes his

international law are either facts established, or rest upon facts established, and are not to be evolved by a process of *a priori* reasoning. General and misty notions of historical events will be worse than useless for they will lead to vague ideas. The skill of the mere chronicler or historian alone is worthless; history does not arrange itself for the purpose of teaching law, and each fact, and each authority must be studied, compared with others, and its effect and importance estimated, not according to the space it fills in history, but with reference to the rules and principles of international law. What to one man will appear to be fairly within a principle of law as it is stated in the text, or as it lies in his mind, and thus to be of no more importance than many other facts, will seem to another of more precise learning, to define a point hitherto vague, or to embody the first indication of a distinction, or of a limitation, or an extension of what had before been a theory of jurists not defined in practice. Unfortunately for the ease of the writer, neither the opinions of jurists nor the practice of nations are uniform upon all points. He starts with a general idea of the rule of law which he is to study; presently he finds something which seems to be inconsistent with it; shall he find a distinction, and determine that the case does not involve that principle? Shall he conclude that it is an instance of a violation of international law, to be noticed only as an example which no nation at the present day would be justified in

piracy, to quote my language literally. The difficulty in answering the question now put is simply this, that my notes were all formed in the manner stated in my preceding answer, adopting in every possible case the language of the authorities. In some of those cases marks of quotation are put and in others not. It is impossible for me to distinguish, without an investigation which I have not made, between those several cases.

Cross-Ans. 27. . . . Mr. Dana has not in a single instance acknowledged matter derived from me, and I have never, in any case, made any distinction either in my own mind or in any memorandum between those cases which may happen to be marked with a quotation and those which are not. They are all precisely in the same category. If there is any distinction between them, some marked and others not, it is merely accidental and not going to the substance, because, if I recollect correctly, some of those where half a dozen pages are compressed into half a dozen lines have marks of quotation. I can recognize no possible distinction between them. Mr. Dana certainly generally, if not universally, when he appropriated any of my labors, did systematically make more or less change in the words, of which I have given heretofore illustrations, and it is a very possible thing that he has done it in every case. If he has done so, it only strengthens my case.

following? Shall he determine that it is a sound authority, really applicable, and that the rule in his mind must be modified accordingly? His judgment will depend in part upon the thoroughness of his study of the facts, for they will show whether the act was done under compulsion or as an act of lawlessness. It will depend upon whether he loves abstractions and generalizations and clear logical statements so much that his natural tendency will be to wrest the proof to suit his preconceived ideas, or whether his love of accuracy, his carefulness, the conscientiousness of his reasoning faculties are so strong that he will not permit his mind to bend the facts he meets to square with the theories he likes. According to the result he reaches, he will place the instance in one note or another, or omit it entirely.

§ 5. The selection of the authorities for a particular note therefore pre-supposes and requires, not only a general knowledge of the law, but a thorough and precise understanding of the principle of law which is the subject of that note, and the careful study and sound judgment which we have attempted to describe; when these have been exercised the note is substantially completed. There only remains then to put upon paper what the writer has in his mind. Whether the result of his thought and study is presented in his own language, or in a series of quotations skilfully selected for the purpose (as Mr. Lawrence tried to do) the note involves originality in the highest sense.

§ 6. If the second writer cannot or will not do for himself all that is necessary to produce such a work as we have described, he may simply refer his reader to his predecessor's book, with perhaps such occasional acknowledged extracts from it as may fairly be given for the purpose of criticising or commenting upon it, or of presenting the opinion of that writer as an authority.

Mr. Dana did not take this course. Indeed his instructions were "not only to separate said book entirely from the complainant's contributions, but to have it distinctly understood by the public that such was the case" (Mr. Dana's answer, p. 58, § 13), and, thereupon, he announced in his preface, p. i, "this edition contains nothing but the text of Mr. Wheaton according to his last revision, his notes, and the original matter contributed by the editor;" and, p. xi, "the notes of Mr. Lawrence do not form any part of this edition." Accordingly it is found

that Mr. Lawrence's name is nowhere mentioned or alluded to in Mr. Dana's book. (Mr. Potter, 6 ans. p. 149.)

§ 7. There is another course open to the second writer. Instead of going through with the process we have described, he may transfer his predecessor's work to his own pages, and may present it as if it were the result of his own thought and learning; he may suppress all acknowledgment of his indebtedness; he may carefully strike out the few references to his predecessor which a momentary weakness or sense of justice has allowed to creep into his MS.; he may make such formal changes as he can make without study or undue labor; he may declare to the world that the note contains nothing but his own original matter. This is what we charge Mr. Dana with having done, not in one note, but in more than a hundred. This is not merely an infringement of our rights by an open and avowed use of our property; it is what is called literary piracy.

When the charge is made against him, he may find it consistent with his notions of propriety to declare that he deemed it necessary to discard all his predecessor's contributions in order to preserve the reputation of the book (Answer of Mr. Dana, §13, p. 58); that his predecessor's annotations were prepared so badly that he did not find it worth his while so much as to read them carefully (*ib.* § 17, p. 63; dep. 20 ans. p. 329); indeed that they were of such a character that he could have got almost no assistance from them in his labor of composing and preparing notes (18 ans. p. 328), and that he "found no occasion for using or borrowing [his predecessor's] ideas with the resources he had" (20 ans. p. 330). This is what Mr. Dana has done.

IV. REPLY TO THE ATTEMPTED DEFENCE THAT MR. DANA HAS MADE A NEW, VALUABLE AND ORIGINAL USE OF THE MATTERS COPIED, SUBSTANTIALLY DIFFERENT FROM THE USE MADE OF THEM BY MR. LAWRENCE.

§ 1. Mr. Dana claims that he has merely copied from L. certain facts and authorities, and that, to the matters thus copied, he has added statements of principles drawn from them which are entirely his own. In examining this defence we have only, of course, to consider such generalizations as are, or as profess to be drawn from the facts copied, because

the contents of other notes and of other parts of the book are not material.

§ 2. In the first place, the facts do not support this defence to any considerable extent. He has, at times, given sentences in the form of generalizations or statements of principles: sometimes these are mere paraphrases or almost literal transcriptions of sentences in L.—perhaps of L.'s own language, perhaps in instances where L. has conveyed the idea he wished to convey in the language of a writer of authority. See for example notes 40, 41, 67, 123. In other cases the matter stated as a principle is a mere obvious truism; see n. 185. In some cases his so-called "original reflections" are re-statements, in his language, of the substance of passages quoted in L. See D. n. 29; Mr. Morse 123 cross-ans. p. 443.

§ 3. Even if there were such generalizations and statements of principles, it would not be material in this case. He has not put them *in the place* of the matter found in L. He has copied the substance of L.'s note, and then added what he claims to be his new matter. Now, where Mr. Lawrence has made a meritorious combination and arrangement of facts and authorities, selected with skill, because in his opinion they exhibit, prove, or illustrate a certain principle of law, or the practice of nations on a certain point, and has presented them for the purpose of proving that principle, even if he has not precisely embodied that principle in a distinct formula, Mr. Dana cannot be allowed to reproduce all this by merely *adding* thereto a statement, in his own language, of that principle or rule of practice.

§ 4. Generalizations are of very doubtful utility. If they are strictly correct, and accurately embody all the particulars from which they ought to be drawn, they are of the highest value; if they swerve from the truth, either from the writer's ignorance or his inability to subject his imagination to the facts, they are deceitful and injurious. They are the common resort of charlatanism, both because they are a convenient veil for indefiniteness and the want of that precision of knowledge which marks a really great mind, and because, while they resemble the work of a great thinker, their value can only be ascertained by a test that few readers apply. Lord Bacon said, "on account of the pernicious and inveterate habit of dwelling upon abstractions, it is far safer to begin and raise the sciences from those foundations which have reference to

practice, and to let practice mark out and define the province of contemplation;" and elsewhere: "that theory which is drawn from a simple enumeration of instances is puerile; it may, for all its author knows, be overturned by a contradictory instance, because it is drawn from fewer facts than is right, and only from those which happen to be close at hand. To be useful it must be based upon a needful and proper selection. . . . The thinker must bring it to the test of examination and proof, and try whether it is only fitted to the measure of those particular facts from which it is drawn, or whether it is of a broader and more general application." Now it is Mr. Lawrence who has examined the field, and presented certain instances as correctly representing the mass from which the rule ought to be drawn, and *the value of Mr. Dana's generalizations, if there are such, directly depends upon the skill and judgment with which Mr. Lawrence has made his selection.**

* The best contemporary critical literature is not without constant complaints which embody the ideas we have endeavored to express. Like Dr. Johnson, in the quotation from the Rambler, modern essayists speak of it as a vice of the age, perhaps because they compare all the books of their time with the few older ones that have survived the test of years, perhaps because the fault is often so glaring that it is hard to believe that it is universal. Lord Bacon saw that it was as permanent as any mental attribute.

Since this portion of our argument was ready for the press, we have met with another article from which we quote:

"A good book is like a gem, which, *to those who do not know*, tells no tale of the toil that brought it out of the depths. . . . Look at a German, how he pries aggressively into every nook and corner of his subject, how he tries every spot of the ground with his pick, if peradventure any morsel of treasure should lie hidden anywhere; how deep he digs, how much he brings up out of the earth, even if he does not always arrange his great heaps as neatly and compactly as one could wish. Why does not your practical Englishman go and do likewise, instead of just scratching the earth as with the foot of a fowl? or perhaps only mixing a little water with what matter he has got and making mud pies? . . .

One effect of this is worth noticing as we pass. Contemporary literature is full of speculation, and, as speculation expands, the knowledge from which only truly valuable speculation can issue seems to shrink and contract; speculation — of a sort — is so easy. You may find theories of history scattered through the pages of periodicals and books as thick as autumn leaves in Vallombrosa. But the number of men with anything like a systematic knowledge of the solid facts and framework of history receives no proportionate increase. . . . We have suffered ourselves to be influenced with an enthusiasm for ideas, and have become a little cool in the pursuit of an accurate knowledge of the circumstances of which the idea is only a complex and synthetic expression. . . . Provided one does not happen to know

§ 5. He has made it with skill and judgment. The constant references to his notes in all modern authors, shown by the schedules in the Record, pp. 84-86, 88-95, prove it if any proof is needed. Indeed, so far as the respondent's judgment may be of value, no higher proof of Mr. Lawrence's success could be found than the manner in which Mr. Dana, who certainly was not disposed to be partial to Mr. Lawrence, has followed his selection.

§ 6. If any notice is to be taken of Mr. Dana's new sentences, they should be treated as they really are,—a presentation in his language and in his form of the facts and ideas which Mr. Lawrence discovered and worked out, and judged to be proper to be presented, to present and prove which he wrote his note, and which are, at least substantially, pointed out by means of sentences written or quotations chosen for the purpose, or by means of the connection of the note with certain statements in the text. Mr. Lawrence's notes may be considered, from one point of view, as of two parts, or fulfilling two functions. They are to display the principle of law, or rule of practice which he has derived from his study and deems to be the correct rule or principle, or the correct limitation or extension of some rule or principle; then they are to present those historic facts and those authorities which, in his judgment, of all he has studied, best prove or illustrate the rule or principle. As was said in the opening argument, they are to be based upon and are to include the results of an examination of all the authorities, and are to present such of them as the writer sees fit to put into his note as bearing upon what the law is. Certainly, if such a change of form had been or could be given to the first part that the law of copyright could consider it as new, this would be no excuse for copying the second portion.

The two parts cannot however be separated. They may be put in separate paragraphs, so that the scissors will divide them, it is true, and this Mr. Dana has often done, but this is a change of form merely, for they are the result of one mental process. The writer cannot finally

too much real history, the development of a scheme of this sort is as easy as blowing soap-bubbles, if you have only plenty of suds in the shape of technical philosophic phrases. . . . Hypothetical explanation of all the transactions that have taken place in the world gradually supersede, in the minds of many writers, and more readers, the proper weighty and minute interest in the actual details of these transactions themselves."

decide what facts and authorities to present, until he understands precisely the rule which he wishes to prove by them. One of the strongest illustrations of Mr. Dana's indebtedness to Mr. Lawrence, in the case of those notes where he claims to have added generalizations to the facts and authorities copied, is, as will be shown hereafter, that his collection of authorities was complete before he pretended to apply serious thought to them: this was because, according to his own confession, he simply copied his authorities and his facts from L. and two or three other books.

§ 7. Full illustrations of all this will be found in the examination of each note in the latter part of this reply. It may be convenient however, in this connection, to refer to notes 40, 67, 123, 137, 185, 233. Upon comparing the real facts about these notes, with the claims put forward in the respondents' argument your Honors must be driven to the conclusion that this respondent's mental and moral constitution is such that he cannot conceive that HE should be indebted to any one and least of all to Mr. Lawrence; that the form in which matters are stated impresses him so much more than the study and thought required to understand them accurately, and the judgment needed to decide about them correctly, that the moment he presents them in his own form, he believes himself to be the meritorious and the only meritorious author of the whole: this will explain much of his conduct.

In his 25 cross-ans. (p. 135) Mr. Lawrence describes the special research and thought which he gave to the preparation of his notes in addition to his previous learning. He says that he studied afresh all the authorities upon each topic, and, selecting what he judged to be the best, he further aimed to express the substance, or the position of that authority in the very language of the authority itself; and he spent day after day in studying to find just the authority, and just the passage which satisfied his mind as being the most appropriate for his purpose. He adds (p. 137): "my original matter consists in the working of my brain for the last ten years and even more than that in the preparation of this book in the form in which it was presented."

The respondent's argument (p. 29) in describing Mr. Dana's original labor, points out his writing and rewriting, correcting and recorrecting, revising again and again by the help of his father and brother — in other words perfecting the "literary style and execution" (argument, p. 19)

of his notes, until he at least looks upon them with entire satisfaction and exclaims, "To these leading notes I gave as thorough thought, I applied to them as much mental power as I am capable of giving to anything. However long I may live I can never expect to try harder, and give more original power to any subject than I did to those notes."* (Mr. Dana's dep. p. 319.)

V. THE OPPORTUNITIES ENJOYED, THE LABOR AND THOUGHT EXPENDED, AND THE MEANS EMPLOYED BY MR. LAWRENCE, WHICH HAVE ENABLED HIM TO PREPARE HIS BOOK.

§ 1. To realize how it is possible to produce such a book as Lawrence's *Wheaton*, so full of well-chosen references to the practice of nations—and certainly there could be found no stronger evidence of the judgment with which he has selected them and of their adaptation to the purposes for which they are selected, than the manner in which Mr. Dana, no friend of Mr. Lawrence's, has followed his selection—it is necessary to make some reference to the facilities Mr. Lawrence had enjoyed for forty years, and the use which he had endeavored to make of them. If any apology were needed for this allusion to Mr. Lawrence's career, it could be found in many pages of the argument for Mr. Dana, culminating perhaps in the assertions on pp. 16–18, (the truth of which can be better ascertained when this suit shall have been decided) "It is in proof, or of common knowledge, that Mr. Dana held, before undertaking this work, by birth, association, and still more by his own labors and merit, a rank among the leading men of the day" and "it may be ASSUMED that his knowledge, by experience, of questions of constitutional law and of international law relating to war, was greater than that of Mr. L."

* "Know ye, whoever of my name would ask,
That I am Leah: for my brow to weave
A garland these fair hands unwearied ply.
. But my sister Rachel, she
Before her glass abides the livelong day,
Her radiant eyes beholding, charmed no less,
Than I with this delightful task."

Purgatorio, canto xxvii. (Cary.)

Mr. Lawrence's early studies in college were contemporary with the great events of 1814-1818; his study of his profession in the office of one of the great commercial lawyers of New York, and at the Law School at Litchfield, was completed before the prize cases and other suits growing out of our war and the European wars had all been disposed of. Circumstances early brought him in contact with many of the great men of that day,—and they were men whose memories ran back to the foundation of the republic, and who had directed the policy of our government through all the difficulties growing out of the claims of neutrals and belligerents during the great wars of the previous thirty years. In 1821-2-3 he was abroad, and devoted a considerable portion of his time to attending lectures on civil law and political economy, and to making a collection of works bearing upon those topics (Record, p. 69).

From the time he was in college, he has especially cultivated questions connected with public law and political science, and the real success with which he had done this sufficiently appears from the intimacy contracted with Mr. Wheaton, many years his senior, in 1823, which continued unbroken until the death of the latter in 1848. It is very obvious from their relations with each other, and from the tone of the correspondence printed in the record, that their intimacy was largely founded upon and sustained by a community of tastes, studies and views, and by the respect Mr. Wheaton felt for Mr. Lawrence's acquirements,—and certainly few men have been less tolerant of superficial learning and empty pretensions, or better able to detect them than Mr. Wheaton.

No higher compliment could have been paid him, and at the same time no better opportunity for the prosecution of his favorite studies could have been afforded him, than he received by his selection by Mr. Gallatin, the greatest of American diplomatists, as Secretary of Legation at London. Upon the return of the former Mr. Lawrence received a direct appointment from the President as Chargé d'Affaires (being the same rank as that held by Mr. Wheaton at Copenhagen and during the first years of his residence at Berlin), and also special authority to act on behalf of the United States in the selection of an arbiter for the North Eastern boundary question. The character of his associates, and of the intimacies he formed in London, can be judged of from a letter of Jeremy Bentham, in Bentham's Works, vol. xi, p. 35. He afterwards (record, p. 70)

passed the winter of 1828-9 in Paris, and while there, still occupied with the same class of subjects, he translated Marbois' History of Louisiana and of the Treaty of Cession. The merit of his performance was such that it called forth a very flattering review from Mr. Sparks in the North American, N. S. vol. xxi, and another review in the American Quarterly for March, 1831.

Upon his return to this country he officiated as professor of Political Economy at Columbia College during the absence of Professor McVickers in Europe (Griffin's Remains, vol. i, p. 64), and delivered a course of lectures, some of which were repeated before the Mercantile Library Association of New York, and subsequently published. (N. Y. 1832.)

During the period from 1832 to 1834, Mr. Lawrence was constantly engaged as counsel before the Commissioners under Mr. Wheaton's treaty with Denmark, and Mr. Rives' treaty of 1831 with France. His arguments necessarily embraced the discussion of most of the questions of international law growing out of the reclamations for spoliations made by, or under the influence of Napoleon. As the hearings were before Commissioners, all these questions of the rights of belligerents and neutrals called for references to historic precedents as well as judicial decisions, and his printed arguments furnished him with much valuable matter which is embodied in his annotations. (Mr. Lawrence's dep. p. 71.) Among other professional efforts was his argument on the Law of Charities, for the appellants, in the great case of the German Reformed Church, in the Court of Errors, which resulted in overturning the judgment of the chancellor. During his whole life he has constantly contributed to the various reviews and periodicals in Europe and America, and written, in French and English, various pamphlets and essays upon the different topics of public law and science, as might be expected from his tastes and studies.

Such was his sense of the duty of an annotator to do something more than repeat the results of others' labors, that, availing himself of the good will of different Secretaries of State, who placed at his disposal the entire archives of the State Department at Washington, he passed many months there, engaged in examining the original papers connected with all the transactions which he thought ought to be examined to the bottom. (18 ans. p. 74; 84 ans. p. 106; 91 ans. p. 123.) From a careful study of these papers, he enriched his book with many facts and

documents for which the publicist and diplomatist must have recourse to his pages, except so far as they have been reproduced in Mr. Dana's notes, by copying from L. In addition to this, Mr. Lawrence testifies (91 ans. p. 122):

I may remark that my studies and pursuits had naturally led to a collection, not merely of printed books, but of manuscripts and documents, whether contained in more elaborate works or in pamphlets or newspapers, in reference I may say to all the great diplomatic events which occurred during the last half century. I had got a complete series of treaties, beginning with those brought together by Barbeyrae in the great collection of Dumont, which, with the collection of Wenekius, and the several series of Martens, goes down to the present day; and I may say that there is not a book referred to by me in my editions of Wheaton which I have not personally examined, and of which I have not verified the citations, unless it be in some few cases where I have expressly stated that I have relied for it upon the authority of another. I had placed at my disposition the entire archives of the State Department at Washington.

In all these matters his acquaintance with diplomatists of different countries was of great assistance, both in suggesting new matters for study, and in helping him in his researches.

With regard to the preparation of the edition of 1863, he testified (84 ans. p. 106):

Ans. I had, as I had in the case of 1855, full access to all and every paper in the Department of State, that I chose to look at. During the whole of Gen. Cass's administration of the Department, I was in the habit of corresponding with him on all important pending questions, both while at home and abroad, and I have from him numerous letters asking me to look into different matters involving international law, and when I was going abroad in 1858, I was requested, both by the President and the Secretary of State, to write to them fully on such matters as I supposed would interest the United States, and I did so. This I was able the more fully to do, not merely in consequence of the introductions of our ministers to the ministers of foreign affairs of different countries, but I had known in this country and entertained at my own house most of the foreign ministers who had been in this country and whose acquaintance I renewed. On my return, after I had agreed to publish the second edition, I went to Washington at the beginning of the session of 1860-1861. Mr. Black was then Secretary of State. As the room appropriated to the Assistant Secretary was unoccupied, owing to there being a vacancy in the office, the Secretary placed it at my disposition, assigned me a messenger, and gave an order to the

chief clerk and, through him, to all the other clerks to give me access to any thing I called for. I did call for all the despatches and instructions which it was in my power to examine during the period that I had the privilege; that is to say, until the 4th March, when Mr. Black ceased to be Secretary of State. From that time, so far as the Department of State is concerned, I have only had the public documents; but I continued to get important information from foreign ministers accredited to this government, and such has ever been my relation with them that when it was understood that I was going to Europe for the Brockhaüs book, the Marquis de Montholon, Minister of France, sent me an introduction to the Minister of Foreign Affairs, asking him to afford me every facility for the prosecution of my investigations in the French archives. A similar letter was likewise sent me by Baron Gerolt, Minister of Prussia, to Count Bismarek. Both of these letters, which I have in my possession, refer distinctly to the established reputation which I have in Europe as well as in this country as a publicist. [These letters are enclosed in some correspondence called into the case by the respondents and are printed in the Record, pp. 543-4.]

That he had done all this was a matter well known, as appears from the testimony of Chief Justice Bradley (p. 263), and Judge Potter (p. 147).

It will thus be seen that, while Mr. Lawrence's opportunities at home and abroad were unsurpassed, his associations and the turn of his mind have led him to devote particular attention to political and diplomatic history and affairs. He has not confined himself to a study of the theory of the science in his closet, but, by reason of his own experience in diplomacy at a very early age, and still more on account of the habits then acquired, he has looked at the questions of international law as they are developed between nations, has fixed in his mind whatever has arisen in the way of precedent or authority during the last fifty years, and has followed up these matters with that thorough research which can only come from a man of means and leisure, who combines a knowledge of affairs and an acquaintance with public men, with energy, with a taste for indefatigable study, and the strict fidelity to historic truth, which is still more rare.

It is by these means that Lawrence's Wheaton is a book altogether peculiar in its character, because it fills a place which no other book on the subject can be expected to fill, unless copied from it. For its value, it would be enough to refer your Honors to the book itself, or still better to the French Commentaire, the second volume of which is now

going through the press. We have already (p. 6 *supra*) described the terms in which all subsequent writers (except Mr. Dana) refer to it. It may be added here that the edition of 1855 drew from the appreciative pen of Mr. Everett a review in the North American, which contained the following:

“Of the present edition of Mr. Wheaton’s work, [that of 1855] about a third part is from the pen of Mr. Lawrence, who has discharged the duty of editor and commentator with signal fidelity, intelligence, and success. He not only shows himself familiar with the subject as treated in the pages of his author, but also well acquainted with the entire literature of the law of nations. Whatever is furnished by the English or continental writers who have succeeded Mr. Wheaton, by Phillimore, Wildman, Manning, Reddie, and Polson, by Ortolan, Hautefeuille, and Fœlix, is judiciously drawn upon by Mr. Lawrence. The diplomacy and legislation of our own and foreign countries are fully examined, and, in short, the work is made in his hands, — we think it is not too much to say, — what its lamented author would have made it had he lived to the present time.”

Miss Wheaton writing to Mr. Lawrence, June 26, 1855, (record, p. 486) referring to the commendations which were expressed, said, “I have heard from other quarters similar expressions.” After the appearance of the second edition, Miss Wheaton wrote, June 1, 1863, (record, p. 513.) “We were very glad to hear that your labors have been appreciated by men of learning and weight, both American and European, and hope this may help you to forget the trouble and annoyance you have had in editing the work.” Mr. Little wrote, May 28, 1863, (record, p. 512,) “I should be glad to be informed of any notices you may see, and if you should think it advisable to make extracts from private letters such as Judge Grier’s, Lord Lyons’, etc., I should be glad to print them, in connection with others, at some convenient time.”

§ 2. *Mr. Dana has no right to copy the results of this preparation.*

Now when Mr Lawrence has embodied in a book, as annotations to Wheaton’s Elements, whatever he deems most fitted for the purpose from these labors of his whole mature life, can it be pretended that another writer may transfer to his own pages, and publish as his own original matter, the whole or a part of this, — and if he can take all that he thinks is valuable, certainly on the same ground he may take the whole, —

and do this for the purpose of publishing rival annotations of the same text, simply upon the ground that what he takes are facts, and not the products of Mr. Lawrence's fancy? Their whole value consists in their being *facts*, and their appropriateness entirely depends upon the judgment and skill which Mr. Lawrence has exercised in understanding and appreciating all that he has read, heard and seen for half a century in its bearings upon the principles of international law, and in selecting certain matters therefrom as best fitted for his purpose.

It is said that to prevent a second writer from thus copying is to put manacles on science. Well, in one sense the law of copyright is a manacle on science, and in the same sense, patents for inventions are monopolies, indeed more odious monopolies, for no man is allowed to produce a previously patented machine even by his own unassisted invention, whereas any one is at liberty to produce a book exactly like Lawrence's *Wheaton*, the only limitation being natural capacity; but the law says that he must produce it by his own work, and not by availing himself of Mr. Lawrence's work. Yet in patent cases defendants at the present day rarely think it worth while to talk of monopolies, so well has it come to be understood that waste fields can never be cultivated, except by some sort of an Enclosure Act which will enable each man to reap the fruits of what he has sown, — whether the fruits be money, or reputation, or both.

VI. THE ACTUAL CONTENTS AND CHARACTER OF THE ANNOTATIONS IN THE TWO BOOKS.

§ 1. The actual contents of the annotations of the complainant and of the respondent are reasonably well described by the respondents' witness, Mr. Morse. He says:

"The original notes in both editions are either statements of historical events, accounts of legislative debates, narratives of diplomatic discussions, negotiations or correspondence, abstracts of cases in the courts or judicial tribunals of different countries summaries of the views of other text writers or essayists on International Law and kindred topics," accompanied with citations of or references to the books and documents where the matters are to be found. (7 ans., p. 401.)

Mr. Dana's testimony is to the same effect:

"When I speak of original work, I use it of course in the sense of the subject, not meaning that I offered to originate law." — "The lesser notes were chiefly devoted to brief statements, and to matters new since Mr. Wheaton's own labor." (Record, p. 321.)

§ 2. The essential part of such notes is the *facts* which they present, whether those facts are strictly historical events, or the contents of the books and papers which contain the written matter thus adduced as authority. Judicial decisions, the opinions of jurists, and positions taken by nations and acquiesced in are not merely the reasons of the law, they are *facts* proving the law; the value of a treatise depends directly upon understanding and applying them, and upon presenting to the reader, from these facts, such as are worthy to be relied upon to prove what is settled, and to show what is proved and what is its bearing upon questions that are not settled. Of these matters, and especially of such of them as are not to be found elsewhere, because not generally accessible, Mr. Lawrence's book is uncommonly full. They are not there presented as bare naked facts, as they are given in an annual register or chronicle, but are combined, arranged and connected with the text with reference to their bearing upon the principles of International Law, and selected and prepared with the skill and judgment already described.

§ 3. From these notes to reproduce these facts and authorities, for the purpose of conveying to the mind of the reader the idea that certain principles exist and are proved by these facts and authorities, is forbidden by the law of copyright. It is copying the vital part of the note for the purpose of presenting it to the reader of the pirated book as *the* thing which is valuable and important to be laid before him. And whether the language employed by the second writer be that of the former or not is immaterial: the object and the result of both processes is the same: to present to the reader of the second book the facts which the writer owes to the learning, skill and judgment of his predecessor, and for the same purpose for which his predecessor had selected and presented them.

The second writer may, instead of stating the facts or the contents of the books contained in the first, merely cite them, thus simply enabling the reader to get the benefit of them, instead of giving it to him at once;

but that the copying is badly done, is no excuse for it in law. This is, in fact, and in law, nothing but a mere reproduction, though in an imperfect way, of the results of the labor, skill, learning and judgment of the first writer.

§ 4. We invite your Honors to apply to this defence suggested by the respondent the test which must be applied to all his arguments, namely, an examination of the notes, because it will be found that there is but a small portion of the copied annotations which it touches, even if it were sound in law. Your Honors will do this if you shall think it necessary, when we come to examine the notes in detail; it will be enough for the present to show that the amount of matter copied, to which this defence cannot possibly apply, is sufficient to entitle us to a decree.

Fifteen of the notes copied from L. are *entirely* lists of citations without a word of text, some containing one, and some, more citations, and in two or three of them some citations of or from Woolsey, etc., are added. Eleven of them are attached to the same word as L.'s note, three to the same passage or section, and the other one is attached to the place pointed out by L.'s Index as the place to which it relates. They are notes 2, 12, 14, 23, 60, 97, 103, 120, 126, 134, 140, 141, p. 417, notes 221, 222. They contain twenty-two citations.

Nine more notes contain dissertations citing no authority. How much of those dissertations consist of matter which could be written by any lawyer of ordinary intelligence, education, and attainments by the use of L.'s corresponding note alone, will be considered in a different connection. Appended to those dissertations, in such a manner that the two could be separated by the scissors, are lists of authorities copied from L.'s corresponding note. In n. 15, for example, D. says: "as to the recognition of belligerency during the American Revolution, see," etc., and under three or four heads of that description, he cites twenty-seven authorities, mostly historical and diplomatic, *all* of which are directly copied from L.'s note, embodying three typographical errors reproduced from L. At the end of n. 67, he says, "For the diplomatic history of this subject see," and then enumerates ten authorities, *all* copied from L., including one typographical error. The others are of the same character. The lists in these nine notes embrace eighty-one authorities almost entirely of a historical and diplomatic character. These nine notes are 7, 15, 67, 92, 137, 139, 143, 147; n. 204 is partly of this char-

acter. All of these are attached to the same passage, and seven of the nine to the same word of the text as L.'s notes from which they are copied. All the value of these matters in these twenty-four notes,—and it is very great,—was derived by directly copying from L.'s note.

A still larger body of notes, including many of the longest and most important, are either entirely, or in some considerable part readily separable from the rest, purely statements of facts. In the early part of the book, under the head of "Nations and Sovereign States," there are many notes devoted to sketches of the political and constitutional history of different States. In other parts there are many long notes,—some of the longest in the book,—giving accounts of the practice of nations with regard to certain matters, including accounts of negotiations, treaties, orders, etc., with the comments of public men and writers. (See n. 173 on Privateering, and n. 233 on Effective Blockades.) Other notes are statements of the contents of certain books, or the opinions of certain writers.

There are forty-one of these notes of which the whole, with occasionally some very slight and easy addition, is taken from L, and seventeen more of which a distinct part of substantial value, readily separable from the rest, (but of which it is generally the foundation), is entirely copied from L. Many of these notes contain from ten to fifty facts and authorities, chiefly historical and diplomatic, copied from L.

Of these fifty-eight notes, fifty-four are attached to the same passage or section of the text. The other four, and a few of the matters in those fifty-four are pointed out by L.'s index as relating to the particular matter of the note. Of the forty-one which we call entirely from L. five continue the narration of events in progress since L., but in each of these cases, it will be pointed out that so far as D. had L. to copy from, his note is crammed with authorities, and that, for the matter since L., no references at all, or very few are given.

These forty-one notes, wholly from L. with a few additions, and consisting entirely of statements, are:

17, 20, 21, 22, 25, 26, 27, 28, 29, 30,
 33, 35, 37, 39, 40, 41, 47, 55, 58, 78,
 79, 85, 96, 99, 112, 116, 117, 118, 122, 123,
 125, 131, 136, 138, 173, 178, 179, 185, 201, 202,
 247.

The seventeen, of which a separable part is of the above character, are :

16, 49, 67, 128, 145, 156, 160, 168, 213,
218, 223, 226, 233, 235, 237, 239, 240.

Among these, n. 49, for example, has thirty authorities from L. mostly historical and diplomatic. The part copied from L. occupies all except less than half a page of a note four pages long, and that half page contains no authorities and is readily derivable from L., and also except three or four mere citations of Woolsey, etc. Many of the other notes are of the same character, and really belong to the previous class.

The value of these matters consists in the learning and judgment displayed in selecting them, combining them together, and connecting them with a certain passage of the text. Mr. Lawrence made his note by exercising that learning and judgment; Mr. Dana made his by copying from Mr. Lawrence.

Twenty-four of these fifty-eight notes are classed by Mr. Dana among his principal notes. These fifty-eight are the notes which contain most of D.'s historical and diplomatic facts and authorities. These notes will be examined in Part VII. *infra*.

VII. MR. DANA HAS NOT USED MR. LAWRENCE'S BOOK MERELY AS AN ENCYCLOPÆDIA OR STOREHOUSE OF FACTS AND AUTHORITIES: HE HAS REPRODUCED MR. LAWRENCE'S SELECTION, ARRANGEMENT AND COMBINATION OF MATERIALS.

There has been, throughout the case, on the part of the respondents, an attempt to suggest, or to convey the impression that Mr. Dana has used Mr. Lawrence's book as an encyclopædia or storehouse of facts to draw from, as he ought to use a bookcase full of annual registers, or congressional documents. It is not necessary to consider how far this may be done in the case of two works bearing the relation to each other that these books bear, and where a part of their value consists in presenting facts not found in any other treatise, and oftentimes not in any other published book, because Mr. Dana has not pursued this course. We have already remarked upon the fact that it is Mr. Dana's practice

to reproduce, for the purpose of annotating a particular passage, those facts and authorities which Mr. Lawrence had selected for precisely the same purpose. That is to say, in the words of some of the cases, he has reproduced L.'s arrangement, selection and combination of materials.

That consists in the selection of the topics to be discussed, in the manner in which those topics are divided, or deemed not susceptible of division, in the manner in which different facts and authorities are grouped together under one head, and in the particular portion of the text to which the annotation is appended.

Upon this point it might be enough to say, that just before considering these matters, Mr. Dana made himself familiar with what Mr. Lawrence had done, and thereby put his mind in a condition in which it was incapable of independent and unbiassed action. But further than that, Mr. Dana says, p. 342: "There is no common mode of division of topics, and authors vary very much in classification." And as to ascertaining whether a given authority is in any author — Halleek for instance — he says that he could not do it "until I had examined every section of Halleek, in which the topic in question, or anything like it, could, by any probability, be treated." When asked to point out where is to be found in Halleek a particular historical matter which is in L. note 143 and D. note 135, attached to the same word of the text, and which he alleges is in Halleek, he answers, "as this case may come up under several heads, I prefer not to undertake to find it." (42 cross-ans. p. 372.)

Thus there is marked difference between different authors, both as to their general plan and arrangement, and, that being determined, there is no certain rule for the distribution of authorities. E. g.

In some cases Mr. Dana has brought together and attached to one word of his text citations which in Story or Halleek are found attached to sections many pages apart. (See Mr. Potter, 24 ans. p. 234, and p. 165.)

Exactly the same citation is found attached to different portions of the text in works of other writers. (See Morse, 130 cross-ans. p. 444, an instance from Kent; Mr. Potter, p. 165, an instance from Halleek.) And the same thing happens with D. where he has not Mr. Lawrence to guide him. See some remarkable instances of this on p. 133, and p. 234 of the record as to citations copied from Story.

This would be still stronger in the case of a person like Mr. Dana,

who, in using authorities, "does not confine himself strictly to those which actually support the views he has advanced, but often adds many bearing upon the general topic . . . and sometimes even he gives citations on the opposite side of the question." (Morse, 9 ans. p. 404.)

As to all these matters, therefore, as there is in fact no identity between different writers, there is room for difference, and the selection of any plan implies substantial originality, and the adoption of the plan of one whom the writer has just read, implies substantial copying and want of originality.

These points will be found to be borne out in the examination of each note, but the evidence presents some facts which, when grouped together, conclusively show that Mr. Dana did not so much as make the attempt to acquaint himself with all the facts in L. and then write from a full mind, but contented himself with transferring them, note by note, to his own pages, not looking beyond the note he was at work upon, except when he followed out L.'s cross-references.

D. has twenty-nine cross-references; *i.e.* there are twenty-nine instances, where, even having seen Mr. Lawrence's arrangement, he thinks that there are two parts of the text to each of which a particular note is so appropriate that it should be attached to both. (Mr. Potter, 21 ans. p. 233.) And in some of these instances he has exactly followed L. as to the place where the body of the note should be printed, and where the cross-reference should be attached. (Notes 125 and 129.)

Mr. Wheaton himself had introduced a large number of cross-references, and Mr. Dana thought this so important that he preserved them at the expense of a great deal of labor and trouble. (See Dana, p. 322.)

In three cases it will be found that the same despatch *etc.*, is cited twice in different passages in L. the date being right in one instance and wrong in the other, and that D. has reproduced these errors. (See our examination of the typographical errors reproduced by D. *infra*, and notes 49; 226 and 233; 152 and 223.)*

There are some instances where the same subject is treated in two notes with different authorities and the same division both of subject and authorities reappears in D. (Notes 12 and 60; 145 and 201.)

* The details of these matters will be found in our full examination of the notes named, *q. v. infra*, Part VII.

There are some places where the same facts and authorities appear in two different notes in both D. and L. See notes 156 and 158, where they are cited in a different manner by L., and D. follows these peculiarities; notes 67 and 79, where the same diplomatic transactions are referred to, but different despatches, and different authorities for them are referred to, and D. reproduces this; notes 49; 226 and 233; 152 and 223, already mentioned.

In notes 233 and 237, he states the same theory of Hautefeuille, but the first time he cites one passage of Hautefeuille for it, and the second time he cites a different passage from a different volume for it, exactly reproducing the matter and the citations from the two corresponding annotations of L.

There are cases where, to a passage in the text enunciating one principle, L. has attached historical matters illustrating a *different* principle, and D. has exactly copied him in this arrangement and in the facts and authorities thus presented, though in some cases there are other parts of the text where the annotations would be strictly appropriate. (Notes 47, 137, 139 (two instances), 145, 176, 239, 247.) Sometimes the same authority ought to appear in different notes, but L. has put it in one only, and D. has put it in the same. (Notes 19; 143 and 223; 237.)

There is the general fact, that the matters copied by D. from L. are grouped together and placed as annotations to the same passage to which L. had attached them, and are not broken up and scattered about through the book. In addition to that, we notice the following:

All Mr. Dana's notes from 120 to 147 inclusive are included in our table at the end of the brief as copied in whole or in part from L. (127, 132, 133, 146 are cross references, not annotations.) To three or four of these Mr. Dana has made some additions from Phillimore, Woolsey and Mr. Seward's correspondence, but these are strictly additions to notes the idea of making which was suggested by L., and the body of which was copied from L. We refer to the special examination of these notes *infra* to show the character, and the great importance of some of them.

Mr. Dana has seven notes on the subject of blockade, and five of them are among his longest notes. He enumerated all of them on p. 321 of his deposition, as among his most important annotations. In n. 232, p. 671, on commercial blockades, he cites four speeches and state

papers copied from L., and the opinions of eleven commentators, also copied from L., his only addition being a citation of Kent. In n. 233, p. 674, he cites twenty-four authorities, mostly state papers, speeches, etc., all of which are from L., except a despatch of Mr. Seward, and this was interlined after the note was completed. In n. 235, he has a considerable number of authorities, despatches, treaties, etc., copied from L., his additions being an allusion to the proclamations of blockade, a despatch of Mr. Seward, two citations of Upton's Prize Law, some New York prize cases of 1861-2, apparently cited from it, and some English prize cases; (four are in L. and five are added). In n. 237 the first part is copied from L., and he has added the same citation of Upton and three cases in the New York District Court. As an illustration of Mr. Dana's care it may be mentioned that one of these cases, the *Mersey*, was reversed by Judge Nelson in the Circuit Court in July 1863 (*Blatchford's Prize Cases*, p. 658); but Mr. Dana makes no allusion to this reversal. Note 238 is short, stating an English prize case. Note 239, on Municipal Surveillance, copies from L. seven authorities, mostly state papers, etc., and adds one fact only, citing no authority for it, and citing no cases. As bearing upon the question whether D. habitually makes any research for himself, it may be remarked that, although D.'s preface is dated July 2, 1866, there is not in any of these notes any allusion to any case in the United States Supreme Court, except the "Prize Causes," and it is not necessary to enumerate to your Honors the decisions touching the subject of Blockade which had been rendered in that Court. Indeed, in the notes upon continuous voyages and other subjects, it is inconceivable that Mr. Dana should so almost entirely have omitted all references to the recent decisions of that Court, every one of which, up to the last moment, ought to have found a place in his book. In marked contrast with this were Mr. Lawrence's exertions to be the first to print the opinions in the great prize cases, which were furnished him by the Judges who delivered them.

If Mr. Dana had prepared his notes independently of Mr. Lawrence, and had brought to bear upon his work that learning, study, intelligence and thought which an annotator of Wheaton should bring to bear upon his task, different as he was from Mr. Lawrence in every mental characteristic (*Dana*, 18 ans., p. 327), it is perfectly impossible that this identity of substance could have arisen.

VIII. THE CLAIM THAT MR. DANA BESTOWED SOME ORIGINAL LABOR AND THOUGHT UPON HIS BOOK IS NO ANSWER TO OUR CHARGE THAT CERTAIN SPECIFIED PORTIONS WERE SIMPLY COPIED FROM L. WITHOUT THE EXERCISE OF ORIGINAL LABOR AND THOUGHT ON THOSE PARTS.

§ 1. In various parts of the respondent's argument remarks are made which are summed up on p. 19 as follows: "Mr. Dana did in fact employ upon this work a great deal of time and severe intellectual labor, and that of the highest quality."

Suppose we concede this. We claim that he has copied upwards of a hundred notes, about half his annotations, and all the revision of the text from L. If he has written the other half of his notes entirely himself, and has bestowed labor upon them, or if, having reprinted our carefully revised text, he has re-sectioned it, or added head titles to it, that does not touch our charge. To give him any claim to the kind of defence which he wishes to set up, even if well founded in law, he must show that *the parts which we say are copied* are in the eye of the law the results of such original labor on his part.

Now there is no substantial attempt to establish this point. The argument (p. 19) does indeed point to Mr. Dana's ninety principal notes as exhibiting proof of this labor; but it does not specify which of them exhibit it. The result of the examination of the notes will be found to be that no such labor is expended *upon the parts copied*.

We invite your Honors to bear in mind this distinction in considering Mr. Dana's argument. Our charge is specific: — that certain notes and certain matters enumerated in Mr. Potter's deposition have been copied by Mr. Dana; that they were selected, combined and arranged by Mr. Lawrence, by the exercise of original thought, study, and judgment, for certain purposes; that Mr. Dana has presented these same matters for these same purposes; that he has done this, not by doing for himself the intellectual labor performed by Mr. Lawrence, but by the use of the book in which Mr. Lawrence had embodied and presented the results of his exertions; that the matters thus copied constitute a large and valuable part of Mr. Lawrence's book, and a large and valuable, — much the most valuable part we submit, although it is not necessary to go so far, — of Mr. Dana's book. It is no answer whatever there-

fore to our charge, either in fact or in law, that, besides this copying, he has also printed in his book certain other notes containing new and valuable essays of his own.

§ 2. This attempted defence, and the evidence in this case calls for another suggestion. There can, of course, be no pretence that half or two-thirds of his book can be copied from L., simply because he has made up the rest of it by a similar use of two or three other text books. If he is to set up the originality of other parts as an excuse for his copying, let him prove it. He hardly proves it by his own deposition, for he says both in his answer and his testimony that he was indebted to other authors as much as to L. It is quite clear that this is not exactly true, because he took more from L. than from all other sources combined: when reading the three or four leading works together upon any topic he found their contents such that, with every disposition to find fault with Mr. Lawrence, he unconsciously took more from his notes than from all the other works together. Mr. Morse does not prove it, because he limits his statements about Mr. Dana's originality by adding, "at least, so far as Mr. Lawrence is concerned." (5 ans. p. 401; see particularly n. 15, and Mr. Morse, 72-78 cross-ans. 437.) If this defence were material it would require an examination to ascertain what is really original in the part not copied from L., and the value and correctness of what might be found to be original. This we have not made and do not propose to spend time in making, as to his whole book. For the purpose of showing a general habit of relying on other sources than his own study and learning we have shown that much which is not from L. is copied from Phillimore, Halleck, Story, etc. (Mr. Potter, p. 233), and have pointed out some typographical errors in those authors which he has reproduced (Mr. Potter, pp. 165-6), though we might have spared ourselves that trouble had Mr. Dana's statement of the manner in which he prepared his book preceded our examination of it. (Affidavit of Mr. Potter, p. 78; of Mr. Lawrence, pp. 37-38.)

§ 3. On pp. 232-233 Mr. Potter has given a list of notes copied from Story, Halleck, etc. With regard to these notes it is to be observed that the notes copied from L. contain a large number and a large class of historical and diplomatic facts and authorities,—those which are most difficult to obtain and most rare in books,—which are entirely wanting in the notes copied from other sources. These notes copied

from L. show a knowledge of the contents of the authorities such as could be got from L.'s notes, which also is entirely wanting in the notes copied from the other authors who merely give lists of citations. Indeed it will be found that the notes copied from Story, though numerically they contain many citations, are merely lists picked up from Story's foot-notes, without any intimation of the contents, and that the number of the citations is swelled by repeating the same many times over. (See Mr. Potter, 16 ans. p. 153; 24 ans. p. 234; Mr. Lawrence, p. 133.) It may be laid down as a rule which will be found generally true in practice, that, whenever in Mr. Dana's notes a valuable authority out of the common course is found, or whenever such statements are given about the contents of the authorities as to enable the reader to know something of them, they are matters which have been copied from Mr. Lawrence's corresponding note.

The respondents' argument accuses Mr. Potter of having prepared these tables solely to injure Mr. Dana's reputation. It will be seen how important they are in the above respect, and also that they clearly show a *habit* of relying on others, — and Mr. Dana confesses that he did habitually rely on them for such facts and authorities as he did not copy from L.

§ 4. By a similar kind of verbal jugglery, it is made to appear, on p. 123 of the respondents' argument, that 70 of Mr. Dana's 90 principal notes are not accused by us, whereas this is not the case. For certain purposes, Judge Potter was asked to prepare a schedule classifying the pirated matter by *notes*. He thereupon gave a list of notes copied entirely from L.; another list of notes copied from L. except that D. has continued the matter since L.; another list of notes most of each of which is copied from L.; another list a substantial and valuable part of each of which is copied from L. It is obvious that to copy three-quarters of a long note is as much a piracy as to copy the whole of a very short note, so that the first list cannot in any sense be said to contain the chief offenders.

Mr. Dana has 229 annotations of which 90, about two-fifths, are in his table of principal notes. Mr. Potter's first list includes 68, of which 20 are "principal notes." His next list includes 15, of which 9 are "principal notes." His next list includes 28, of which 20 are "principal notes." Here at once we have 111 notes which are substantially taken

from L. with some addition or continuation, and these include 49, or more than half of his principal notes. Upon examining these notes, or looking at the lists given by Judge Potter of notes where the additional matter was copied from Phillimore, Halleck, etc., their true character will readily be seen. The next list names 29 notes, each of which contains some substantial matter of value of greater or less extent copied from L., and, of these, 15 are included among the principal notes.

As has been already said, neither the number of the notes (for they vary from one line to twenty pages in length) nor the number of pages, nor the number of authorities copied from L. is a sure criterion of the value of what is copied. It is not necessary to compare the amounts, for it is sufficient if a considerable part of substantial value is copied, — and in this case there can be no possible question but that the amount is sufficient. And it will be very clear that the historical and diplomatic facts and authorities, the most valuable for a book to contain, because the most inaccessible, if for no other reason, are entirely taken from L. with the exception of some matters from Mr. Seward's volumes or especially relating to our war. (*Vide* pp. 67, 68, *infra*.)

§ 5. On pp. 98, 112 of the argument, Mr. Dana has constructed some tables based on this schedule of Mr. Potter. We are at a loss to see what they would prove if true; in fact they are entirely incorrect. They should be as follows:

Whole number of notes	258
Cross references	29
	<hr/>
Number of real annotations	229
Copied from L. in whole or part.	
List (1)	68
(2)	15
(3)	28
(4)	29
	<hr/>
Total	140
Taken from Phillimore etc. (lists 6, 7.)	43
	<hr/>
Total number copied in whole or in part from L. and other authors named	183

The second paragraph in list (7) on p. 233 of the record, refers to the

character, not the sources of the notes, and therefore includes many which are in lists 1-7. The respondent has treated this as if it were a continuation of the other lists, and not a classification of the *same* notes on a different plan, and, in that manner, has been able to arrive at an absurd result, not due, however, to any absurdity in Judge Potter's schedule.

IX. IMPORTANCE OF THE FACT THAT THE MATTERS COPIED BY D. FROM L. ARE ATTACHED BY MR. DANA TO THE SAME PASSAGE OF THE TEXT TO WHICH MR. LAWRENCE HAD ATTACHED THEM.

On p. 49 the respondent has another table which shows that out of L.'s two hundred and forty-nine notes and D.'s two hundred and fifty-eight notes there are one hundred and thirty-four instances where they are attached to the same *sentence*. The table does not tell us in how many other instances they are attached to sentences in the same paragraph, which generally amounts to the same thing so far as substance is concerned, and therefore their table does not in the least conflict with Mr. Potter's statement, that "nearly all the notes of Dana, where they are upon the same subject, are attached to the same word of the text with the notes of L., and to parts of the same paragraph." (18 ans. p. 155.) We were struck with the fact that an elaborate table and discussion, professing to contradict Mr. Potter's statement, does not meet it. So far as that table goes it agrees with what we have elsewhere said. There are one hundred and thirty-four notes attached to the same sentence; this is just about the number in which Mr. Dana has copied from L., and it will be seen when we come to examine the notes that, except in a few cases where L. has given cross-references, D. has attached his note to the same passage as the note of L. from which his is copied. The most important bearing of this is that the facts and authorities and matter copied are presented by D. for the same purpose for which L. had prepared and collected them, namely, to support, explain or illustrate a certain particular rule of law or practice — that stated or alluded to in the text; and next to this is the fact, that in preparing an annotation for the same purpose as L., he puts into it L.'s selection of facts and authorities. See particularly pp. 32, 46, *supra*.

PART IV.

THE PROOF OF PIRACY FROM MR. DANA'S CONFESSIONS.

I. MR. DANA'S ACCOUNT OF THE MANNER IN WHICH HE COMPILED HIS BOOK.

§ 1. Mr. Dana's account of the manner in which he prepared his book is this:

Int. 14. Please state what course you took in preparing for and making your annotations. (Record, p. 317.)

Ans. I began by re-reading or reading the latest works upon the subject. As well as I can recollect, I took into the country with me Wheaton of 1863, [he very properly names this first, and very naturally and consistently does not mention Mr. Lawrence's name in connection with it] Phillimore, Heffter, Halleck, Kent (some edition prior to 1864), — I don't recollect whether I took Hautefeuille, [we shall hereafter show that if he took it he certainly never studied it] — and President Woolsey lent me the sheets of his second edition while there. During the time while I was in the country, I didn't undertake to make a single note for printing, but to read and make memoranda. I had my edition of Wheaton of 1863 interleaved with writing paper, and put up loosely in four parts.

An early edition, without any of L.'s notes, is what he ought to have used if he really intended "to take the *text of Mr. Wheaton*, with Mr. Wheaton's notes, and annotate the same with original notes of his own, in the same manner as if they had never before been annotated" (answer of Mr. Dana, p. 59); "to *build up a new and original body of notes on the basis of the text of Wheaton*, and to leave out all the original contributions of the complainant, and to discharge the book from them completely, and to make the fact known to the public." (Answer of Mr. Dana, p. 67.) He certainly had the Wheaton of 1855 (Mr. Dana's dep. p. 323), which, as being smaller, would have been more convenient, if Mr. Wheaton's text was all he wanted to use, or even if L.'s revised *text* was all he wanted, for the text of 1863 is a reprint of L.'s revised

text of 1855. (Mr. Lawrence's dep. p. 115; "Advertisement" to ed. 1863, p. i.)

P. 318. My memoranda from other books were always made on separate pieces of paper, and not on the books. My memoranda from Wheaton were sometimes made on the fly-leaves (meaning the inter-leaves), and sometimes on separate sheets of paper. My intention was to make a careful study of these books, and to study Mr. Lawrence's notes as much as I did the writing of any other person. Finding that there was no reference in his margin, as indeed there could not have been, to his very full addenda, supplement and appendix, as I believe they are called, and thinking I might wish to read them in connection with the body of the notes, I noted in the margin of my copy references to these supplemental parts, taking them mechanically as they were read to me by one of my family from the heading of each article in those supplementary parts. No examination was required to do this. It was mere mechanical transfer. This was to enable me to read the supplementary parts when I read the notes. I usually read one topic in all the books at a time — not reading any one book through.

As I read I would note on a sheet of foolscap in a short and rough way, just to aid my memory, sometimes references to volumes or pages, and sometimes words and a cue to my own thoughts. Where the case seemed to require it I would take down, either on the same or a different sheet a list of the authorities cited by the authors I read. It would be impossible for me if I had such a sheet now or indeed at the time, to tell to what author I was indebted for any of those citations. (p. 319.)

Int. 32. What was your method as to citations, — meaning the giving merely name, volume, page, etc., of an authority? (p. 339.)

Ans. When I began reading up upon a topic, in addition to what I may call memoranda of mental suggestions, which, as I have said I put upon appropriate sheets, *my general course was, on important points, to copy, directly from the author the citations he made.* These were put on a sheet of paper, with some heading or mark for identification of the subject, and on this sheet I placed from time to time such citations as I found. I had thus a great quantity of loose sheets kept together in some order, and marked or entitled.

All these sheets I endeavored to keep together; when I came to write my note or notes on the subject, I consulted them. (p. 340.)

He says that these masses of sheets have been destroyed. (p. 342.)

As to Mr. Lawrence I felt at liberty to examine his notes as I did the writings of other persons, whether copyrighted or not. I entered his citations on my rough sheets as I did those from other writers. Not more so, I do not know that I did less so. I made no distinction on these sheets of the source from which the citations came. If those sheets had been preserved, I could not now tell, nor at any period of my

work could I have told, nor did I ever think of remembering or noting the authors from whom I derived the several citations after I had minuted them down. Neither could I have told from the sheets, with any certainty, the order in which I set them down, except that doubtless those in one place were generally put together on the sheets. After my examinations and markings, when I came to enter the citations in my note, I would write them or dictate them from these sheets, and sometimes from new memoranda of my own in any way that might be convenient for me. I never gave the matter a consideration in what proportion I was indebted to one or another source for the citations. . . . As to the manner of citing, the citations were written so many times that they sometimes took my form and sometimes kept that in which they stood. (p. 341.)

As I have said heretofore, I took into the country with me, in the summer of 1864, Lawrence's Wheaton interleaved, for the purpose of re-reading the text, and a careful examination of the notes. . . . Where I found in the notes an historic fact or diplomatic act that seemed to me important, I would make a mark against it as I read. So with any quotation or citation that I thought, as I read, I might desire to recur to when at work upon my notes. So, where a note was long, after reading it through, I would, for the same object, write something against it in the fly-leaf, either to show that I should or should not re-examine it — that the substance of it was material, or the like. All these marks, jottings, memoranda, were intended for my own aid when I should come to my work. I had with me at the same time two or three other books, which I read in connection with Wheaton. Of these, I remember Halleck, Woolsey, Phillimore. What appears in my notes may be the result of examining several sources, including the marked passage in Lawrence, or I may not have recurred to him. (Record, p. 394.)

His long notes were written on separate sheets of foolscap, and his short notes were written on the fly-leaves of his copy of Mr. Lawrence's book, "*and the interleaving was very convenient*" (p. 323). Undoubtedly.

Mr. Potter testified: (3 ans. p. 148.) Mr. Lawrence's book is particularly rich in giving very full statements of historical facts, treaties, etc., illustrating different topics, and in quoting the text of authors, documents, despatches, etc. In this respect I think it surpasses all books which had preceded it, except Phillimore, and perhaps even that and all which have followed it. This is an exceedingly valuable feature of the book, and distinguishes it from all others which I have examined. It gives in a convenient form many matters not collected or stated anywhere else, and the text or substance of papers which are not found in any published books, or only in books not easily accessible. Many of these facts were taken from newspapers and other publications of the day, and, to the best of my knowledge and belief, are not found in any

other work, except the complainant's, and some books published since, which have probably copied from him.

Not only are these authorities frequently difficult to be found when pointed out, but the knowledge of the existence of authorities of this kind, the knowledge what to look for and where to look, so as to make an intelligent and valuable *selection* of the best of them, can only be obtained by that extraordinary learning which Mr. Lawrence's attention to this subject during his whole mature life has enabled him to acquire.

Mr. Dana testifies (p. 344):

Int. 36. What course did you take as to public documents, diplomatic despatches and other State Papers you found cited or quoted from by any author?

Ans. . . . I felt at liberty to examine and use the document as I pleased, and if it was one to which it was impossible for me to get access, or extremely inconvenient, as in the case of *most* foreign and some American originals, and it seemed an important document or passage, I did not hesitate to trust to the best secondary authority I had for it. . . . I do not doubt I may have treated Mr. Lawrence's citations in the same way as those of others. (p. 396.) As to events of a public, political, or diplomatic character, stated and used by Mr. Lawrence, I thought it my duty to be possessed of all the facts, and where, after finding such a fact in one author, I examined other authors as to it, it was for the sake of accuracy, and not because I thought I could use the fact if it had been used by several authors, and could not if I found it in but one. In reading Mr. Lawrence's notes, as in reading other authors, I intended to let no important fact or authority escape me, and in all alike I took some mode of securing that end, by note, memoranda, or otherwise.

In the margin of his copy of L., and on the fly-leaves, he made, he says, marks and memoranda against "any historic fact, or diplomatic act that seemed to me important," and against "any quotation or citation that I thought I might desire to recur to when at work upon my notes" (p. 394). "In some cases, I may have afterwards written out a memorandum of what I considered to be the substance of the note, and placed it among my materials upon the subject. In other cases, I may have trusted to re-reading." (p. 396.)

§ 2. It requires only the most cursory examination of Mr. Potter's deposition or of the books themselves to show that about one-half of Mr. Dana's notes consist of historical and quasi-historical matters, and references to books other than text books or treatises on international law,

and that, with very inconsiderable exceptions, these facts and references are all to be found collected in L.'s corresponding note, and in no other book whatever, except in the few cases where Halleck and others have professedly copied from L. There are many hundreds of them, we believe about 650, sometimes as many as 40 in one note, all to be found in the same form in the corresponding note of L. and frequently with slight errors of figures, or in the spelling of names, or with verbal peculiarities, which are reproduced by D. The few historical matters which are not taken from L. mostly relate to our civil war or to matters to which notoriety has been given in connection with it.

Upon this general evidence therefore, upon Mr. Dana's own confessions, with perhaps a mere glance at Mr. Potter's deposition and without going into details, your Honors must come to the conclusion that Mr. Dana has taken from Mr. Lawrence's book a large amount of valuable matter — and that is enough to decide this case.

§ 3. He confesses that he carefully studied Mr. Lawrence's notes for the purpose of writing his own. He provided himself with special facilities for making memoranda of all he found in them. He did all this for the purpose of taking from them everything that he thought valuable, and, in this manner, he prepared his notes. Having thus written his book, having also exactly reprinted the text prepared with great care and judgment by Mr. Lawrence, and differing by about sixty pages from any one edition published by Mr. Wheaton, (being made up from different editions in different languages,) Mr. Dana undertook "to make it known to the public" that he had "built up a new and original body of notes on the basis of the text of Wheaton, and had detached Mr. Lawrence altogether from the book." (Ans. p. 67; 21 ans. p. 331.) One way in which he made this known was by printing in his preface an assertion that his "edition contains nothing but the text of Mr. Wheaton, according to his last revision, his notes, and the original matter contributed by the present editor," and that "the notes of Mr. Lawrence do not form any part of this edition. It is confined, as has been said, to the text and notes of the author, and the notes of the present editor," making no other allusion to Mr. Lawrence's work in any part of his book.

Miss Wheaton certainly showed a most creditable sense of honor in her instructions to Mr. Dana. They were such, he says, that he thought he ought to detach Mr. Lawrence altogether from the book, going be-

yond the limits which the test of copyright would have allowed. (p. 312.) His course was very simple. He had of course read Mr. Lawrence's notes and retained something from them; but at the moment when he resolved to undertake the work he could also have resolved that Mr. Lawrence's notes should be to him a sealed book—as if they were in manuscript, locked up and never printed or published, at least until his own work was finished. Considering the relations in which he and Mr. Lawrence stood to each other, and to the Wheatons and Mr. Wheaton's book, common fair dealing required this; a man who was at all scrupulous about literary honor and propriety would have done this for his own sake. It would not need an over nice sense of honesty to make him determine that, as he was writing in part for the reputation he wished to acquire, it should be a reputation based on his own attainments and performance, without suspicion of aid from another and least of all from the man he was attempting to supersede. He could have taken "the text of Mr. Wheaton according to his last revision" in the edition of 1846, without Mr. Lawrence's notes, and built up his "new and original body of notes" on that basis. But all that would need that he should acquire as much learning as Mr. Lawrence, or suffer by the comparison, and so, *for the purpose of availing himself of Mr. Lawrence's work*, he took the course described.

Since he denied all indebtedness to Mr. Lawrence in his preface he has confessed that he intended to do, and that he did do substantially, indeed, exactly, what we charge him with having done, and his only difficulty is, that he cannot tell precisely to what extent he did it. Yet what grounds does he put forward in his defence? He testifies (p. 327): "I cannot, either intellectually or morally, do beggar's book making." And the argument, devoting in one place (pp. 16-19) a special head to it, more than once asserts that it is not from a person of Mr. Dana's character that we are to expect to find violations of literary privilege.*

§ 4. Mr. Potter shows that Mr. Dana has citations from about one hundred and sixty-two different works; some of these, such as Martens, Hansard, Br. and For. State Papers, Congr. Globe, etc., being in from

* Lord Sunderland, with characteristic ingenuity, defended himself by representing that it was quite impossible for any man to be so base as to do what he was in the habit of doing. — *Macaulay, Hist.* ch. ix.

twenty to two hundred volumes each. Nowhere in Mr. Dana's testimony is there any pretence even that he ever made any *independent* research or examination of these authorities themselves, except perhaps as to some of Mr. Seward's recently published volumes, and a few recent pamphlets. One reason for his studying the latter may be inferred from his statements (answer, p. 62,) that they were "liberally supplied with references," and that "they furnished me with some of my best collections of citations" (p. 341). On the contrary, it distinctly appears, from his own testimony, that his whole plan was to study carefully L. and four or five other authors, and, by means of a convenient method of making memoranda, to procure his facts and citations by "copying directly" from the authors he read. In some instances he afterwards supplemented to this by taking up recent pamphlets, etc., and treating them in the same way.

§ 5. He has not occasionally used L. to assist a study, and search otherwise independent, nor to verify and correct the results of previous research. He has taken the results of L.'s work *instead* of making such study, and to save himself the necessity of making it. He has not even used L. to direct his study, and then actually written his notes from an independent examination of the authorities to which L. referred him, but has in fact, and habitually, prepared them by reading L.'s notes, and directly copying or making memoranda from them as he read, and going no further. When he returned from the country he had his facts and authorities for each note substantially all collected; and, at that time, he had not looked at one of these one hundred and sixty works cited in his notes, except L. and his two or three hand-books. The facts pointed out under VII. p., 46 *supra*, are entirely inconsistent with the idea that his notes could have been in any sense the result of original, independent thought and study, especially when the difference of mental characteristics between the two writers is remembered.

He did not undertake to procure, and it is perfectly clear that he did not procure his citations and quotations of Hautefeuille, Westlake, Twiss, by studying those authors themselves. He did not undertake to procure, and it is perfectly clear that he did not procure his innumerable references to foreign state papers, debates, Hansard, Al. de Gotha, Annuaire, Le Nord, either by reading those books and papers, or by examining them for the purpose of finding those facts and documents which a knowl-

edge of the subject made him desirous of using. He procured all these by "copying directly" from L. etc.; *before* looking at the books, by his own confession, — and without ever looking at them according to the clear weight of the evidence, including his confession of his practice. As to a large class of these authorities, he has not a reference, or an extract, except such as are furnished him by L., Halleek and Phillimore. With a few trifling exceptions, of a special character, he has derived nothing from the authorities copied from L. except what is found in L.'s notes.

§ 6. The only cases in which he went to the authorities substantially were where he had been directed to them by Mr. Lawrence or some other of the few authors whom he used as hand-books, and where the statements those books gave of their contents specially made him think further examination necessary. This would be the case very seldom if the book gave copious quotations and full statements of their contents as Mr. Lawrence does, and more often with authors like Halleek who do not either state or indicate the contents of the authorities cited. (Mr. Potter, 3 ans. p. 148; 16 ans. p. 153.) But even in these few cases it is not *independent* examination. It is only verifying L.'s work.

He did not even take the trouble to compare citations, quotations, or memoranda of facts, or of the contents of quotations and books, thus taken at second hand, with the originals. He may have done it and probably did in *some* instances; but he did not make it a rule to do so, even when he conveniently could have had access to the original. Whether he would do so or not, in any case, would depend upon whether there was any special reason for so doing, — one consideration being, "the reputation for exactness of the source from which you obtain it." (Dana, 32 cross-ans. p. 368.) Mr. Lawrence has given a long schedule, showing how his book is universally relied on for accuracy. (Mr. Lawrence, 52 ans. p. 85; 58 ans. p. 88.) The respondents' "expert" says "I should say that Mr. L.'s citations were usually made with minuteness and exactitude." (Mr. Morse, 193 cross-ans. p. 452.)

Mr. Dana's argument (pp. 136, 164) makes some comments on the two preceding paragraphs which are here reprinted from our opening brief (p. 60.) He says (p. 164):

"But the most extraordinary thing is that one of the complainant's counsel cross-examined Mr. D. on these very points, his questions *admit-*

ting that D. had represented himself as having examined the authorities and citations and compared them with the originals, and obtained from Mr. D. a frank statement as to his exceptions from this course."

Certainly, although he nowhere distinctly states, as so acute a lawyer would have done had the facts permitted, that he always, or habitually examined the authorities he cited, the language he used is calculated and (we may now assume) was intended to represent that he had done so, except in the case of what he has called traditional citations and quotations.

Perceiving the looseness of his statements we cross-examined him: (pp. 366-8.) (the italics are ours.)

Cross-Int. 29. You say in your deposition (p. 319), "I would at some time examine the authorities, etc." Do you mean to state as matter of recollection, that you did in all cases, in fact examine the originals of the authorities you have put into your notes?

Ans. I do not mean to state as matter of recollection that I examined the originals of all the citations which I put in my notes. Indeed, I know that I have cited, in the sense we have used that word, without quoting language, in a group of citations at the end of a note or paragraph, works which I had never seen, and which perhaps no living person has ever seen.

This was calculated, if not intended, to convey the idea that the cases where he did not examine were limited to mere *citations*. So we went on:

Cross-Int. 30. Do you mean to say as matter of distinct recollection, that you examined the originals in all cases before putting *quotations* into your notes?

Ans. No. In some cases, where the quotation has passed through the standard authors, I have not thought it necessary to get the original for the purpose of a verbal comparison, or to compare different editions if they differed. If there was anything to suggest a doubt of the accuracy of the quotation,—I would solve the doubt by comparison. I may in many instances have handed down a quotation in that manner.

Here was another exception. But this answer also would convey the idea that these instances were limited to what have been called traditional quotations. So we went on:

Cross-Int. 31. Are the exceptions referred to in your last answer confined to cases of authorities or quotations, which have passed through

standard authors, or which are so rare that perhaps no living person has seen them?

Ans. No, not strictly. For instance, if a quotation should be made by a single authority, as a leading periodical, from a statute or other public document which had not appeared in a public form, and I had no reason to doubt its correctness, I shouldn't hesitate to print it rather than to keep my book waiting till the original statute might appear. There are all degrees of safety in trusting to authenticity, and of justification for doing so.

Here were three answers, each professing to state the whole, and yet each enlarging its predecessor. We thought we had not touched the bottom. So we asked him whether these were all the exceptions.

Cross-Int. 32. Do you mean then that the qualifications contained in the preceding question, with the further qualification that you sometimes cited a statute or public document from a newspaper, cover all the cases where you made citations or quotations from other sources than the originals?

And we learned that instead of being *all*:

Ans. I believe I stated that they were *only illustrations*. The question whether in any given case I should compare the correctness of a mere citation by page and volume with the original book, and whether I should compare a quotation with the original, would depend upon a great many considerations, which it is almost impossible to state, of every degree and kind. [Sometimes, he says, every word and figure ought to be verified; sometimes the matter is so plain that no one would do it.] Between these two are all degrees. The considerations usually are, — the length of the passage, its importance, the fact whether it is a tradition with many authors or not, the reputation for exactness of the source from which you obtain it, its apparent correctness on its face, and the amount of labor, expense and time that would be required to procure the original, the fact of their being authentic originals attainable whose readings are recognized as correct, [he had said that most foreign and some American public documents were not accessible, *v. supra* p. 59], and other considerations which may not occur to me at this time.

Now we have got to it. He did not make a rule to do it. He did not do it when he could. He did not think that he ought always to study the authorities for himself. It depended upon the circumstances of each case, — whether it was convenient, whether the author from whom he copied had a reputation for exactness (and certainly Mr. Lawrence had), in short whether there was any *apparent* necessity. Mr.

Potter (3 ans. p. 148, quoted p. 58 *supra*) has pointed out that L. is exceedingly rich in giving very fully the text or substance of treaties, state papers, etc., especially those not readily found elsewhere, so that it is very seldom that there is any apparent necessity for going beyond his notes.

At the outset of this case (answer, p. 65), and down to the passages of his deposition above quoted, Mr. Dana had constantly alluded to traditional quotations, which passed from book to book, but neither he nor Mr. Morse had pointed out one of them, or had even said that so much as one of the matters charged to have been copied was of this character or was found in any book *prior* to L., in the same form. We therefore asked him to "point out *some* instances of such quotations or citations." (p. 368.)

33 cross-ans. It would be impossible for me to do so without an amount of work which I am not willing to give unless required. . . . I think the demand an unreasonable one to make of a witness.

§ 7. Mr. Dana's deposition is ninety-two printed pages long, but there were a certain class of our cross-interrogatories which he always thinks it unreasonable for us to ask or for him to answer, though they are never objected to as incompetent; this is one of them. Certainly it was "unreasonable" for him, a party testifying in his own behalf, to say that there were such quotations in his book, when it is evident, not only that he could not put his finger on one of them, but that he had never ascertained by actual examination that there were such, for he had the search still to make. All his statements about the matter therefore are the mere conjectures of the party accused, and, in no sense, testimony as to facts.

§ 8. The respondents' argument (p. 181), says:

The brief represents D. as excusing a practice of citing public documents from other authors, on the ground of its being inconvenient for him to get the originals. D. admits no such practice. All he says is, that, if a document was one to the original of which it was impossible or extremely inconvenient to get access, he trusted to the best secondary authority he had.

He also testified (p. 396), that he felt at liberty to use such documents, though he only found them in one author, and that if he looked elsewhere it was only for greater accuracy; that this impossibility or ex-

treme inconvenience existed in the case of most foreign and some American documents, and that "I do not doubt I may have treated Mr. Lawrence's citations in the same way as those of others" (p. 344). We submit that the statement in our brief (p. 70) is clearly right, and is admitted by the argument to be correct. We said: "As to public documents, etc., it was his practice to take them from whatever author he found them in, *because* he could not conveniently get access to the originals."

II. THE DIFFERENCE IN THE CHARACTER OF THOSE NOTES OF D. WHICH RELATE TO FACTS AND AUTHORITIES BEFORE 1863, WHEN HE HAD L. TO COPY FROM, AND THOSE WHICH RELATE TO MATTERS SINCE L. SHOWS COPYING WITHOUT INDEPENDENT STUDY.

§ 1. Another proof of Mr. Dana's want of original learning and study is found in the fact that most classes of his citations stop in 1863 where Mr. Lawrence's book of 1863 stopped. Mr. Lawrence says (affidavit, p. 39.):

With regard to many of my citations copied into D., as they were made during a period running through nearly forty years, and in many cases from newspapers and ephemeral pamphlets, it is scarcely possible that the same should have also been made by another person and given to D. The coincidence in so many hundred cases would be remarkable. I would, by way of illustration, state that as to the *Nord*, a newspaper printed at Brussels a part of the time, and in Paris the rest of the time, and from which D. in common with myself, has made citations between 1860 and 1863, after the most diligent inquiry, I cannot learn that any copy was taken in this section of the United States, except by myself, till July, 1864, when it was taken by the Boston Athenæum. No citation in D. is subsequent to 1863, nor is there any of a date later than my last edition from the Almanach de Gotha, or Annuaire des Deux Mondes, previous to which time the coincidences in our quotations from those works are very numerous. No continental elementary text writer since 1863 is mentioned by D. The names of Cauchy, Gessner, Vergé, Ott, Pradier-Fodéré, are not to be found in his book, nor are there any European diplomatic notes since my time noticed, except such as are connected with American affairs and to be found in the Diplomatic Correspondence published at Washington.

Mr. Potter, 20 ans. p. 156, and 20 cross-ans. p. 244, testified substantially to the same effect.

If he had prepared his book by what, in the most liberal sense, could be called his own research and learning, using Mr. Lawrence's book only to *assist* his study, nothing of this sort would be found. In Mr. Potter's deposition (pp. 179-187), and in Part V., II., § 9, of this argument, there is a list of works from which D. has no citations except such as he has copied. Some of these are historical works or reviews and newspapers, continued to the present day. Others are the works of text writers, one of whom (Dr. Twiss) has published a second volume since L.

Perhaps the most remarkable difference is found in regard to historical and diplomatic authorities. So far as Mr. Lawrence's book extends Mr. Dana's notes are full of them, relating to all countries and cited from every variety of sources: but with 1863 all this stops, with the exception mentioned in the quotation above given from Mr. Lawrence's testimony. In a few cases — three or four — when the beginning of negotiations was noticed in L., and attention was thus called to something as in progress, Mr. Dana has stated the final result, but in these few cases, as will be pointed out hereafter, while the note is full of details and authorities so far as L. supplies the materials, it dwindles down to a statement in the most general and indefinite terms without authorities, the moment his *vade-mecum* ceases to aid him, and he then gives only such information as might be picked up from a cursory reading of a contemporary cyclopedia, without any study of the matter.

For example, in the sketch of the changes in Poland (D. n. 27) D. take much from L., with citations of *Le Nord*, etc.; the interesting discussions which grew out of the matters then in progress, and with which was connected the question of the application of the rule of belligerent rights to a revolutionary party on land, are not noticed by D. The conference of London of 1864, called on the question of the Danish succession, discussed some points of maritime law independently of the principal question, and among them was a question as to the effect of an armistice on a subsisting blockade. Nothing of this is in D. State papers did not cease to be published in *Le Nord* in 1863; *Le Nord* was not the only continental journal that published them. Mr. Lawrence took that paper, and having it in his library cited from it. Mr. Dana never saw that journal, and as a rule did not procure continental matters except from L.'s notes.

§ 2. A similar state of things exists with regard to the period prior to 1863. Your Honors will find that the historical and diplomatic authorities which constitute a very large if not the largest part of his annotations are *all* copied from L. with the exceptions mentioned, and perhaps a very few others. Mr. Dana enumerated on pp. 320-321 of his deposition those notes which he considered the most important. We undertook to prove this peculiarity out of his own mouth, and as a first step asked him (41 cross-int. p. 372) to point out which of them contain any considerable statements of or references to historical and diplomatic matters prior to 1863. He made no objection to the question and took it home with him. On the next day he came and as usual thought he ought to be excused from answering such a question, and did not answer it. (P. 382.) Mr. Morse had a rather less peculiar idea of the duties of a witness under the circumstances, and the result of what he gave as a fair answer to the question was that, with the exception already mentioned, D. has not such facts or authorities except when copied from L.: the only matters he points out are a reference to a fact for which no authority is cited by D. (n. 239), and an allusion to some details which are taken from the authority to which L. referred Mr. Dana. (Mr. Morse 21-48 cross-ans. pp. 429-432.)

This is not because Mr. Dana did not think these facts and authorities valuable. On the contrary he thought it his duty to let no important fact or authority escape him (p. 396); and the estimate he unconsciously formed of Mr. Lawrence's judgment was such that he transcribed Mr. Lawrence's facts and authorities, so far as the limits of size imposed by his publishers would allow him. So far as he had the materials close at hand in Mr. Seward's published volumes, and in the publications of Mr. Bemis and two or three other gentlemen who have discussed some recent questions with real learning, Mr. Dana found substantial matter since 1863, and something before 1863 which was not in L.,—and he found nothing else that was valuable or important,—because he did not look for it.

It will be shown hereafter (Part V., III.) that Mr. Lawrence's notes contain only a selection, and are not exhaustive; that no two writers, and, least of all, two gentlemen as different as Mr. Lawrence and Mr. Dana, would make the same selection. Mr. Lawrence performed his task with skill and judgment and he has every reason to believe

that his selection was well made, but he certainly does not think that his book of 1863 is perfect as a whole. His second edition was an improvement on the first, and he undoubtedly hopes that the changes made for the French edition will add to the value. But whether they do or not, they show that even the same man does not write his book twice alike.

All these matters, and the facts pointed out in Mr. Potter's deposition and this argument, are totally inconsistent with the idea that Mr. Dana's use of L. was merely to aid a search which can in any sense be called independent or original. They show, we submit, beyond all question, that on L. chiefly and on other authors to a less extent, he relied for his facts and authorities, and that, in note after note and page after page, he simply adopted the results of Mr. Lawrence's judgment, not only without exercising his own, but without putting himself in the position where he was able or qualified to exercise it.

III. THAT MR. DANA DOES NOT NOW SEE ANY OBJECTION TO THE COURSE HE PURSUED, SHOWS WANT OF ORIGINALITY AND LEARNING WITH REGARD TO THE MATTERS COPIED.

§ 1. Mr. Dana does not now see any objection to the course he took to procure the facts and authorities which constitute the whole of a large portion of his notes and the basis of many others. (See his argument, p. 139.) He does not think it necessary even that he should so much as look at the authorities to which L.'s notes direct him, but believes that he is at liberty to copy all these matters directly from L.'s notes without looking at any other book whatever about them. He does not seem to understand that there can be any merit or any originality in a law book except so far as it consists of matter purely evolved from the writer's own mind and *expressed in his own language*. That is substantially the definition he gives of original composition in his deposition (p. 327; 19 ans. p. 328; 33 ans. p. 342; 25 cross-ans. p. 365), and it is the one assumed by the respondents' counsel and by Mr. Morse in their cross-examination and testimony. (See particularly Mr. Lawrence's dep. 25 cross-inter. and ans. p. 135; 26 cross-inter. and ans. p. 138.) It is only original composition in this sense that he denies

having copied from L. It is upon original composition in this sense, and in this sense only, that his labor was expended. He says (18 ans. p. 328): "My system, therefore, led me to a kind of labor in which I could have got almost no assistance from Mr. Lawrence's work, in the way of making extracts, as to which this question particularly inquires, nor *generally in my labor of composing and preparing notes.*" He was then asked what his rule was as to "substantially appropriating" the "labor and merits" of Mr. Lawrence's original composition. He answered that "my process did not admit of that kind of plagiarism described in the question. I wrote from myself."

If his system and his process included any study of authorities and any research whatever, if it included any attempt to prepare for himself the historical and quasi-historical notes, or to exercise judgment in the examination of the large number of authorities upon which his legal notes are based, certainly it in fact admitted of assistance from L.'s notes, though he had no right to such assistance. But it did not include this study and research. He confesses that, in all these matters, he habitually, not only availed himself of the work of L. and two or three other writers, but relied on them for his facts and authorities. The system and the process and the labor which he proposed to himself and which he undertook was, substantially and habitually, as to most of his notes, to re-state, in his own language, and as his own matter, what he found in L. and Halleck, etc., and, at times, to add his comments thereon. It is of this system and labor, and of this alone that he can say truly that it does not admit of assistance from L. or substantial appropriation of L.'s labor and merits; the whole *result* of it is such an appropriation.

§ 2. This is a clear confession and proof not only of his indebtedness to L. but that his acquaintance with the subject he was writing about was such that he was not even aware of the learning, thought and study necessary to prepare his notes.

His expert, Mr. Morse, seems, like him, to have got no further than the threshold of the science. He cannot see much merit in L.'s notes. He speaks of them as "a mass of undigested materials," "thrown together and printed as they are found" (p. 402), and of one note, he says that L.'s "erudition is more than usually chaotic" (p. 415).

These opinions are not peculiar to these gentlemen. They naturally accompany a certain condition of mind and of knowledge.

“The mental disease of the present generation is impatience of study, contempt of the great masters of ancient wisdom, and a disposition to rely wholly upon unassisted genius and natural sagacity. . . . Men who have flattered themselves into this opinion of their own abilities, look down on all who waste their lives over books as a race of inferior beings. . . . Vanity, thus confirmed in her dominion, readily listens to the voice of idleness and soothes the slumber of life with continual dreams of excellence and greatness. A man elated by confidence in his natural vigor of fancy and sagacity of conjecture soon concludes that he already possesses whatever toil and inquiry can confer. He talks of the dark chaos of undigested knowledge, . . . and gives vent to the inflations of his heart by declaring that he owes nothing to pedants and universities. All these pretensions, however confident, are very often vain.” — *The Rambler*, No. 154.

“This evil, however, has been strangely increased by an opinion or conceit, which, though of long standing is vain and hurtful; namely, that the dignity of the mind is impaired by long and close intercourse with experiments and particulars, subject to sense and bound in matter. . . .

So that it has come at length to this that the true way is not merely deserted, but shut out and stopped up; experience being, I do not say abandoned or badly managed, but rejected with disdain.” — *Novum Organon*, I., lxxxiii.

PART V.

PROOF OF COPYING FROM INTERNAL EVIDENCE.

I. NATURE AND CHARACTER OF THE PROOF.

In a case like this, a valuable part of the proof of copying depends upon bringing together many details of resemblance. It may be shown that, in facts and citations, scattered through the whole book, there are

resemblances which can only come from copying, and these may be classified according to the nature of these details. It may also be shown, taking a note of D. and comparing it with the corresponding note of L., that the resemblance of many or all parts of each note, consisting of many details, is such as can only come from copying.

Mr. Potter has adopted both plans. He begins by making some general statements, of great importance in this case, which are derived from his study of these books, and his knowledge of the subject. He then, in the first part of his twentieth answer, classifies the details according to their nature, mentioning for each the place in D. and the place in L. where he finds the details which he compares. If, in one note of D., there are half a dozen of these separate details, of a different character, each detail will be put in its appropriate list.

The weight of this proof increases, not by addition, but by multiplication. If it were *possible* that a resemblance in one detail should come by accident, and that another resemblance should come otherwise than by copying, yet when you have both of these in the same sentence, the presumptions are no longer one to ten, or even one to twenty, but one to a hundred. When you add to that the fact that between D. and other writers there is no identity, and the fact that D. wrote his note with L.'s note under his eyes, or from a very fresh study of L.'s note, there is no longer any question of weighing evidence, — it is infinity to nothing.

After these lists, Mr. Potter takes up each note *seriatim*, and shows from what note in L. it is copied: shows that, in passage after passage, D. has nothing, as regards the general contents of the authorities cited, nor as regards the form of the citations, except what would be copied from L.; and he points out such other matters as seem to him important.

It will be seen, therefore, that the fact that a note is mentioned in half a dozen different parts of Mr. Potter's deposition is the most conclusive proof that it is copied from L. For an example of this, see note 173 *infra*. Most of the notes copied are included in many of Mr. Potter's lists of details.

II. — THE DETAILS OF THE EVIDENCE. PHYSICAL PROOF OF COPYING.

§1. *The reproduction of clerical and typographical errors and peculiarities, including special translations.* — In cases where a statement of facts in

one book ought, if correct, to be the same as the statement in the other, and where it is reasonably to be expected that each writer should state the same facts as their annotation to the same word of the text (though that is rarely the case), and where the question is, whether the second writer did this by reproducing his predecessor's work, or by going to the original sources independently, "it might happen that the only proof of the fact would be a coincidence of errors." — (Jeremy's Eq. Jurisp., p. 322.) There is abundance of such proof in this case. "Where the question is whether the defendant, in preparing his book, had before him and copied, or imitated the book of the plaintiff, it is manifest that this kind of evidence is the strongest proof, short of direct evidence, of which the fact is capable." — (Curtis on Copyright, p. 254.)

The effect of this kind of evidence is very extensive. Lord Eldon laid down "the principle, that where a considerable number of passages are proved to have been copied, by the copying of blunders in them, other passages which are the same with passages in the original book must be presumed, *prima facie*, to be likewise copied, though no blunders occur in them."

Curtis on Copyright, p. 255.

Mawman *vs.* Tegg, 2 Russ. 393.

Every citation, or nearly every citation, is somewhat of this nature, because no two writers, as a general rule, give the same form to their citations; the identity of form therefore shows actual transcribing. (See p. 96 *infra*.) Peculiarities, not amounting to positive errors, stand on the same footing, for they are due to accident, and their reproduction can only come from copying.

Mr. Potter's deposition, pp. 157-164, contains fifty-four instances of these errors and peculiarities. Mr. Morse, careful as was his examination of Mr. Potter's testimony, does not attempt to impugn this list.

These instances are errors in dates,—9th instead of 11th, 26th instead of 16th, etc. They are errors in the number of the volume cited,—viii. instead of ix. They are errors in the page cited,—249 instead of 429; 432 instead of 445; 485 instead of 475; 862 instead of 882; 354 instead of 255. There are three cases where L. has cited the same despatch, treaty, or debate twice, in the same or different notes, giving the right date the first time and the wrong date the second time, and D.

has reproduced all these with the same error in the corresponding passages. In D. note 49, the same despatch is cited twice, as of July 8, and July 9; in D, notes 226, 233, the same debate is twice quoted from and cited; the first time as of May 26, and the second time as May 16; and in notes 152 and 223 the same treaty with Venezuela is cited twice, the first time as of 1830, and the second time as of 1836,— all these being reproduced from the corresponding notes of L. attached to the same passages as D.'s notes respectively. See these notes *infra*, Part VII.

L. cites the French *Moniteur*, in three different notes, with certain peculiarities and certain differences in the name and dates; and exactly these three citations, with the same peculiarities respectively, are reproduced in the three corresponding notes in D.

There are other cases where L. has translations; in some cases certainly made by him, and in other cases, whether made by him or not, differing from all other known translations; these are reproduced by D.

Sometimes in different notes, and sometimes in the same note (because his book was written in 1855, and added to in 1863), L. has cited from different editions of the same book. There are nine of these instances reproduced by D.; not one of these peculiarities has been corrected by him.

The argument makes two suggestions. One is, that L. and D. copied from a common source other than the original. No suggestion was made in the answers against L.'s originality; in spite of Mr. Morse's examination, not an instance is pointed out where these citations, etc., are found elsewhere with these errors.

The other suggestion is, that D. did procure all these by copying, but *may have afterwards* examined the originals, and he testifies "it is not at all unlikely that I might often omit to correct the reference" (p. 342); but, according to the above authorities, we have made out a *prima facie* case, and there is no evidence, of any value, that he *did* look at the originals in any of these cases. The evidence is quite clear that he did not. Some of these are errors in citing or quoting from Le Nord, Dr. Twiss's Cagliari opinion, Beudant on Naturalization, and some MS. despatches, and there is no pretence that D. ever had access to these originals.

If he habitually looked at the originals, in order to verify the references, he would have corrected the errors. If he went to them for an

independent study, different as he was from L., it is not possible that in no one case out of these fifty instances he should have nothing from them or about them except what is taken from L.'s note, — yet he has not.

The boldest suggestion Mr. Dana makes is, that he *might often* forget to correct the error. Surely, he would *sometimes* do it. Where the wrong volume was cited, — viii. instead of ix., — or a page so far wrong as not to lead him to the passage, e. g., 249 instead of 429, he could not help noticing the error, and at least sometimes correcting it. But the argument does not point out a *single case* of an error in L. which he has corrected, except one case which is very instructive. In note 111 (in which there is plenary proof of copying), L. had referred to a U. S. treaty of "Feb. 22, 1862," and, it being so recent, he cited the "National Intelligencer" for it. D., in this case, was *obliged* to go to the Statutes in order to give a citation; and what was the result? He *corrected* the error, and gives the date "Feb. 25," as it should be. This is the only case where there was any obvious occasion for him to look at the original, or any evidence that he did so.

The respondent's argument (p. 141) makes some comments on this part of Mr. Potter's deposition.

(Specification 1.) This is a note, the whole of which Mr. Dana admits to be in fact simply a reprint of L., and he says that he should probably have cited a different authority had he written it himself.

(Sp. 2.) This is not a correct statement of the facts as to the first matter, the date of Canning's speech. Mr. Potter says, "the true date as given in *Hansard*, the authority cited by both, is Feb. 3." L. and D. give it as Feb. 4. As to the other date, Mr. Potter says, that the true date is Feb. 6, citing "*Hansard*, 3d series, vol. clxvi., p. 35," and that L. and D. give it Feb. 7.

(Sp. 3.) It is suggested that the error of citing p. 348 instead of 347 is one that any person might make. Even if it were a matter of indifference, the fact would remain, that L. has taken one course and D. has followed him; and not an instance of the kind is pointed out where he has not followed him.

(Sp. 4.) The error in L. was very likely a printer's error; but the production of D.'s MS. shows that it was not a printer's error in his case. See p. 80 *infra*, Mackintosh's works.

(Sp. 5.) "L., p. 175, cites, for speeches of Lord Palmerston and the Attorney General, Hansard, cxlvi., pp. 37-49; D. cites the same. This is wrong. The whole debate covers pp. 35-58; Lord Palmerston's speech is on pp. 40-43, and the Attorney General's is on pp. 48-9."— (Mr. Potter, p. 205.)

Mr. Dana's argument, p. 142, says, that Mr. Potter "gives no reason" to show that D. is wrong. Clearly he does in this and two other similar cases. As to some of the instances in this list, the argument suggests that there is no error. This is a question of fact, upon which, if the facts permitted it, Mr. Morse would have corrected Mr. Potter.

(Sp. 6.) L., p. 65, cites Heffter, §20, note 2. D., n. 23, cites Heffter, §20, note. It should be §19. The argument takes the ground that this is a natural error. In a previous part of the argument (p. 71), to overcome our proof of copying from identity of selections, (there being many authorities besides Heffter,) Mr. Dana has gone outside of the record to state that Phillimore had referred to the same passage. When he suggested that this was a *natural* error, he probably forgot that Phillimore cited it as §19.

(Sp. 7.) This is an instance where, of two words equally good in a translation, L. takes the one furthest from the original, and D. follows him. It further appears (Record, p. 241) that this word is in the middle of a line and a half of L.'s translation reproduced by D. This is one of those instances of the reproduction of L.'s language, which Mr. Dana's argument (p. 57), commenting on some, and saying "we believe these are all," nowhere makes any allusion or reference to, or attempt to explain.

(Sp. 8.) This was taken from *Le Nord*, a paper never seen by D. See special examination of note 26.

(Sp. 9.) Mr. Potter pointed out that both L. and D. cite *Le Nord*, Oct. 18. He said that it "should be Oct. 19, (third page of newspaper, first column, near the top.)" [Mr. Potter, p. 200.]

In their *evidence*, there is no pretence that Mr. Potter's statement is incorrect; yet the argument (p. 143) says, "We have not the journal at hand, but it would not surprise us if the subject were in both." The writer was quite right in saying, "We have not the journal at hand." Mr. Potter (p. 184) pointed out that D. has eight citations of *Le Nord*, that they are all copied from L., and that for the period since L. there is

not a single reference to Le Nord. It also appears that there is no copy of it in this country to which Mr. Dana could have had access. See p. 67, *supra*. See examination of note 30 *infra*, and Mr. Potter, p. 200.

(Sp. 10.) The suggestions as to this error (de Beudant instead of Beudant,) is, that D. "might do well to follow" L. as a person professing peculiar knowledge on the subject. Yes, not only might do well, but did do well. This instance is from note 49 on naturalization; there is no foundation for the suggestion that D. made an independent examination of Beudant or any other authority referred to in that note.

(Sp. 11.) See Mr. Potter, and this argument as to D., note 173.

(Sp. 15.) In the case of the translations, though D. has no right to reproduce L.'s translation, yet the most important purpose of this proof is, to show that D. has procured the authority by copying from L.; and in this point of view, the reproduction of the translation given in L., where it differs from other known translations, though it be only by a single word, is proof of copying the *authority* from L., like the reproduction of typographical errors.

Mr. Potter (p. 239) says, that every time he has gone over the book, he has been struck with new instances of copying, and he has no doubt that further examination would exhibit more; and the cross-examination of the respondents' witnesses, merely upon the specific matters touched in their direct examination, has disclosed the following:

L. p. 978, and D. note 15, p. 39, cite Stapleton, p. 476. It should be p. 475.

L. p. 978, and D. note 15, p. 39, cite same, p. 399. It should be p. 397.

(See Potter, p. 178; Dana, 60 cross-ans. p. 375; 71-2 cross-ans. p. 377.)

L. p. 458, and D. note 139, p. 339, cite U. S. Stats. iii., p. 354. It should be p. 255. (Morse, 143-4, cross-ans. p. 446.)

The other comments are sufficiently noticed in our examination of notes 49, 202, 226, 247, *q. v. infra*.

The portion apparently covered by the respondents' argument includes forty-four instances. The argument, however, only refers to twenty-four of them, leaving twenty, and those the most remarkable, without any pretence of an answer. Among these twenty are the cases

of errors in the volume, in the dates of despatches, etc., cited twice, to which we have referred.

§2. *Peculiarities as to the editions and titles of books cited, found in L., and reproduced by D.* — Next follows in Mr. Potter's deposition (p. 161) a list of fourteen instances of peculiarities in the manner of citing certain works, and in citing from different editions (with different paging) in the same note, or in different parts of the book, which are found in L., and reproduced in the corresponding note in D. The following is from Mr. Potter's deposition, p. 161:

Hautefeuille's earlier edition was in four volumes. After the Declaration of Paris, he re-wrote his book, and published it in three volumes. All the citations in L.'s edition of 1855 are necessarily from the four-volume edition. In the edition of 1863, he appears to have preserved some of the old citations, and added new ones from the later three-volume edition. Thus it frequently happens that *the same* citation refers twice to the same passage, one being to the old, and the other to the new edition.

D., note 156, p. 388, and L., p. 532, cite "tom. iv., p. 267; tom. iii., p. 278." The first citation from the four-volume edition refers to the same passage as the second citation, which is from the three-volume edition.

L., p. 798, tom. ii., p. 412; tom. ii. D., p. 631, tom. ii., pp. 84, 101, pp. 84, 101, 154, 2^{me} ed.; ib. tom. 154, 412, tom. iii., p. 222, iii., p. 222.

In fact, tom. ii., p. 412, is from the four-volume edition, and refers to the same passage as tom. ii., p. 154, of the three-volume edition.

Mr. Dana (argument, p. 30) says, that he had "the latest *Hautefeuille*."

Some of the comments in the respondents' argument (p. 149) are considered in connection with the notes in which the matters are found. We add: For Dr. Twiss's books, see p. 89 *infra*.

(Sp. 2.) Daly on Naturalization, see note 49.

(Sp. 3.) There are three editions of *Lord Mahon's History*,—the Leipsic edition, the English 8vo edition, and the 16mo edition, with Little, Brown & Co.'s imprint,—all with different paging. L., p. 396, cites from the London edition; and on p. 745 from the Leipsic edition. These two citations exactly reappear in D., notes 126, 222, attached to the same words of the text as L.'s two notes, respectively.

There are three editions of *Mackintosh's* works,—the English edition,

in three volumes of about four hundred and fifty pages each; an English edition, in one volume, of about eight hundred pages; and an American edition, in one volume, of about six hundred pages. In note 16, on Recognition of Independence, a paragraph on p. 42 is copied from Phillimore, and in that D. refers to Mackintosh's speech on the subject, citing vol. iii., p. 444, that being the citation found in Phillimore (and in the same paragraph he reproduces two errors from Phillimore,—1688, instead of 1668, and Dumont vii., 238, instead of vii., 70). The next page is copied from L., and there he refers to the *same* speech, giving the date as in L., and citing p. 749 as in L. It is p. 549 of the American edition, and p. 747 of the English one-volume edition (and on that page he reproduces two errors from L.,—249, instead of 429, and Feb. 4, instead of Feb. 3).

(Sp. 5.) D. professes to cite the German *Savigny*, giving the German title (System), while L. cites the French translation (Droit Romain, par Guenoux). It is clear that D. copied from L., merely giving an appearance of difference by the change of name, because he cites p. 270 as in L., and of course the paging of the French and German cannot be the same. (Mr. Potter p. 163.) Indeed Mr. Dana, who testified about this matter (Record p. 353), did not then pretend that they were, though in the argument he suggests that they *may* be. This is one of the books which Mr. Dana says he had access to, but he does not say that he ever looked at it.

(Sp. 7.) See our examination of the long note 223, the whole of which is copied from L.

It is stated (argument p. 51), that Mr. Potter "charges Dana with giving the wrong name to journals, and that these cases turn out to be that he sometimes calls the Times, the London Times; the Moniteur, the Paris Moniteur; and the Annual Register, the British Annual Register." No reference to Mr. Potter's testimony is given, and no where in his testimony is there the *slightest allusion* to any mistake of name in the case of the Times or the Register. On the contrary, it is *Mr. Morse* who points out, as a matter material for the defence, that D. cites "British Ann. Reg.," while L. cites the "Ann. Reg.," and it is only on cross-examination, upon the book being put into his hands, that he admits that the title of the book is the "Annual Register" and says:

"*Cross-Int.* 163. D. and L. cite the same pages of the same volume do

they not; and the difference in name, so far as it amounts to anything, is an error on the part of D., is it not so?

Ans. It is." (Morse, p. 448.)

The argument states that Mr. Morse shows that L. has cited these authorities by the same names himself; certainly L. did, and it is because he simply copied L. that the peculiarities reappear in D. Mr. Morse however did not show this: he only stated what he thought was useful to the defendant. See p. 75 *supra* and note 158 *infra*, for the case of the "Moniteur," and note 247 for the Ann. Reg. No citation of the Times is pointed out in D. and we cannot find any.

§ 3. *Peculiarities in the form of dates from foreign newspapers, despatches, etc., found in L. and reproduced by D.*—Next follows, in Mr. Potter's deposition (p. 164), a list of forty-five dates from foreign newspapers, debates, despatches, etc., which are written in certain forms in L. and reproduced with the same peculiarities in D. The only suggestion made in the respondents' argument (p. 152) is, that the cases where they cite dates differently are "indefinitely" more numerous. "Indefinitely" is just the word; for they do not point out those other cases, the existence of which is suggested in the argument, but not asserted in the evidence. Mr. Morse directed his attention to this table of dates, (p. 411.) He said that two of them were in identical form in Halleck; and, on cross-examination, he admitted that Halleck professedly took from L. the documents connected with them (151 cross ans., p. 447; 135, 139 cross-ans., p. 445). He also points out *one* case where they give the same date in a different form,—and there he stops.

In point of fact, Mr. Potter's examination was not exhaustive. While upon this part of the argument we have met with the following, which are all dates of despatches taken by L. from MS., and which are not in Mr. Potter's table:

L. p. 377. 31st of March, 1848.	D. p. 291. 31st March, 1848.
January 12, 1852.	Jan. 12, 1852.
17th February, 1853.	17th February, 18[5]3.
398. November 12, 1860.	303. Nov. 12, 1860.
445. 8th July, 1840.	338. 8th July, 1840.
460. 20th January, 1835.	339. 20th January, 1835.
473. December 8, 1856.	353. Dec. 8, 1856.
575. November 26, 1858.	418. Nov. 26, 1858.

It will be observed that Mr. Potter obviously selected only striking

instances; that is to say, cases where, on one page, or in one note, D. has a considerable number of dates written in different ways, reproducing, not merely one peculiarity from L., but a *series of variations*.

§ 4. *Errors in D. arising from his habit of hastily and carelessly copying from L. without verifying.* — Mr. Dana's answer, p. 63, says, with reference to some notes of Mr. Lawrence, that "he did no more than read as far as he could in them, and either not read at all, or only skim over the rest."

Mr. Potter points out some errors in D., which arose from this habit of not reading carefully enough to understand the note, but just enough to enable him to copy what, at a hasty glance, appeared to be the valuable portion of it. Among many other things, he specifies eight instances where Mr. Lawrence has mentioned in one note, or in immediate connection with each other, two distinct matters and given authorities for each, and Mr. Dana, in his corresponding note, has mentioned only one of them, but has given for that the same authorities that Mr. Lawrence had given for both. (See pp. 166-173.)

There is also a case where L. mentions a despatch, and in the next line gives a date which is not the date of the despatch. In D. this date appears as the date of the despatch, and is not otherwise alluded to.

Another is a case where a "*ib.*" is referred back by Mr. Dana to the wrong antecedent, so that Mr. Dana's citation gives the *page* of one book, attached to the *name* of another.

The cross-examination of Mr. Potter, and of Mr. Morse, the respondents' witness, has developed some more of this class.

D., note 49, p. 145, cites for the diplomatic correspondence about Gavino de Liaño, mentioned by both L. and D., the reference given in L. for the correspondence upon another subject, narrated in L., but not alluded to in D. (Potter, 69 cross-ans. p. 256; 28, 29 ans. p. 261.)

D., note 15, p. 38. Mr. Dana mentions a despatch of 1861, also mentioned in Lawrence, and attaches to it a reference to a volume of the correspondence of 1783, which is cited in L. for another subject, which subject is in no way alluded to by D. (Morse, 62-71, cross-ans. p. 435.)

§ 5. *Errors of substance and of form, arising from a habit of not studying the originals, from want of knowledge of the facts and authorities cited, and from a practice of preparing annotations by reading L.'s notes, and paraphrasing or copying from them.* — On page 169, Mr. Potter says: I

have found some errors in D., some of them merely clerical errors, and some of them errors of substance, which I think a writer would not be likely to make if he wrote with the original authorities before him, but which, from the peculiar manner in which the corresponding note in L. is written, a person hastily or carelessly reading or copying from L., or attempting to paraphrase his language, would be likely to fall into. He gives twenty-three instances of this nature. These are matters of very great importance in this case.

If two independent writers prepare a book based on original authorities, giving the substance of those authorities, we should find, where they used the same authority, that so far as they used the exact language or the exact phrases of the original, they would necessarily coincide, and that this would be the case whenever the form of the phrase of the original was such as to show that it was a technical phrase.

We should also find that, where they used purely their own language, it would be strikingly different.

But, if the second author was ignorant of the originals, and was copying from the other, and, either because he deemed his own literary style altogether superior to any other person's (see Mr. Dana's 34 ans., p. 343), or because he wished to have as much apparent difference as possible, even to the extent of taking pains to create a factitious difference (Dana, 37 ans., p. 345), we should expect to find these things:

Paraphrasing of technical or other phrases which were repeated by the first writer from the original without quotation marks.

Errors in so doing by substituting a term, synonymous in ordinary parlance, but with a different meaning as a technical term, or with respect to the subject-matter.*

Such additions as a person, shrewd, intelligent, but ignorant would conjecture might be correct, but which a knowledge of the authorities would show to be entirely wrong.

And if we could get to his MS., where his earlier ideas of the matter were written down, we should find, in some cases, reproductions of the predecessor he was copying from, and then, by crasures and interlineations, changes and additions of the nature above indicated.

* Quoy! s'il a emprunté la matière, et empiré la forme, comme il advient souvent!
Montaigne.

These would show designed and intentional copying, and a deliberate intent to conceal it. All these things are pointed out with reference to Mr. Dana in this evidence.

Of the twenty-three instances mentioned by Mr. Potter as above, some are from the accidents incident to Mr. Dana's carelessness in actually copying from Mr. Lawrence's note, as where he attaches to one book the paging of another, or to one fact the date of another, by the copyist's eye skipping a line, or some similar accident. Others, partaking perhaps somewhat of that nature, or rather cases where there has been an attempt to change, and where, the language of Mr. Lawrence being technical phraseology, or exactly the correct language to express the precise idea, the change has led to an error, showing ignorance. Of this latter class are the following instances: D., notes 15, 79, 223, 235, 241, 117. D., pages 22, 56, 64, 137.

Mr. Morse has taken great pains to point out every case he could find in the notes charged to be copied wherein Mr. Dana differs from Mr. Lawrence, either by additional matter or by change of phraseology, or by difference in the form of the citations. On cross-examination, a large number of original authorities were produced by the examining counsel and put into the witness' hands, and it was thus made to appear that these differences were errors of the nature above pointed out, and, after this process had been pursued through many instances, he was asked a question (193 cross-int. p. 452), in answer to which he stated in substance that he could not say that such was not the case as to all those differences — and from the examples given, and from the testimony of Mr. Potter (top of p. 176), and Mr. Lawrence (pp. 128-131, and 26 cross-ans. p. 138), it is evident that this is the general rule; and a good reason may be conjectured why Mr. Morse in his very elaborate examination, thought best not to be informed on this point.

The instances thus pointed out on Mr. Morse's cross-examination are the following, the reference being to the passage of his direct examination where the difference is pointed out, and to the cross-examination which shows the errors. M. refers to the page of Mr. Morse's deposition, D. refers to the page or note of Mr. Dana's book where the matter is found, P. refers to Mr. Potter's deposition.

D. p. 121, M. 408, 162 cross-ans. p. 448. D. n. 37, M. 414, 185 cross-ans. p. 451.
D. p. 712, M. 408, 163-5 cross-ans. p. 448. D. n. 40, M. 415, 192 cross-ans. p. 452.

D. p. 277, M. 408, 138 x-ans. p. 445; p. 177. D. n. 41, p. 128, M. 426, 12 cross, p. 428.
 D. p. 56, M. 409, 167-9 cross-ans. p. 449. D. n. 49, p. 143, M. 426, 17 cross, p. 429.
 D. p. 21, M. 410, 170 cross-ans. p. 449. D. n. 49, M. 416, 202 cross-ans. p. 453.
 D. p. 150, M. 410, 204-6 cross-ans. p. 454. D. n. 52, M. 416, 204-6 cross-ans. p. 454.
 D. p. 193, M. 411, MSS. p. 386. D. n. 79, M. 418, 210 cross-ans. p. 454.
 D. p. 143, M. 410, 171 cross-ans. p. 449. D. n. 125, M. 420, 243 cross-ans. p. 460.
 D. n. 17, M. 413, Potter p. 198. D. n. 185, M. 422, 220 cross-ans. p. 455.
 D. n. 17, p. 31, M. 412, 61-71 x-ans. p. 435. D. n. 221, M. 423, 221 cross-ans. p. 455.
 D. n. 20, M. 413, 152-5 cross-ans. p. 447. D. p. 454, M. p. 424.
 D. n. 26, M. 413, 117 cross-ans. p. 443. D. n. 233, p. 675, M. 426, 18 cross, p. 429.
 D. n. 29, M. 414, 184 cross-ans. p. 451.

Cases where D.'s MS. is like L., and where the form of the citation has been changed afterwards, or an additional citation taken from another "hand-book."

D. p. 631, M. 408, Potter 182. MS. p. 387. D. n. 52, p. 150, M. 410, 416, MS. 454.
 D. p. 298, M. 409, 411, MS. p. 386. D. n. 82, M. 418, MS. p. 386.
 D. p. 193, M. 411, MS. p. 386. D. n. 124, M. 420, MS. 386.
 D. n. 26, M. 413, MS. p. 384. D. n. 173, p. 454, MS. p. 389.
 D. n. 41, M. 415, MS. p. 389.

In a few of these cases, where the means for making the conjecture or addition are supplied by other matter on the same page, or by such knowledge as any person may be supposed to possess, or by a passage in Phillimore or Halleck, referred to by D. in the same connection, the change does not embody any error.

One instance, disclosed on Mr. Morse's cross-examination (p. 449), shows Mr. Dana's readiness to supply desired facts by guesswork or conjecture, his error in so doing, and his ignorance, not only of the particular fact, but of the whole plan and contents and structure of a book,—the Almanach de Gotha,—with which he pretends (see p. 347) that he is entirely familiar, but of which he has made no use whatever that required him to look at anything besides L.'s notes, (see Potter, p. 183.)*

* Mr. Morse testified on direct examination (p. 409), "In the first citation of the Almanach de Gotha given in affidavit, p. 71, it is perhaps worthy of note that L. does not connect the year 1862 with the citation, but that D. does."

Cross-Int. 167. Your deposition, p. 409. As to Almanach de Gotha, though L. does not give the year of the Almanach, he gives the date, 1862, as the date of the fact which he states from it, does he not?

Ans. He does.

Cross-Int. 168. Might it not be a simple and easy conjecture on the part of Mr. Dana to connect that year with the Almanach without looking at the original?

Ans. I suppose it might.

Cross-Int. 169. Would not such a conjecture show, not only ignorance of the fact,

cal form in the passages of Halleck cited by D., with some typographical errors and peculiarities which exactly reappear in D.; some citations of the Annual Register which appear to be taken from Halleck and Phillimore in the same way, and a few from volumes of the Annual Register since L., those few, six in all, being the only instances in these one hundred and thirty-five citations that called for or *in any way* show any reference to the originals.

Mr. Potter points out that L. cites Hautefeuille by page, and Halleck cites him by section. That, where the context of D.'s note shows that he is copying from L., he also reproduces L.'s citations by page; where the context shows that he is copying from Halleck, he reproduces Halleck's citation by section; and, in a few cases, where he is copying from both, he combines two citations. L., in some of the notes copied by D., cites from different editions of Hautefeuille; and D. *always* reproduces this peculiarity (*v. supra* p. 79).

Mr. Dana's references to *Hansard* are very strong evidence to show not only habitual copying, but habitual copying without verification even. He has eleven citations of *Hansard*, one of which is copied from Phillimore (reproducing a clerical peculiarity), and *all* the others are from L. As in the case of the recent statutes, Mr. Lawrence referred to or quoted many very recent debates, and of course could not cite *Hansard*. If Mr. Dana, writing three years later, had referred to these speeches from the results of his own knowledge, he would have cited *Hansard* for these as much as for the former ones. If he had even undertaken to verify the references to them, of course he would have gone and must have gone to *Hansard* for them, and would have cited *Hansard* for some of them at least, and probably for all. If he had been in the habit of looking at *Hansard* for *any* speeches, he would have done it for these. He has copied from L. references to ten of these recent debates, and, like L., he has not cited *Hansard* for any one of them. There are ten accidental errors and peculiarities in these citations of *Hansard* and these debates, and D. has reproduced *all* and has not corrected one of them. (Mr. Potter, p. 185.)

The argument states, that Mr. Dana used "The Times," the Spectator, Al. de Gotha, and Annuaire. The books afford no foundation for this statement. We have shown that all that he has from the last two are directly copied from L. and the facts are not denied. No instance is

pointed out of any allusion to, or any matter taken from "The Times" or the Spectator and we do not find any mention of them in his notes. With regard to this topic, see p. 67, *supra*.

Dr. Twiss's books.—Dr. Twiss is one of the two or three most prominent recent English writers of great authority. He has written two books, one on the Law of Nations in time of Peace, published in 1861, before L.'s 2d ed., and one on the Law of Nations in time of War, published in 1863, *after* L. L. has many citations from the first, but of course none from the second. D. has five citations and quotations from the first, *all* of which could be copied from the corresponding note in L. But to the second book, which covers the ground of a little more than half of Mr. Wheaton's and Mr. Dana's work, D. has not so much as a single allusion or reference. Dr. Twiss also published some lectures, and from them L. has one quotation and citation. This D. has copied (n. 2), and he has not anywhere any other reference to this book. Dr. Twiss also furnished to the Sardinian government an important opinion in the Cagliari case; a part of what L. has quoted from it is copied into D. with an error,—the omission of a line,—reproduced from L. (D., notes 108 and 240; Mr. Potter, pp. 158, 212, 230.) This proves that D. never studied Twiss. The fact that he did not carefully study books as important as both of Dr. Twiss's great works shows that he did not attempt to make the independent study that he ought to have made.

None of these facts are denied; but Mr. Dana naturally felt called upon to speak of this in his deposition. He says (p. 347) that he *had* Twiss's two books and his lectures: but it is useful to observe that this acute lawyer, in a document prepared at his leisure, does not say that he so much as read a word in them. On p. 339, it is true, he enumerates Twiss among the writers to whom he was indebted for "thoughts, views and expressions." When cross-examined (35 cross-ans., p. 369), he is only able to say that he used him on the subject of the liability of ambassadors for taxes. (D., n. 131, p. 319.) It afterwards appeared that all he did in this case was to *direct the printer to reprint this passage from L.'s note attached to the same word.* (Wilson, 4 cross-ans. p. 466.) He offers no explanation of the fact that he has no references, except such as are copied from L., to the first volume, and none at all to the second. As to the Cagliari opinion, Mr. Dana (36-7 cross-ans., p. 369) is only able to say that he copied it from some source, but he cannot tell whence.

It is in L., with the error which D. reproduces. Mr. Potter says that he never saw it in any book except L. (Mr. Potter, pp. 158-9); and Mr. Morse says the same (236 cross-ans., p. 457). Mr. Dana offers no explanation of the reproduction of the error.

He tries to evade further cross-examination by saying, that he is not prepared to answer; but certainly it was not for want of notice that he was not prepared. He himself alludes to our charge that he had not used Twiss, on pp. 339, 347. In truth, he is not prepared to bear cross-examination, in any instance, as to the sources of his notes. Either he pleads want of memory, or he complains that the answer would require too much labor, and the questions elicit excuses, but no real information. See cross-ans. 33, 35, 36, 37, 42, 52, 58, 67, 74, 75, 83, 85, 93.

§10. *Despatches first procured by Mr. Lawrence from MS., and reproduced by D.*—Mr. Lawrence (dep., p. 124) points out twenty-five despatches, etc., first printed by him, chiefly from MS. obtained by him in the course of a very long examination of the archives of the State Department, the others being from MS. obtained from other sources, and never printed except in his books, and which have been cited or quoted by Mr. Dana (Mr. Lawrence, 93 ans., p. 124). Mr. Lawrence's statement, that he took them from MS., and that, to the best of his knowledge, they have never been printed elsewhere, was in the printed affidavit (pp. 36-37), and has been before the respondents for eighteen months. As they have not pointed out that any of them are in print elsewhere, the Court may well rest on Mr. Lawrence's statement. The argument (p. 158) says that a certain despatch has been printed. We do not find the names mentioned among those enumerated by Mr. Lawrence.

If the writer of the argument had taken the pains to count them as enumerated in the deposition, before undertaking to contradict the complainant's counsel, he would have found that there are twenty-five, and not fourteen. He probably read the first paragraph, and "skimmed over the rest," counting the fourteen paragraphs, each representing the contents of a separate note, and many of which enumerate several despatches.

In three cases, these are cited by L. from "MS.;" in one case, as "Letter of Mr. Wheaton to Mr. Butler," and, in all the other cases, from "Department of State MS." In one case (D., p. 145), D. copies a quotation from L. In three cases (D., pp. 303, 303, 325), D. gives statements of their

contents, taken from L.; and a large portion of the facts about the Marcy Amendment (D., p. 454) are taken from the despatches. Indeed, merely citing them to a particular point is giving a statement of their contents. The remark in the argument (p. 157), that, "if D. has used them, it is merely to refer to volume and page," is, in fact, and necessarily incorrect, inasmuch as MS. despatches do not constitute volumes.

There is no denial that all these were simply taken from L., and no pretence that there are any MS. authorities cited in his book, except such as he has copied from L.

§11. *Authorities are found in D., cited in the same order in which those authorities are found in L.'s note, from which D. is charged to have copied them.*—If the facts and authorities in any note of D. were obtained by looking over a note of L., and copying out, one after the other, as D. did, such of them as struck his fancy, we should expect to find that those authorities would appear in D.'s note in the same order in which they are found in L.; and, if another part of the note was copied in the same way from Halleck or Phillimore, we should expect to find, before or after the "block" thus taken from L., a "block" reproduced from Halleck or Phillimore. And, in stating that this was his general course in collecting authorities, Mr. Dana says: "Doubtless those in one place were generally put together on the sheets" (p. 341). If they were copied over several times, or made carelessly, some few changes would creep in, and, if occasionally Mr. D. looked at the originals, there might be changes in the form of those; but the reproduction in this order would show, that the book was compiled in this way, and would show what was copied from one writer, and what from another.

Mr. Potter (pp. 191-4) gives a long list of such instances of identity in order.

Some criticisms have been made on this list by the respondents in other parts of the testimony; but it will be found that, except perhaps with one slight error, fairly attributable to a clerical mistake in writing out the list, their criticisms do not touch either its accuracy or weight for the purposes above-mentioned.

That, in copying from L., D. skipped some authorities, or that, before or after those taken from L., he copied others from another author, does not weaken this proof that certain references are derived from L. by

mere mechanical transcribing: it being remembered that the contents of the authorities are so fully stated in L. that the reader can see at once which he wants. So a change in the form of the citation may show mere carelessness in copying; it may show an error such as a copyist might fall into from the accidental juxtaposition of citations in L., or it may show that, from a citation of the same thing, supplied by another hand-book, D. has been enabled, without labor, to produce the difference of form which he seems to have sought for.

Mr. Morse (pp. 410-411) commented a good deal on this list in terms which one witness seldom employs towards another, and the argument (p. 45) in several places repeats his comments. It will be found, where his comments are at all material in *any* point of view, that, except in one case fairly attributable to an accidental error, Mr. Morse is wrong in the facts on which he bases his comments. E. g., L., p. 20, D., p. 21: this difference arose from D.'s carelessly copying from L. — (Morse, 170 cross-ans., p. 449; our examination of note 7.) "D.'s citations (p. 137) are altered in the affidavit, in order to make them suit L.'s, and all of them are not given." — (Morse, p. 410.) He afterwards confesses that, though he charged *both* alteration and omission, there was no alteration, but only an omission. The omission pointed out is, that Mr. Potter put in D.'s list and L.'s list a despatch cited by both, and omitted from D.'s list the vol. of Dip. Cor. cited for it — (102 cross-ans., p. 441) — the fact (*not* stated by Mr. Morse) being that he made the *same* omission from L.'s list, the same volume being cited for it in L.'s note. Mr. Morse says, that the citations in D., pp. 150, 193, 298, 373, are in such a form that they could not be copied from L. These are the instances where it appeared, on the production of D.'s MS., that he first copied exactly from L., and changed the form afterwards by copying from Phillimore, etc.

Mr. Morse says: "The citations on D. (p. 339) are nearly all in Halleck, and occur there in the same order in which they are given by L. and D." It appears that there are fifteen in D. Of these, twelve are from L., the other three being citations of Phillimore, Kent and Halleck; that four only of those twelve (instead of "nearly all") are in Halleck, and that Halleck takes these from L.'s note. — (Morse, 140-145 cross-ans., p. 445; our examination of note 139.)

"L., p. 820, D., p. 763. Phillimore and Wildman are only referred

to, *not cited* by L." — (Morse, p. 411.) D. also only refers to them and does not *cite* them. — (Morse, 174 cross-ans., p. 450.) This makes our proof the stronger. The argument attempts to point out some errors in the list; these will be referred to in connection with the notes in which they belong.

It will be seen that none of the citations in this list are given in full, but all are abbreviated. The nature of the abbreviations are pointed out by Mr. Potter :

I may have omitted dates of despatches and pages and so forth, when they were the same in both, or I mean substantially the same, as when L. cites a book and gives the edition or series, D. pretty generally omits that. If there was an intervening reference in L. not used by D. I should probably omit that, as the only object was to show that D. used the documents and citations which he did actually use in the same order as they appeared in L. ; but enough is given to enable a person to identify the citation given, the page of L. and D. being given, and to trace out the order stated. The order is not always exactly the same, as will be seen by referring to page 191 of my deposition (p. 255); that is, I mean that in the instances given in the deposition, the order of the citations given in D. is not always the same exactly as in L., though generally so; there are a few slight differences (p. 261).

Cross-Int. 67. Are the names or titles of books, the dates of despatches or the persons to whom they are addressed ever omitted in the list purporting to come from D. when they are to be found in D. at the place referred to, and not to be found in L. at the place referred to?

Ans. I do not think they are; but even if such a case should happen it would not interfere with the purpose for which the list was made (p. 255).

Mr. Dana's argument (p. 45, sp. 11, p. 103, sp. 2). The statement that L. does not give the date of the treaty has been shown to be untrue (*supra* p. 13).

The argument (p. 103) asks how it happens that Mr. Potter, in this list or elsewhere, never makes any mistakes, errors or omissions, except such as injure D. and help the complainant's case. The answer is, that the fact is not so.

It was pointed out (p. 78 *supra*) that there are some typographical errors found in L. and copied by D. which Mr. Potter did not notice. The 16th point of the brief, pp. 48-56, points out quite a number of proofs of copying which Mr. Potter had not discovered, and which ought to be added to his lists. (V., pp. 78, 81, 82, *supra*.) In this list, there are a

number of clerical errors and misprints as much in favor of D. as the one in question is against him. Thus, if the lists from L., p. 156, D., p. 127 (Record, p. 192), are taken *literally*, it would appear that while L. cites a French paper of 1862, D. cites one of 1860, whereas in fact, the citation is the same in both. That D. gives the date of the letter, Emperor to Forey, while L. does not, whereas D. copied it from L. So, near the bottom of p. 192, it would appear, if taken *literally*, that D. gives the date of the despatch, Manteufel to Fay, while L. does not, whereas in fact D. copied it from L. So, on p. 193, in the citations from D., p. 339, if taken *literally*, it would appear that D. cites Ann. Reg. 1831, while L. cites Ann. Reg. 1834, whereas in fact both cite 1834.

It would have made the case stronger also to have pointed out, as Mr. Potter might have done, that many of these citations found in the same order in L. and D. also afford instances of the reproduction of typographical errors and the like physical proof of actual copying, or that they are citations of MS. despatches, etc., which could not have been taken except from L. The truth is, that in these lists in the earlier part of Mr. Potter's deposition, he took the great pains, which this case requires, to present what was necessary to exhibit the kind of proof he was presenting and nothing more ; and as his list is unimpeachable for *that* purpose, abbreviations or omissions are not only unobjectionable but commendable and necessary.

Some clerical or typographical errors necessarily occur in such a document as Mr. Potter's deposition is, especially where the print must follow the MS., and the writer cannot be allowed to correct it by reading proof. No instance has been pointed out of any error in this list or elsewhere, material to the point which the list or schedule is prepared to show, except in one or two cases of mere clerical errors or misprints ; and a comparison of Mr. Potter's deposition with Mr. Morse's, in this regard, should have induced the respondents to be very sparing of their comments on defects of this nature. See particularly Mr. Morse's cross-answers 61, 93, 100, 149, 177, 178, 215.

III. IT IS PRESUMED AS MATTER OF LAW, AND IS PROVED AS MATTER OF FACT, BY THE COMPARISON OF DIFFERENT TREATISES ON INTERNATIONAL LAW, THAT THE IDENTITY BETWEEN L. AND D. CAN ONLY HAVE ARISEN BY COPYING L.

§ 1. Nearly all of the proof to be derived from internal evidence, as distinguished from Mr. Dana's confessions, consists in showing, in substance and in details, a very striking identity between the notes of L. and of D. This alone, with the fact that L.'s and D.'s annotations are of considerable bulk, made at different times, and under different circumstances, by men of totally different character, would be enough to prove copying.

After the passage about the proof from the reproduction of typographical errors referred to on p. 74, *supra*, Mr. Curtis says: "In many cases, the occurrence of passages identically the same, or but slightly varied, but not having the ear-mark of inaccuracies, has been held conclusive proof of piracy, even in that class of works in which, from the nature of the subject, there must be resemblances between any two books in which it is treated."—(Curtis on Copyright, p. 255.) In a foot-note, he quotes from an opinion of Lord Ellenborough: "It is remarkable, however, that he has given no evidence to explain the similitude, or to repel *the presumption which that necessarily causes.*" In *Emerson vs. Davies*, 3 Story, 791 (*q. v. infra*), Judge Story quoted this sentence and continued: "Now it is quite as remarkable that the defendant Davies has not (as far as I recollect) given any evidence as to what sources he examined in the compilation of his own work; and this, coupled with the fact that he has offered no denial or proof that he had not seen or read the plaintiff's book before his own compilation was made, is certainly a circumstance of some significance."

In this case, Mr. Dana confesses that he studied L. with care, for the purpose of taking from it, and that he did take from it, all that he thought was sufficiently valuable; and that he cannot tell, from recollection or memoranda, in any instance, what he did take. We are therefore entitled to say, that everything identical in the two works must be presumed to be copied, unless there is evidence to repel that presumption.

§ 2. We did not stop here. Judge Potter, a gentleman exceedingly familiar with the literature of the subject, testifies that, *from the nature of the subject, and the materials that exist, this identity could not have arisen except by copying from L.* (5 ans., p. 149), and he was open to a cross-

examination as to the grounds for this statement, which they forebore to make.

Mr. Potter gave some detailed statements showing the enormous field to select from, stating, among other things, that Mr. Lawrence's library contains upwards of 5,000 volumes upon or connected with this subject (p. 149).

He then shows that, as *matter of fact*, the number of books used and cited by different writers is very large; and that, even in the books cited, there is no identity between them. He says:

9th Ans. Mr. Dana cites about ninety different treatises on international law and the different branches of it, and about seventy-two other works. Mr. Phillimore gives a list of about six hundred and fifty separate works (not including law reports), upon or relating to the subject, which he has cited; not professing to make his list complete. Of these, Dana cites fifty-four of the treatises and about twenty-two of the other works. Story gives a short list of the most important works on private international law, which list contains twenty-seven treatises in eighty volumes not cited by Dana, and does not contain a considerable number which Mr. Dana does cite on that branch of the subject. Prof. Woolsey gives what he calls a "brief selection" of works on international law, — ninety-four treatises, — (about the same number which Mr. Dana cites,) but only about thirty-eight cited by Dana are to be found in Woolsey's list. Mr. Woolsey's list also embraces forty-eight works of a diplomatic and historical nature, but does not include public documents, debates, and pamphlets, etc., which he says are of great value, but not easy of access, and require much time and labor to make available. Only ten of Dana's seventy-two works are found in this list. Klüber in his edition of 1831 has what he calls a "select library" on the subject of International Law, comprising four hundred and forty-four works, and there is a very large number of very valuable works which is not included in this list. The edition of 1861 by Ott has a list at the end of over a thousand separate works. [p. 150.]

As to what passage to cite, where, as is generally the case, several passages are pertinent, there is also great opportunity for difference. See note 237, for an example.

Then, going to matters of form, he says, that in the form of citations, and in the manner of presenting the authorities, i. e., whether citing them in such a way as to show the precise point supported by each, or merely giving a list of authorities bearing upon the subject at the end of a long discussion of it, there are, as *matter of fact*, great differences between different writers, and great identity between L. and D.

From beginning to end of this controversy, from the magazine article of Mr. Morse down to the present argument, the defence undertaken to be set up against our proof from general identity has been, that this identity is the result of necessity, and that the matters common to L. and D. are also equally common to all other prominent modern writers.

On the first occasion when this case was brought before the Court, Oct. 31, 1866, one of the respondents' counsel said (we quote from the short-hand report):

"These affidavits set out the points of similarity. In the preparation of counter affidavits, *it will be necessary, of course*, to show that the passages quoted, or authorities cited, were found in other books than those of Mr. Lawrence."

For proof that the many hundred citations of these works presented by Mr. Dana in his book, as if derived from his own study of the authorities themselves, were copied by him at second-hand, without that study, many of the matters thus copied not being found in any book whatever except Lawrence's *Wheaton*, see this argument, p. 27, note; pp. 39-40; § 4, pp. 44-46; § 2, p. 59; §§ 4, 5, pp. 61-62; §§ 1, 2, pp. 67-69; pp. 107, 110, 233; and particularly §§ 2, 3, pp. 52-54; pp. 67-69;

in consequence of delay, and consequently, owing to the engagements of the Court, a withdrawal of our motion for a preliminary injunction.

Mr. Morse, the respondents' expert, testified:

The work of the complainant, published in 1863, and that of the respondent, published in 1866, in the shape of annotations to Mr. *Wheaton's* treatise, I have studied with especial care and thoroughness, and have compared closely with each other, *and also with the works of many of the most famous modern publicists*. (2 ans., p. 400.) Further, I have compared both works with the works of other famous modern publicists for the sake of discovering how far the common matter was also to be found in other writers, and to see what comparative degrees of similarity existed between these and other works, and between other works, *inter se*. (15 ans., p. 407.)

My examination has been specially directed to comparing Mr. Dana's work with those of other publicists. (8 cross-ans., p. 428.)

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Mr. Dana's counsel said:

"The affidavit of Mr. Potter points out, by a rough count which I made last night, some three hundred cases [there are about seven hundred in the deposition] where it is alleged that Mr. Dana has improperly taken citations from the notes of Mr. Lawrence. Not for the present claiming or disclaiming the right to make those citations, I have simply to say, from the few minutes' conference I have had with my client, that *he proposes to show* that those citations are made from, and are to be found in other works on international law. . . . We propose to show the Court that these citations are found in those works, . . . and we ask the Court simply to give us that amount of time which, assuming that we have that defence, it will require to make that comparison."

And for this purpose, expressly, counsel asked for and obtained a continuance or delay; and consequently, owing to the engagements of the Court, a withdrawal of our motion for a preliminary injunction.

Mr. Morse, the respondents' expert, testified:

The work of the complainant, published in 1863, and that of the respondent, published in 1866, in the shape of annotations to Mr. Wheaton's treatise, I have studied with especial care and thoroughness, and have compared closely with each other, *and also with the works of many of the most famous modern publicists*. (2 ans., p. 400.) Further, I have compared both works with the works of other famous modern publicists for the sake of discovering how far the common matter was also to be found in other writers, and to see what comparative degrees of similarity existed between these and other works, and between other works, *inter se*. (15 ans., p. 407.)

My examination has been specially directed to comparing Mr. Dana's work with those of other publicists. (8 cross-ans., p. 428.)

We have heard Mr. Dana, through the mouth of counsel, ask for delay, upon the ground that "*it will be necessary, of course*, to show that the passages quoted, or authorities cited, were found in other books than those of Mr. Lawrence;" (the authorities are clear that it is necessary to show this.) We have heard that he proposes to show it, if time is given; we have seen that the time was granted. In his answer (p. 63), we find a general statement in the same direction based upon information derived from "one whom he has employed to make the examination." Mr. Morse made the proposed examination with great care, and when he was ill, this cause was continued six months to enable him to complete his work,—and what next? Why, the next time we hear from Mr. Dana (deposition, pp. 341-2), he is giving reasons to show why it would be very laborious to make such an examination perfectly thorough and conclusive, as if laying a foundation to excuse his failure to exhibit those results which were to acquit him.*

Then the case came to a hearing; we urged, with such strength as we could, both in our brief and in our oral argument, the overwhelming importance of the fact that Mr. Potter's knowledge and Mr. Morse's research showed that no other book than L. existed from which D. could have copied the matters in question. Our remarks seem not to have been without effect; for, with that growth which we shall have occasion to show frequently accompanies the respondents' progress from the evidence to the argument, we now find Mr. Dana declaring, not only that he ought not be asked to make the examination, not only that the respondents have not made such an examination, but that "they have distinctly disclaimed it on the ground of its impracticability" (p. 159). On the next page, this is repeated, with the addition that "no attempt has been made by the complainant, or his expert, *by any general examination*, to show that they are not to be found in the same form elsewhere."

Well, your Honors will find, upon looking at the dates in the record, that, between Mr. Dana's announcement of his intentions and his first attempt to offer excuses, Mr. Morse's direct examination intervened, and,

* His reasons are unsound. Most of his authorities are confessedly copied from half a dozen books. It only required an examination of these half dozen "most famous modern publicists" to show that he took them from those other works, and not from L.—if such were the fact.

out of the seven hundred instances named by Mr. Potter, Mr. Morse only points out about twenty or thirty, where *more or less* of the common matter is found in some other book. Between Mr. Dana's deposition and his argument came Mr. Morse's cross-examination and our argument. Upon the cross-examination, it appeared that, in many of these cases, even that portion of the common matter which is found in the other books is there found with such differences of form or otherwise that the matter common to D. and L. and the matter found in the other writer are not derivable from each other (157 cross-ans., p. 447). In the other instances, it appears that the matter common to L. and D., and found in the other writer, is by that writer *professedly quoted or copied from L.*, giving L. credit for it, (129, 141 cross-ans., pp. 444-5; 159-160 cross-ans., p. 448.) See our examination of each note *infra*, and particularly note 156.

To point out passages showing that, where the subject-matter of a note is in L., D., and other works, and where L. and D. are identical, those other writers use different historical illustrations and authorities, would be to reproduce all other modern works. That Mr. Potter has stated the results of his examination on this point, and that the respondents have made a similar examination, and are unable to point out any such identity, is enough. (See note 156, *infra*.) But Mr. Potter has gone further. On pp. 187-190, he has pointed out twenty-seven instances in which other familiar modern writers have illustrated the same topic by different historical examples, or different authorities, and have not used those which are common to L. and D. Two of these are cases where exactly the same point is mentioned in two different notes of L., and in the first, one authority is cited, and in the second a different authority is cited, and the same thing is reproduced in two separate notes of D. attached to the same portions of the text as the two notes of L. (See Record, bottom of p. 188, and of p. 189, and D., note 223, p. 190.) There are also a number of cases where L. and D. profess to give either all, or examples of certain classes of treaties made by the United States. In many of these cases, it appears that L.'s list is not complete, and in these instances it is found that L.'s list and D.'s list are identical, the same treaties being given, and the same omitted. (See D., notes 118, 152, 223, 235, 235, stated on pp. 189-190.)

The same thing is true as to selections made by L. from a whole vol-

ume of U. S. documents, where the same volume contains a large number of separate negotiations about similar subjects, or of different despatches relating to the same subject. (See D., note 41 on Mexican Intervention, note 49 on Naturalization, note 143, Mr. Potter, pp. 188-190, and note 228, Mr. Potter, p. 227.)

The cross-examination adds to this list. Mr. Morse has pointed out many instances where, though the *topic* of L. and D.'s note is discussed by others, they give only *a portion* of the historical matter and citations common to L. and D.

Mr. Dana's argument (p. 94) gives an excellent illustration. It says:—

“ If two persons were to write independent pamphlets on any topic,—for instance, Effective Blockade, or the Slave Trade as Piracy,—though the authors should never consult together, the probabilities are, that at least nine out of ten of their authorities would be the same. They would refer mainly to Wheaton, and his *two* annotators, Kent with Abdy's notes, Phillimore, Halleck, Twiss, Heffter, Ortolan, Hautefeuille, Woolsey, to a few pamphlets, to prize decisions in Great Britain and America, to a few well-known treaties between the Great Powers, and to certain equally well-known diplomatic correspondence, mainly between Great Britain and the United States.”

If this is intended as a statement of the authorities which, in fact, are cited in any book upon these subjects, it is one which the writer of the argument has no right to make, inasmuch as there is not a particle of evidence to sustain it. Mr. Morse does not pretend that any of the authorities in D.'s note are found collected in any other book whatever, except in L.

If it be taken as Mr. Dana's statement of the authorities which ought to be cited in those notes, and based on such knowledge as he possesses, it is very instructive.

In fact, of all these authorities mentioned by Mr. Dana, only Ortolan, Hautefeuille, *one English* prize decision, *one* treaty,—the declaration of Paris, if it can be called a treaty,—and *one* reference to diplomatic correspondence between England and the United States, (which are in L.) are contained in D, n. 233 on Effective Blockade. It has a different class of authorities. It has many quotations from and references to parliamentary debates, English, French and American State papers, instructions, etc., and some informal correspondence of Lord Russell, and of

the French Government. One despatch is printed by L. from MS., and copied by D. Another letter, Mr. Morse confesses that he never saw, and never heard of its being printed, except in L.'s and D.'s note. It is a very elaborate note, *entirely* made up of statements of facts, quotations, and statements of the contents of books, and the opinions of writers, and everything in it is copied from L., except two or three authorities, which were interlined by Mr. Dana after his note was finished (See this note, *infra*).

The reference to n. 85, p. 201, on "The Slave Trade as Piracy," is perhaps even more unfortunatc. It contains a reference to Wheaton's *History*, copied from L., and a statement from a passage in Phillimore, cited by L. Except them, it does not contain a single reference to any writer, pamphlet, or prize decision. It contains references to Franco-English diplomatic correspondence and State papers, as much or more than to Anglo-American papers. Instead of "a few," it refers to a considerable number of treaties, and to the Statute law of nine European countries by name, "and others"; and it omits Mr. Seward's latest treaty with England. In *all* these respects, it *exactly* copies L.'s note.

With the exception of Mr. Seward's treaty of April 7, 1862, and the matter from Phillimore, the whole of this note contains matters before Mr. Wheaton's time; yet a very large amount of important matter, common to L. and D., is not found in Mr. Wheaton's text. (See this note, 85, *infra*.)

IV. PROOF OF COPYING AFFORDED BY MR. DANA'S MSS.

Some of the most valuable proof in this case is derived from so much of the MS. written by Mr. Dana in preparing his book as remains to us. The manner in which his first sheets were prepared, and the successive steps of writing and re-writing, until his MS. went to the printer, have been described in his own words on pp. 57-8, *supra*.

It appears that Mr. Dana bestowed great time and infinite pains upon his literary style. In order to perfect his notes in this respect, he read all his manuscript—every note, he believes—to his father and brother. "After this consultation, some of the notes were entirely re-written, and many of them considerably altered in the manuscript." *Ans.*, p. 59.

What we have in the case, therefore, is the final copy, which is the

result of all this copying and re-writing, and in which the citations he copied upon his sheets "sometimes take a new form, and sometimes keep that in which they stood."

There is one exception. We have D.'s copy of L., with marks in the margin. Now, your Honors will find in note 49, on Naturalization, for example, that every fact, and every quotation, and every authority, with the exception of two or three citations of Woolsey, etc., are to be found in L. in exactly or almost exactly the same order as in that note. And your Honors will also find, that there is a pencil mark against *every one* of these in the margin of D.'s copy of L. They are the marks to show that these were matters which he ought to "*recur* to when at work upon his notes;" they were "for his own aid when he should come to his work." It is evident, therefore, that he not only read these matters during his preliminary reading in the summer, making memoranda on his sheets, but that he actually recurred to them while writing his notes; that is to say, that he actually wrote his note with the marked passages in L. open and before his eyes, copying, transcribing, from L.'s pages, such portions of the matter there found as re-appear in his note. And, in fact, in this note 49, we find various typographical and verbal errors in a date, a quotation, the name of an authority, and certain peculiarities in citations, *exactly* reproduced from L., and more than three pages and a half of this note of four pages is exclusively a statement of historical and diplomatic matters, *all* of which are in L.'s note.

There are other similar cases noticed in our examination of the notes. His shorter notes were all written on the fly leaves (p. 315), and consequently whenever, as is almost always the case, they are attached to the same word, or to some word on the same page as L.'s note, they were actually written with L.'s note before his eyes while writing, "*and the inter-leaving was very convenient*" (Dana's dep., p. 323). These notes, as appears from the MS., generally stand pretty nearly as they were first written, and, in some cases, the interlineations and erasures in the MS. show that he actually kept his eyes on L.'s note while writing, and simply paraphrased its language, writing first phrases found in L., and then changing them *while writing*, as he went along. (See notes 19, 22, 25, 27, 47, 126.) The same thing is true of some of the longer notes, written on separate sheets of foolscap. (See notes 30, 41, 173, 228.)

In a few cases, where he wrote one of his notes on a fly-leaf which con-

tained his memoranda, those memoranda have been thus accidentally preserved, though all the others were destroyed. In three cases, those memoranda were "substance of this note" (notes 20, 21, 26), and, before the MS. was exhibited to us, Mr. Potter had shown, from internal evidence, that those notes were simply reproductions of the substance of L.'s notes attached to the same word, with trifling additions in one or two of the cases about matters since L.

In some cases Mr. Dana first reproduced what was in the foot note, and then added what was in the supplement to the note by means of *interlineation*. This clearly shows that he did not so much as take the trouble even to study L.'s whole annotation before writing, but sat down and wrote from L., writing as he read; and, having paraphrased the foot note, he added the matter of the supplement by interlining it in its proper place. (See notes 21, 41, 78.) In some other cases, where a part of the matter is from L., and a part not from L.,—perhaps copied from another author,—this distinction is exactly marked in the MS.; in one instance, the different parts being in different handwriting, on separate pieces of paper, pasted together (note 30). In other cases, the note was once written, completed, and signed "D." and all the matter from the different source added afterwards, or added by interlineation. (See notes 21, 47, 82, 112, 124, 145, 213, 41, 240.)

In two of D.'s notes, which are in fact simply the reproduction (with omissions) of L.'s corresponding notes, and which contain matter taken by L. from manuscripts, he had cited L.'s notes as authority; this reference was struck out, but *all the matter thus taken from L. was retained*. (notes 112, 128). Of these instances, Mr. Dana says (dep., p. 399):

I thought of referring to a note of L. for general information, but I came to the conclusion neither to cite nor quote him, for reasons I have previously given. I never thought of quoting him, that is, of making extracts from his original matter, unless as a compliment, and I thought it best not to cite him, after reflection.

Truly, of all conceivable distinctions, this is the acutest. "After reflection" and "for reasons" his keen discrimination, his nice sense of propriety and fairness, draws that line, which must be drawn somewhere, so as to include all desired use of another's labors, but so as to exclude everything which could be supposed to be an acknowledgment of indebt-

edness. It is the good fortune of some men, and some minds, that their sense of duty coincides with their apparent interest. Mr. Dana wrote his book chiefly for the reputation he hoped thereby to acquire, — no motive could be more laudable. He said in his preface that the notes contained only his original matter, and that none of Mr. Lawrence's contributions formed any part of them; anything that should throw doubt on those statements, or should lead the reader to pass from his note to L.'s note, might suggest to captious persons that it was hardly fair to rise by leaning, ever so lightly, on the man he was attempting to supersede. Where the crop of one man's plantation is found in the hands of another who claims it as his own production, the fact that the first name has been erased, and his own substituted by the possessor, is apt to be attributed to fear of detection. Some writer, imbued with the spirit of the authorities hereafter referred to, once said:

"May my candle be put out when I refuse to confess at whose torch I have lighted it!"

But we have changed all that. The respondent has gone back to the Spartans for the law of *meum* and *tuum*; he has added a refinement even to their theories, for it is nowhere reported that they set up an attempt at concealment as a reason for not restoring the property when detected. (See also notes 40, 49, 67, *infra*.)

We submit that these various instances, coupled with the fact that he habitually cited Story, Phillimore, Halleck, and Woolsey, when copying from them, and, instead of citing, rather ostentatiously disclaims indebtedness to L., entirely preclude him from the defence that he was making what he truly believed to be a fair and legitimate use of L., even if the kind of use he made, and the amount of aid he derived, could be covered by the attempted defence. (See pp. 31-34, *supra*, and notes 40, 67, 112, 128 in Part VII., *infra*.)

These MSS. afford other proofs of actual transcribing which are noticed in our examination of each note.

Mr. Dana's argument devotes considerable space to the proof afforded by these MSS. It says, "Mr. D., which is very unusual, *has voluntarily put into the case all his manuscript, as first written, with all the changes made in it afterwards.*" [The italics are Mr. Dana's.] True, he did it voluntarily in one sense, but he was too acute a lawyer not to perceive that *withholding* it would be a proof so *conclusive* against him that his only hope would be in putting it in, such as it was, and trying to make the best of it.

Besides, he seems to have thought that if he could show that his notes were all in manuscript, and were not made by bodily cutting out slips from L.'s printed notes, and sending them to the printer, he should clear himself, and it is pretty apparent that it was this notion which operated in part, or at any rate was the ostensible reason, to induce him to produce his MS. (See record, p. 323.)

It is entirely untrue that he has put in "*all his MS. as first written.*" He testifies that "some of his notes were entirely re-written" (ans. p. 59). "In many cases, the changes were so great that I re-wrote pages" (p. 315). "I wrote my note, often re-writing and correcting. I then, as I have described, went over it with my brother, making further changes, sometimes sending it then to the printer, and sometimes re-writing it" (p. 320). "The citations were written so many times that they sometimes took my form, and sometimes kept that in which they stood" (p. 341). All that he has produced is the note as *last* written, the final "copy" which was actually sent to and used by the printer, and remained in his hands.

For *all* the proof which depends on identity of form, those *original sheets* on which his "general course was, on important points, to *copy directly* from the author the citations he made" (p. 339), would, therefore, have been invaluable. The order in which the citations there stood would, also, frequently have shown whether they were copied from L. or Halleck, or Phillimore. He testified: "doubtless those in one place were generally put together on the sheets." "If . . . I wrote my citations on the same sheet with my memoranda, they would be likely to follow extracts from or references to the author, made at the same time" (p. 319). (See p. 58, *supra.*)

"These masses of sheets containing the early portion of my work prior to the copy, were, as I have said, destroyed when the work was finished, and usually from time to time as notes were finished and printed." (p. 342.)

"I think I have a few scraps in my drawer, left accidentally. If they are desired, I will produce them. *I think that they have no value in this case.*" (p. 323.)

We took Mr. Dana's word for the want of value of these scraps, and did not ask for them. Yet this is imputed to counsel as an intentional

suppression of those seraps which Mr. Dana still has in his pocket and no one else has ever seen.

"Many fly-leaves are missing. They were doubtless blanks which were left out either by me or by the printer, and in some cases where I had criticisms and suggestions made while reading, which were not to be printed, I may have taken out the leaf. I find, however, that there are in this packet fly leaves containing some matter not intended for the printer, with a pen drawn through it. These instances probably arose from the fact that they were on the same leaf with some note, and I didn't take the pains to cut them off." (p. 324.)

We were right therefore in expressing our regret that the Court had not the benefit of an inspection of these sheets. This regret is not based upon mere conjecture; for we know something of what these sheets must contain, from the few fly-leaves that still remain containing similar matter, both the first memoranda, and the manuscript as first written with all the changes made in it afterwards.

The particular matters commented on in Mr. Dana's argument will be noticed in our examination of each note. We add:

D., p. 631, n. 226. Mr. Morse (p. 408) pointed out that D., besides copying L.'s citations of Hautefeuille, had also cited him by title and section. Mr. Potter, p. 182, had pointed out that this citation was copied from Halleck. The MS. (Record, p. 387) shows D.'s pencil marks in the margin, opposite L.'s citations which he reproduced.

Mr. Morse, p. 411, pointed out that the form of two citations in D., p. 193, differed from the form in L.: the record, p. 386, sp. 24, shows that in D., p. 193, these citations were first *exactly* copied from L., and the changes made by interlineation.

PART VI.

THE CHARGE MADE FROM THE OUTSET HAS BEEN, THAT MR. DANA COPIED THE SUBSTANCE OF MR. LAWRENCE'S ANNOTATIONS, BUT CAREFULLY CHANGED THE FORM AND LANGUAGE. THE ATTEMPT TO SHOW THAT HE DID NOT REPRINT VERBATIM IS NO ANSWER IN LAW OR IN FACT TO THE COMPLAINANT'S CASE, NOR TO THE CHARGE MADE BY HIM.

The charge which we have made from the outset was stated in general terms in an opinion prepared by the late Chancellor Walworth, as the result of his examination of Mr. Lawrence's and Mr. Dana's notes. This opinion was procured, Mr. Lawrence says, to guide him upon the question of propriety and expediency as well as upon the questions of law, in determining whether he should file the present bill; and a copy of it, dated Aug. 29, 1866, was annexed to the affidavits filed with the bill.

The Chancellor says:

"Throughout this edition it will also be found that many of Mr. Lawrence's notes have been used in substance by the editor, though he has attempted, in most of those cases, to cover the piracy by carefully changing the language of Mr. Lawrence's notes. In several cases, however, he has servilely copied the very language of the note; and in other cases he has used the citations of authorities which the industry and research of Mr. Lawrence had collected and referred to in the notes. Probably he has examined *some* of the books referred to by Mr. Lawrence, but he has copied some of Mr. Lawrence's references to letters and documents, which letters and documents had never been published, nor been referred to except in Mr. Lawrence's copyrighted notes."

"In the present case, it will be found that Mr. Dana, in preparing this eighth edition, has copied into, or transferred to it, several errors which had crept into Mr. Lawrence's notes."

Throughout our direct testimony, and in the preparation of our case,

we paid no attention to finding instances of the reproduction of Mr. Lawrence's own language; for our charge was, of the reproduction of the substance, with a change of language. Mr. Lawrence, 26-29 cross-ans., p. 138; Mr. Potter, 5 cross-ans., p. 239 and their depositions, *passim*.

The very first moment that the respondents open their lips on the subject of piracy in the evidence, they start by asking Mr. Potter, with an air of triumph, to point out a single note of Mr. Lawrence's containing the only thing which *they* call original matter, which has been exactly reprinted by Mr. Dana from Mr. Lawrence's notes—that is, matter where the same ideas are expressed, or facts stated, in the same *language* (p. 237). Their continued cross-examination of our witnesses, and their own testimony and their argument show that this is their great defence, namely, that Mr. Dana has not reprinted, *verbatim*, Mr. Lawrence's *language*. And having proved the fact, which we have stated from the outset, that Mr. Dana has not reproduced L.'s *language*, they say that we have made out no case. In the course of their cross-examination of Mr. Potter, he said, that he thought that D. had sometimes reproduced L.'s phrases, but that he was looking at the substance of the matter, and had no list of them. They thereupon asked him, and asked Mr. Lawrence, to furnish a list of phrases in L. reproduced by D., and this was done. (Mr. Potter, 13 cross-ans., p. 241; Mr. Lawrence, p. 145.) These lists are of the same value as the list of typographical errors reproduced. The reproduction of a dozen sentences, if that were all that he had taken from L., would be unimportant. But they are very valuable, as showing such habitual copying and paraphrasing, that, in spite of the excessive care he exercised *not* to use L.'s language, a few instances escaped him. They are verbal peculiarities reproduced by D., and they show that the sentences in which they occur must have been actually written with his eye on L.'s note.

The respondents' argument (p. 56) makes some comments on this list. (Specification 1.) See note 19, *infra*.

(Sp. 2.) It is certainly true that *neither* note has the words "*this territory*." It appears from D.'s MS. that this note 22 must have been, in the first instance, actually transcribed in part from L., and verbal changes made afterwards. One phrase thus reproduced is "all *his territories*"; this fact was proved on Mr. Dana's cross-examination (Record, p. 384, sp. 9). (See this note, *infra*.)

(Sp. 3.) This is not quite a correct statement of Mr. Potter's deposition; for the two phrases found in L. and D., the second of which is a line long, are in reality one passage in D. of fourteen words.

In note 55, a whole sentence is reproduced; the respondents' argument does not allude to this.

The other specifications will be referred to in connection with the appropriate notes.

Having commented on some of the instances, the argument (p. 58) says: "We believe these are all the instances, out of thirteen notes cited by Mr. Potter, of phrases repeated." If your Honors will look at Mr. Potter's deposition, you will see that the argument, professing to have noticed *all*, passes over all the longer ones. In note 22, it refers to the phrase "preliminaries of Villafranca," but makes no allusion to the clause "Lombardy, with the exception of the fortresses of Mantua and Peschiera." It entirely passes over note 55, which contains a whole sentence, "The Pope refused to annul this marriage on the application of Napoleon [L.]" It makes no allusion whatever to five translations, each from one to four lines long *literally* reproduced by D., nor to a peculiarity in the phrase separating a quotation in note 108. And yet this part of the argument is professedly prepared to prove Mr. Potter guilty of "*intentional deceptions.*"

Mr. Lawrence (p. 145) produced a schedule which contains two translations, identical in L. and D., and the argument makes no allusion to this.

PART VII.

EXAMINATION OF THE NOTES COPIED FROM L.

I. PRELIMINARY.

We have now examined most of what has been called the physical proof of copying. This forces upon the mind the conclusion which cannot be got rid of by any testimony, or any facts, that such copying as he has been guilty of is not confined to a few notes or a few matters, but is a thing constant and habitual, pervading the whole book. It shows that

he has adopted Mr. Lawrence's selection of facts and authorities, and their combination with each other, and with the text. Even if Mr. Dana had taken from every authority cited, something not to be found in L., the fact of identity in selection of authorities would show that he had relied on L.'s learning and judgment instead of his own. In truth, however, the fact that D. has followed L. in *all* these peculiarities of form which have been alluded to is conclusive evidence, of itself, that he did not habitually, at least, go to the originals.

We shall now go to another line of proof. We shall show, relying on the facts pointed out in the latter part of Mr. Potter's deposition, and brought to light by the subsequent evidence, that note after note reproduces, in whole or in part, matters from the note which L. has attached to the same passage. We shall show that, except in a few peculiar cases forming a class by themselves, D. has derived nothing from the authorities copied, either in form or substance, which requires or indicates the use of anything, except L.'s note from which he was copying; and that he has made no use of the matters thus copied in any way different from the use made by L. in the note from which they are copied, with such additions and changes of form as can readily be made by a lawyer of respectable intelligence and attainments. Considering the entire want of identity between different writers, and the great difference of mental character between Mr. Lawrence and Mr. Dana, this identity of substance is a conclusive proof that the notes, where it occurs, have been copied from L. without the exercise of independent and really original thought.

It will be found, in most cases, that the copying is proved by *both* these different lines of proof,—identity of substance, and identity in matters of form.

In several places in the argument, and more particularly on pp. 67, 97, the respondent charges Mr. Potter with having omitted to point out the passages in L. from which D. has copied. In the first portion of his deposition (pp. 157-194), for each detail, Mr. Potter named the note and page of D. and the page of L. On p. 194, he began what he called a "special examination of specific notes," taking up the copied notes in their numerical order, and stating the note and the page, or pages, from which D. has copied. Your Honors will remember that, in the examination of some of the notes in the opening oral argument, when the Presiding

Justice was about to make memoranda of the passages from which the notes mentioned were copied, it was explained that this information was all contained in the latter part of Mr. Potter's deposition. The pretences that Mr. Potter has not stated this, or that the respondents are obliged to "search" to find where he has stated it, are therefore entirely unfounded.

II. THE NOTES.

D., n. 2, p. 5. See Mr. Potter, p. 194. This note consists of four citations, of which two are from L., note 1, attached to the same word, though p. 16 would be a more appropriate place. One of them is Twiss, an author from whom D. has no original citation.

In writing this note on the interleaf, with L.'s note under his eye, as he was merely transcribing without thought, he copied the citation of Twiss in the same form as in L. (MS., in record, p. 383); but in reading proof, when, for the first time, he paid attention to the note, he changed the form somewhat, as he had a peculiar taste in such matters, (Dana's dep. p. 341, at bottom,) which he undoubtedly would have followed, when he wrote the note, had he not been "directly copying."

D., note 6, p. 16. Mr. Potter, p. 194. This note is to show that Mr. Wheaton misunderstood Heffter, to point out in what the misunderstanding consists, and to show what Heffter's real meaning is; Mr. Lawrence has a note for the same purpose, attached to the same word. Our claim is that Mr. Dana has written his note from reading L.'s note, and not from reading Heffter. As one proof of that, we point out that D. contains errors such as might be made by a person carelessly reading L.'s note, and attempting to paraphrase it, but such as could not have been made if D. had prepared his note by studying Heffter.

Wheaton refers to Heffter, § 2. The title of that section is "*Fondement et Sanction du Droit International.*" In a foot-note to it, Heffter says that Mr. Wheaton has misunderstood him; he does not expressly say upon what point, because the observation necessarily relates to the views expressed in that section which Mr. Wheaton cited, and to which Heffter appends the note. In § 10, Heffter states the different theories on which the principles of International Law are based by publicists, and says that his own views are stated in §§ 2, 3, and those sections relate

exclusively to the theory of the law of nations, as stated in L.'s note, and in no way apply to the terms by which it may be designated. Mr. Lawrence is right, therefore, in stating that Heffter's complaint relates to a misunderstanding as to the foundation of the law, and he is right in quoting from, and referring to §§ 2, 3, to show Heffter's real views.

It is clear that D. did read Wheaton's text and L.'s note carelessly, without perceiving their real force. To show that *Heffter* does admit the term "Droit International," he states that *Bergson*, the French translator of Heffter uses it, — which of course is no proof of *Heffter's* use. He omits to state the pith of the matter which L. states and which is, that the French translation was published under the auspices of *Heffter himself*.

Mr. L. says, "Heffter intimates that he has not been clearly understood by our author." D. says, "Heffter says that he did not intend the construction put upon his language by our author." This is a paraphrase of the sentence in L.'s note, which was before D. when he wrote, — for the note is on an interleaf. If D. had prepared his note from the original, he would, instead of a paraphrase, have had almost exactly the same sentence as L., because L.'s is an accurate translation of Heffter's own language ("*ne nous a compris que d'une manière imparfaite*"), — Mr. Wheaton's mistake not being as to the construction of language, but as to the whole drift of Heffter's two sections on the subject.

D., note 7, p. 21, could be written from reading L.'s note 5, p. 20, attached to the same word. In a cluster at the end of the note, D. has copied nine citations from L. in substantially the same order as in L. These embody an error as to *Fœlix*, which could only arise from copying without knowledge of the original. As to two of them, *Riquelme* and *Bello*, L. does not cite any page, and D. does not. Two others, *Hautefeuille* and *Westlake*, are authors to whom D. has no reference except such as are copied from L., with a few additional citations from *Halleek*. (See Mr. Potter, pp. 179, 195.)

D., note 8, p. 22. Mr. Potter stated that he found errors in D., some of them merely clerical errors and some of them errors of substance, which he thought a writer would not be likely to make if he wrote with the original authorities before him, but which a person attempting to paraphrase L.'s language would be very likely to fall into; and his

deposition (pp. 169–173) contains a list of such instances, *q. v. supra*, p. 82.

Among them is the following:

<p>“L., p. 23. ‘Great Powers declare the sublime Porte admitted to participate,’ etc. This is the phraseology of the original treaty. See Martens, cited by L. See Ann. Reg., 1856, 313.”</p>	<p>“D., p. 22. ‘Great Powers invited the Sultan to participate.’ D. gives no authority for this statement.”</p>
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The facts are, that D. used the term “Great Powers,” and that L. wrote “Great Britain, Austria, France, Russia, Prussia, and Sardinia.” The argument (p. 42) states that Sardinia was not one of the Great Powers; if this be true, it would furnish an additional instance of D.’s historical errors in his attempts to substitute synonymous terms for the language used by L., and if Mr. Potter committed an error in not noticing this, it was in D.’s favor.

Mr. Potter ought to have put the quotation marks after, instead of before the words “Great Powers.” He says (30 cross-ans., p. 247), “That is the explanation; the quotation marks were put in the wrong place,” and (31 cross-ans.) “of course I should have put the quotation marks in the right place if I had observed them.”

In documents like these depositions, an occasional error in copying, — *not affecting the professed and declared object for which the passage is written*, is not only excusable but unavoidable by the most careful person. Misstatements, however, upon which the whole argument is made to depend are not so excusable. This very paragraph (p. 42), as well as the whole of the attack on Mr. Potter, abounds with such misstatements. Thus it is stated that “Mr. Potter, producing a list of ‘parallel passages’ [the quotation marks are Mr. Dana’s,] cites this but alters the language to make them parallel.” Now the whole force of this argument, as an attack on Mr. Potter, is, that he produced these and called them “parallel passages,” — for Mr. Dana puts those words in quotation marks, — and that the alteration was by *design*, and for the purpose of making them parallel. The fact is, that the words “parallel passages” are not used by Mr. Potter; that he produces this as an instance of a *difference* between L. and D. of such a character as to show that it

resulted from a conscious attempt to make a difference in form, by a person who had not read the *original* paper, whose contents he professed to state. Mr. Potter's mistake does not in the least affect this declared purpose, and it arose from a clerical error.

D., note 9, p. 23, is taken in part from L., note 8, p. 26, attached to the same word. A peculiarity in a citation of Hautefeuille, an author from whom D. has no citation, except at second hand (Mr. Potter, p. 181), is reproduced in D. See Mr. Potter, p. 195.

On p. 45 of the argument, after saying that there are matters in Mr. Potter's testimony,—which they do not specify,—and which, they charge, show that he has pursued a dishonest course, they continue:

"Similar instances have been discovered by Mr. Morse in Mr. Potter's affidavit attached to the bill and *repeated in his deposition*. (See Morse's dep., p. 410 *et seq.*)

(11.) Thus, turning to Mr. Potter's affidavit, p. 74, he gives the following parallel lines:

'L., p. 26, Austin, Hautefeuille. D., p. 23, several authors, thus:

Austin, Hautefeuille.'

On referring to the notes, it appears that L. makes two long quotations from Austin and Hautefeuille, and cites no others, while D. quotes and criticises seven authors, among whom are Austin and Hautefeuille."

In the first place, it is not true that D. *criticises seven*, or any authors in that note. As to the first four, Halleek, Woolsey, etc., which he did not take from L., he gives quotations, simply introducing them thus: "Woolsey defines it," "Prof. Cairns says," "Kent describes it." Then follow the two authorities copied from L., making six, and not seven in all. He gives a statement of a passage from Austin, which is quoted in L.'s note, and a statement from a long passage of Hautefeuille, which is translated and condensed in L.'s note. There is nothing in the nature of a criticism about Austin. What Mr. Dana probably thinks is a criticism on Hautefeuille is a statement, in Mr. Dana's language, of those views of Hautefeuille which are stated in the quotation presented by Mr. Lawrence for the purpose of exhibiting Hautefeuille's views on this point. The passage in L. extends over pp. 6-13 of Hautefeuille, and L. cites pp. 6-13. The passage in D. is from p. 13; he, however, copies "6-13," as in L. (Mr. Potter, p. 173.) D.'s MS. shows that this paragraph, copied from L., was all written at one time, and at a different time from the rest of the note, which is not copied from L.

It is quite clear, therefore, that D. collected quotations from several authors not in L., and *then* gave extracts from Austin and Hautefeuille taken from L.'s note, where they stand in the same order.

It appears a little extraordinary, if Mr. Potter's statement is "contained in his affidavit and *repeated in his deposition*," that the respondent should quote it from the affidavit, which was never read to the Court, and never used, because the motion for which it was prepared was not heard, so that it was still open for verbal corrections, and should not have quoted from the deposition which is printed in the record, while the affidavit is not printed in the record. This will seem still more extraordinary, if your Honors will turn to the record, p. 191, because you will there find that it stands, "several authors, *then*," exactly according to the truth, so that the error is *not* repeated in the deposition.

It is obviously a misprint. Two do not constitute "several"; It takes three to make a group. It is plain that Mr. Potter put in that line for the express purpose of stating what they accuse him of suppressing, namely, that D., unlike L., cited several authors, and *then*, at the end, cited the two named, in the order named, copying these from L. No inquiry has hitherto been made as to the origin of this misprint; but the facts are, that in the original MS. of the affidavit now before us, the word is "then;" that in the printed affidavit it became "thus;" that that page of the affidavit was pasted into Mr. Potter's deposition to save copying, and that the correction was made in printing the deposition, as a misprint obvious from the context.

"D., note 12, p. 31. A mere citation of an authority (Heffter) cited in L., note 14, p. 34, attached to the same word of the text. Westlake, pp. 119, 120, § 137, is appropriate, and is cited in L.'s French edition;* and in a subsequent note (D., note 60, L., note 69), both cite *Westlake alone* to the same point." (Mr. Potter, p. 195.)

"D., note 14, p. 33. A mere citation of a U. S. case quoted in L., p. 977, addenda to n. 15 attached to the same word." Mr. Potter, p. 195.

The respondents' argument, p. 69, contains the following: "D., note 14, p. 33. This, Potter says, is wholly taken from L.'s note, 15, p. 37. . . . His note *does not refer to Harcourt vs. Gaillard*, which is all that is in D.'s

* *Commentaire sur les Eléments du Droit International et sur l'Histoire des Progrès du Droit des Gens de Henri Wheaton, précédé d'une notice sur la carrière diplomatique de M. Wheaton*, par WILLIAM BEACH LAWRENCE, etc. Tom. i, p. 164.

note." (The italics are in the argument.) Both literally, substantially, and in the charge of false statements which it makes against Mr. Potter, the argument is entirely untrue. It is in the addenda to note 15, p. 977, exactly where Mr. Potter said it was. See p. 13, *supra*.

D., note 15, p. 34. L.'s and D.'s notes are attached to successive paragraphs. A long note, containing *twenty-seven* authorities, mostly historical and diplomatic, merely cited by D.; all from L., note 16, p. 40, with two typographical errors, one of which is shown on Dana's cross-ex., pp. 376-7. D.'s note contains three errors, arising from hasty copying. An obvious selection is pointed out. The other authorities are taken *directly* from Bemis (p. 435), though Mr. Morse says (p. 412), that they are "of course obtainable only by independent research." Mr. Morse says, that "this matter resolves itself into one of those *frequent and simple* instances where two writers upon the same legal topic have found a *few* of the same citations and historical instances." On cross-examination, he admits that he never saw, and did not think it worth while to waste time in looking for such identity as this, but has only found a *few* cases where Halleck has citations identical with L.— and those are cases of *professed* copying. (Morse, pp. 437-8.) Mr. Potter's dep. p. 196, is very full as to this note; he points out that it is taken from L.'s note 16 and addenda.

D., note 16, p. 41. Part is a dissertation, without authorities, and part is historical. The historical part has a great many authorities. Some are from Phillimore, with three typographical errors. The rest are from L., note 19, attached to the same word, with three typographical errors. D. also has looked at Webster's works, and a message of Pres. Jackson, quoted in part by L. Mr. Morse says (p. 413), that in this note he can "trace no foundation for Mr. Potter's charges," but makes no attempt to deny these specific points of identity pointed out by Mr. Potter. See Mr. Potter, p. 197, where the proof of copying is fully pointed out. Mr. Morse's state of mind is such that from beginning to end he cannot see any foundation for any charges against Mr. Dana; at least, his *direct* examination gives this impression.

"D., note 17, p. 48, simply states two facts, with an authority for the latter. The first, I think, is incorrect. (See Am. An. Reg., 1830-1, p. 150.) The latter and the authority is in L., note 20, attached to the same word of the text." (Mr. Potter, p. 198.)

Mr. Dana (argument, p. 70) seems to think that he has made a discovery as to a fact unknown to Mr. Lawrence, in ascribing the refusal to accept the award of the King of the Netherlands about our N. E. Boundary, to the disruption of that kingdom. This Court, which does not need to be instructed upon any matter relating to the Northeastern Boundary questions, knows that the true reason, admitted by both parties, was, that the award did not profess to follow the submission, but recommended a conventional line. If Mr. Dana had studied L., note 51, or L., p. 499, while writing this note, and had not confined himself, in each instance, to the facts stated in L.'s corresponding note, supplementing thereto by conjecture instead of research, he would have found this reason stated in L., pp. 133, 499. This is a matter about which Mr. Lawrence could not be mistaken, inasmuch as the submission and the selection of the arbitrator were negotiated by him as the diplomatic representative of the United States at London. The knowledge of this matter thus acquired as an actor in the negotiations in question was the basis of his pamphlet (New York, 1841) entitled "The History of the Negotiations in reference to the Eastern and Northeastern Boundary of the United States." As the natural result of the character of that publication, Mr. Lawrence, (as first Vice-President of the N. Y. Hist. Soc.,) at the special meeting of April 15, 1843, held on the occasion of the discovery of the "Jay Map," at which the President, Mr. Gallatin, read a learned memoir, gave an able analysis of the boundary treaty, (Proceedings of 1843, p. 54,) which elicited from Mr. Webster an elaborate speech. (Webster's Works, vol. ii., p. 145.) This is only one of the many instances in which Mr. Lawrence's notes were the embodiment of thorough and elaborate studies, completed and published, and the value of which had been recognized long before his annotations of Wheaton were thought of, and where Mr. Dana's note is a mere careless paraphrase of L.'s work.

"As to the effect of a union of States on treaties, both cite only one and the same example,—Texas. There are others." (Potter, p. 187.)

D., note 18, p. 49, relates to the effect of divisions or consolidations and annexations of States on their public debts. It cites only one instance of a diplomatic settlement in the absence of treaty stipulations, and two instances of treaty stipulations, at the same time stating that there are many others. Exactly these three instances and no others,

with the same references for them, are given in L., note 21, attached to the same word of the text. Both cite U. S. Stats., viii., 446. It should be ix., 446. (Mr. Potter, p. 198.)

Mr. Dana, in his argument, permits himself to make a statement as to the contents of two books, concerning which there is no evidence. We shall therefore take the liberty of following his steps. He says, (argument, bottom of p. 100), that the matter of the first paragraph common to L. and D. is in the report of the commissioners. The *facts* about the Texan question undoubtedly are to be found in the Report. The first paragraph in D., besides the facts, gives as citations for the Stats. bearing on the case "U. S. Laws, v., 797; viii., 446; x., 617."

L. cites "U. S. Stats. at Large, vol. v., p. 797; vol. viii., p. 446; vol. x., p. 617." D. reproduces these typographical errors.

The report (p. 383) cites "vol. 5, p. 798;" on p. 407, it cites "vol. 9, ch. 49, p. 446;" "vol. 10, p. 617." These citations are correct.

It is clear therefore that D. copied from L. and not from the report.

The argument says: "Halleek also goes to the same source (p. 79)"; Halleek and D. often go to the same source, but Halleek always gives credit to Mr. Lawrence. Halleek went elsewhere also. He does not cite the statutes at all; he does not give the date of the Belgian treaty; he does not allude to the treaties of Zurich, all of which D. simply copies from L. He also cites seven text writers which are not in L. and not in D. Mr. Potter, p. 187, testified that, while L. and D. both cite the same historical instances, there were also others, and Halleek (p. 79) refers to the matter of the Florida Bonds, which is not in L. nor in D. L. names the special article of one treaty and not of the other (Morse, 38, 39 cross-ans., p. 431). In *all* these particulars, D. exactly follows L., and differs from the only other writer who is mentioned as having treated the subject. It is clear, therefore, that D. derived his knowledge as to what were proper illustrations, and the proper books and acts to refer to, entirely from L.; and his additional matter, be its value what it may, was procured by simply looking at one book, the Report of the Commissioners under the Convention of 1853, which he happened to own, at the passage to which L. referred him. As usual, when he went to the book, his note shows the marks of his having used it. If he had ever studied the book independently of L., or done more than turn to the passage designated by L., he would probably have cited from it the

case of the Florida Bonds as Halleck has done, for his judgment, when exercised independently of L., would rarely lead him to the same selection as L.

D., note 19, p. 52.

L., p. 177, says that "the declared object of the recent tripartite treaty between Spain, France and Great Britain" will be recollected. "The reclamations which . . . Great Britain presents in this case, arising as they do from the seizure of moneys, even from the house of the British legation, made by the opposing faction, when in possession of the capital, and during a civil war, are strong illustrations of the necessity of the rule that holds a State always liable for the acts of its *de facto* authorities. Earl Russell instructs Sir C. Wyke, March 30, 1861," about "wrongs done to British subjects," etc. "Vide supra . . . p. 57 . . . editor's note [53, pp. 157-9]."

D., note 19, p. 52. "The British and French governments made reclamations on Mexico for property of British subjects, seized by a faction which, during a civil war, was in actual possession of the capital. The tripartite treaty between Great Britain, France and Spain, of Oct. 31, 1861, and Lord John Russell's instructions to Sir C. Wyke, 1861. Annual Register, 1861, p. 216. D."

[This is the whole note. It is attached to that portion of the text which is on p. 57 of L. and which treats of the responsibility of the lawful government, for acts of the *de facto* power.]

The previous portion of L.'s note is an account of the Greytown case, which Mr. Dana has reproduced in note 49, attached to the same word. When he came to this part of the note, he did what he was directed to do, looked back to p. 57 of L. and determined to follow L.'s direction, and place this Mexican case as the illustration of the rule for which Mr. Lawrence had produced it, and which Mr. Wheaton had stated on that page. That this is what D. did is proved by his own written statement. He testified (p. 317) that when he first studied L.'s notes he did not undertake to write his notes, but only to make memoranda of what he should do, and that the notes were written subsequently. On interleaf 176 $\frac{3}{4}$ of his interleaved copy of L. and exactly opposite the passage, L., p. 177, which he copied, these words are written: "Substance of the Mexican case on p. 57." And when he came to write his note, he did attach to page 57 a note which was the substance of the Mexican case on L., p. 177. Having referred to the case in language which bears a verbal resemblance to L.'s so striking that it could only come from an

attempt to paraphrase, with L.'s note under his eyes, he also copied from L. the two authorities, the only two authorities mentioned in L.,— the treaty, (taking the date from note 53, to which L. refers him, and from which he had just been copying at wholesale in his note 41,) and the instructions, — putting them in the same order as in L., though it is contrary to the order of dates; having thus simply transferred L.'s note, and no more, to his own book, he closed his note and signed it (MS. in record, p. 383). L. spoke of "Earl" Russell, and Mr. Dana makes it a point of difference that his *book* speaks of "Lord John" Russell. He first copied "Earl Russell" exactly as in L., and changed it to "Lord John" by erasure and interlineation (MS., p. 383).

D.'s work was a mere unthinking transfer from L.'s pages to his own. He presents one and the same instance as illustrating the same rule as L. He could hardly have studied modern history at all without finding others. Indeed, if it had not been his habit simply to transfer from L.'s pages to his own, from corresponding note to corresponding note, without exercising his mind, or even improving his mind, he would probably have had different illustrations. One omission is rather remarkable. The same question,—how far a State is responsible for the acts of a usurping *de facto* government,—was alluded to by Mr. Adams in a despatch, as being a liability from which recognition of the rebels as belligerents freed us in our war. Both L. and D. mention that, citing that despatch, in connection with the recognition of belligerency, in a previous note, but *neither* adduces Mr. Adams' authority in connection with *this* portion of the text which expressly diseusses it.

Having thus completed his work and left the note as finished, on a subsequent occasion, whether by copying from some other author or not does not appear, he added a referenee to the Annual Register, not for any new matter, but merely as the place where the instructions are to be found.

The respondents make and repeat several attacks upon Mr. Potter about this note. On p. 46, they say that D. does and that L. "*does not give the date of the treaty.*" [The italics are theirs.] This is untrue, both literally and substantially. They point out that L.'s note is four pages and D.'s is four and a half lines. True, but the last ten lines of L.'s note contain this matter which D. reproduces and attaches to that portion of the text which L. tells him is the proper place. The rest of

L.'s note relates to an entirely different matter, and is reproduced in D., note 49, attached to the same word. See p. 13, *supra*.

On p. 43, the respondents say that Mr. Potter has added the date of a treaty not found in L. at that place, but found in D., and that when interrogated he had no excuse to give. On the very page (248) which the argument cites, Mr. Potter pointed out, that, though the date was not given in L. *at that place*, it was given in a previous note, to which L. gave a cross-reference at that place; and even if there had been no express cross-reference, an allusion to the treaty as a thing the reader "will recollect" is a cross-reference to the note twenty pages before where it was discussed at length. The fact of this cross-reference is entirely suppressed in the argument.

On p. 103, the argument returns to the same charge. It again says: "D. gives the date of the treaty by year, month and day, which is not in L.;" and it occupies about a page in repeating the charges already noticed.

Mr. Potter (pp. 198, 241) had pointed out a resemblance between the language of L. and D., and the argument (p. 103) comments on this. One phrase is said to be "faction possession of capital." Obviously, this ungrammatical phrase could not occur anywhere. There was evidently a clerical error in omitting the — or . . . between "faction" and "possession." The phrases (quoted on p. 119, *supra*,) are very similar.

We have devoted more space to this note than its length deserves, because it shows D.'s manner of copying, and illustrates the character and utter want of foundation of his attacks on Mr. Potter.

D., note 20, p. 55, is an historical note copied from L., note 23, attached to the same word. (See Mr. Potter, p. 198.) The following is from the short-hand report of the opening argument for the complainant:

Will your Honors look at the 55th page of Mr. Dana's book, note 20. Mr. Lawrence's note upon this subject, attached to the same word of the text, contains a statement of what is found in the first paragraph of Mr. Dana's note, and cites for it the same case and the same book, except that Mr. Lawrence's citation is from the "Jurist, new series," and Mr. Dana's is from the "Jurist" simply. Mr. Morse, in his deposition, pointed out that difference; but on his cross-examination, it appeared that as to that difference, Mr. Lawrence was right and Mr. Dana wrong; that it was merely carelessness in copying. Mr. Morse pointed out that

that matter was found also in Twiss, though he did not state where. On cross-examination, it turned out that Dr. Twiss had cited the same case, "The Leucade," but he cites it from "Admiralty Prize Cases," — an entirely different work. In the only other treatise, therefore, where this matter and this case is found, it is cited from a different book, so that there can be no question of copying there; whereas, what is given in Mr. Dana's book could have been readily copied from Mr. Lawrence. The next paragraph of that note in Dana contains a statement of something that happened after Mr. Lawrence wrote, in 1864, Mr. Lawrence's book having been published in the spring of 1863. It relates to the well known cession of the Ionian Islands from Great Britain to Greece. Mr. Lawrence's *addenda*, pages 979, 994, state that the withdrawal of the Protectorate had been proposed and negotiations begun. Mr. Dana's note is therefore a continuation of the statement of Mr. Lawrence's, embracing the results of that negotiation, to which his attention was directed by Mr. Lawrence's note. This is one of the shorter notes written on the interleaves, and that sheet shows what Mr. Dana calls "memoranda of mental suggestions," and the words written are, "substance of this note; also, last act of Gr. Br. ceding the Islands to Greece." That is the point to which Mr. Lawrence's note, stating that such a negotiation had begun, directed his attention; and the Court will find that the first part of D.'s note contains the substance of Mr. Lawrence's note, and the latter part contains the result of those negotiations to which his attention was thus directed by Mr. Lawrence.

D., note 21, p. 55. The argument continued as follows:

The next note, on the same page, as your Honors will perceive, is simply an historical note, with a great many facts, and a considerable number of citations of passages from the "Almanach de Gotha," involving a very careful examination by *some person* to acquire all these facts. Now, opposite this note in Mr. Dana's copy of "Lawrence's Wheaton," was written these words: "substance of this note;" and Mr. Potter had previously pointed out that the substance of Mr. Dana's note was simply a reproduction of Mr. Lawrence's.

In the third line of the note, on the 56th page, you find the words, "The United Legislature met in Feb. 1862." It appears that that fact is not stated in the *body* of Mr. Lawrence's foot-note, but is a fact stated by him in his *addenda* (p. 979); and it appears from Mr. Dana's

copy of L. that he made a cross-reference from the foot-note to the *addenda*. Now, in Mr. Dana's MS. of this note, the body of this paragraph is written out, and then that particular statement which is found in Mr. Lawrence's *addenda* is interlined; showing that he first copied what he found in the foot-note, and then, on turning to the *addenda*, he found this matter which ought to go in there, and interlined it.

The next thing to which I call your Honor's attention, are the dates, — "19th August, 30th March." Then, further down, in the third paragraph, at the end, "Sept. 30," and "28 Sept." Observe the peculiarities of these dates, which are exactly the same as in Mr. Lawrence's note. Those four dates are there written in the same way. All the facts and references are reproduced that are found in Mr. Lawrence's note, and the way in which these dates are written is the same, and there is nothing which required or shows the use of any book except L.

Next is a citation of the "Almanach de Gotha," near the close of the first paragraph. That is the citation to which I have already referred, where Mr. Dana, as Mr. Morse pointed out, has given the year of the *Almanach*, which is not given by Mr. Lawrence, and falls into an extraordinary error, showing not only ignorance of the particular matter, but ignorance of the whole plan of that work. (See p. 85, *supra*.)

Next, in the paragraph second below, on that page, — "After the campaign of 1862, Turkey insisted on her sovereign rights over Montenegro, and provided by a convention, to which the prince was compelled to agree, that Turkish garrisons should be received in the country. The convention recognizes the *suzeraineté* of the Porte. Russia remonstrated against these terms, but England declined to interfere." One would suppose the natural way after this statement would be to cite first the Russian remonstrance, and then the despatch in which England refused to interfere; but it so happens that Mr. Lawrence, for some reason or other, reversed the order, and Mr. Dana, copying him, of course did the same. It is a matter of no importance in itself, but the other would seem to be the more natural way. Then Mr. Lawrence cites these same despatches, so that Mr. Dana could have got all he has got from Mr. Lawrence's notes, making the following mistake in copying: Mr. Lawrence speaks of the first despatch as a despatch of "Lord Russell to the diplomatic representative of England, at the Court of St. Petersburg." It was a somewhat peculiar phrase, and a little awkward, and perhaps Mr. Dana thought he would make it a little better, and he calls it a de-

spatch to the "English Ambassador." It turns out that the English Ambassador, Lord Napier, was absent, and that the person addressed was the *diplomatic representative* of England,— Secretary of Embassy, Mr. Lumley,— and not the English *Ambassador*. Mr. D.'s error is such as a man might make from conjecture, but which a knowledge of the facts would have rendered impossible. The despatch itself shows that the person addressed was not the Ambassador.

Mr. Morse pointed out that L. did not have the name "Moldo-Wallachia," by which D. says that the province is "more commonly" called. It appears from D.'s MS. that this was an addition, interlined after he had completed what he copied from L.; and, as it is the "common" name, it is one of the kind of additions not requiring learning, study, or research which he frequently makes.

Mr. Dana thinks that the principal facts are to be found in the opinion in the case of the *Gerasimo* (*Cremidi vs. Powell*), 11 Moore's P. C. R. They are to be there found; and it is no small praise of Mr. Lawrence's work, that the learned judge (Lord Kingsdown) made the whole of that part of his opinion by extract and quotation from Mr. Lawrence's note to his edition of 1855, p. 48, *a*. This was pointed out by Mr. Lawrence in his testimony (p. 88), and shows the great and recognized value of the purely historical portion of his book. It is quite clear, however, from the details already referred to, that D. (who, like L., does not cite the *Gerasimo* in this note) in fact copied directly from L.'s note; though of course it would be quite immaterial whether he made his book by directly copying from L.'s pages, or by picking up here and there acknowledged quotations and extracts, and, *putting them together*, reconstructed the book. If he wrote from his own knowledge, or even attempted to vary L.'s arrangement, he might have cited this case, which is in L, p. 574 (*nom. Cremidi vs. Powell*.) D. does not say, as matter of fact, that this note was not copied from L. Here, as elsewhere, your Honors will observe that others give credit to Mr. Lawrence for what they take; that Mr. Dana has plentiful citations of Halleck and other authors, from whom he copies, but never once alludes to Mr. Lawrence, except by denying indebtedness to him in his preface. Your Honors will not be able to reconcile this with the attempted defence that he even honestly believed that he was making a fair and permissible use of L.,— such as he made of other authors, and such as other authors made of L.,— even if the

extent and character of the use made, or the agreement of June, 1863, would permit of that defence.

This note is another example of the immateriality of the fact frequently insisted upon by the respondents, that D.'s annotations are shorter than L.'s, and of the incorrectness of their statement that L. merely covers the time since Mr. Wheaton, and D. goes back of that. L. states the condition of the principalities from 1774 down to the present time. D. states their condition at the present time. That is, he copied the last part of L.'s note, and omitted the rest. That is no defence, the part taken being of substantial value and amount, and requiring study and learning to prepare it.

D., note 22, p. 56, is from L., note 25, p. 64, attached to the same word. The opening argument has the following: The next is n. 22, on the same page, stating a little historical fact, but citing no authority. The same thing is found in Lawrence, and he cites no authority. The first thing to be noticed is, that the date, "2 Feb.," is written in the same way in both; so that there are five dates written in different ways on that page of D., and *all* written exactly as in Mr. Lawrence's note.

D.'s MS. (p. 384) shows that this note was first "written with phraseology identical with L.'s original language, and then changed, some words being changed while writing. L. has 'ceded'; D. wrote 'ccde,' and erased it. L. has 'Monaco enclavé'; from a change in the construction of the sentence in D., it would be ungrammatical to use this phrase; D., however, wrote 'Monaco en,' and then struck out the 'en.' L. has the phrase 'annexed the territory,' etc., 'to.' D. first wrote 'annexed,' and changed it to 'included.' He must have done this *while writing*, because when he came to write the preposition he uses 'in' and not 'to.' Clearly this was *copying* so hastily as to follow the words, though meaning to change the phrases." (From opening brief, p. 72.) This could only come from actually paraphrasing L.'s note, in the most limited sense of the term, i. e., reading L.'s note while writing, and merely attempting to change the phraseology as he went along. If we only had, in *all* cases, those lost papers written while reading L.'s notes!

D., note 23, p. 56, consists of one citation. The facts stated by Mr. Potter (p. 199), and not denied, show that this note was made by copying from L., note 26, attached to the same word, and before D.'s eyes while writing this note on the interleaf. D. reproduces a typographical

error found in L., but not found in Phillimore, the only other author who is said to refer to the same authority (*v. supra* p. 77). Mr. Potter shows that the authority, which is the only one cited by L. and D., is a selection from five authorities equally pertinent, and that Dr. Twiss, upon the same subject, cites other authorities but not this one (p. 187).

"D., note 25, p. 61. A mere statement of an historical fact, found in L., p. 111. The text and note refers to Neufchâtel, and L.'s index *nom.* Neufchâtel refers to the same passage of the text, and to L.'s note on p. 111" (Mr. Potter, p. 199). The statement in the argument (p. 71) that D. makes no use of L., note 44, or any of its material, is not true. Note 25 is a reproduction of the *last* paragraph; and note 33, attached to the same word as L., note 44, is a reproduction of this and all the previous paragraphs that relate to the present condition of Switzerland.

"D., note 26, p. 61. Same word. Historical. A portion is continued since L. Dates written same way. Typographical error in a date taken from Le Nord,—an authority never found in any other writer, (Morse, 115 cross-ans., p. 442.) As originally written by D., it had some technical phrases exactly as in L., and which are the phrases of the original. These were changed for others apparently synonymous. (See Morse, p. 443.) D., in stating the contents of a law also stated by L., adds something which is not in L.: it is not in the law. (See Morse, p. 441.) Mr. Potter expressed a strong opinion that this note was copied from L. Mr. Morse (p. 413) says that 'the charge of the deposition is thoroughly groundless,' and he points out, as the grounds of his opinion, those differences of form which the subsequent production of the MS. show to be the *result of erasures and interlineations after the note was written*, and each of which involves a departure from the original authority referred to (Record, p. 384). Here, as elsewhere, he seems to think the reproduction of a typographical error to be of no importance" (our brief, p. 72). (See Mr. Potter, p. 199.)

The first sentence of this note relates to Lombardy, is attached to a portion of the text giving an account of Lombardy, and is copied from L., p. 153, which is pointed out in L.'s index, *nom.* Lombardy. The rest is from L., n. 29, p. 172, to the same word, and the supplement thereto.

This note was originally partly written on the fly leaf, reproducing some of L.'s expressions, and then written out on the foolscap sheets in different language. On the fly-leaf, opposite L., n. 29, these words are

found: “substance of this note.” (See MS. in Record, p. 384, sp. 10, 11.)

D., note 27, p. 64. Historical. See Mr. Potter, pp. 172, 199. D. copies citations of Le Nord, a paper he has never seen. (See p. 67, *supra*.) L. had spoken of the “Council of State for the Kingdom of Poland,” that being the correct name, and the name used in the original State paper in Le Nord, and that D., as if to make a paraphrase, changed it to the “Diet of Poland;” no such body has existed since the abrogation of the Charter in 1832; this mistake could not have been made unless Mr. Dana was either ignorant of the whole subject-matter of his note, or else was copying so carelessly, without verifying, thinking only of imparting to his work a different form, as not even to perceive where changes could be made and where not. (See p. 82, *supra*.) In D.’s deposition (p. 348), he tries to make it appear that he took this from a cyclopædia, where the phrase “Diet” is used, though he does not state as matter of fact that it was derived from that source; whether he copied directly from the cyclopædia, or paraphrased from L., that he should not, of his own knowledge, have corrected so gross a blunder, shows an ignorance of modern European history entirely unaccountable, unless he habitually relied upon copying to supply the defects of his own want of learning. (See Mr. Lawrence’s dep. p. 129, and note 202, *infra*.) As usual, however, the production of his MS. showed that Mr. Potter was right, and that, in fact, he got it by copying and paraphrasing from L. He began actually (record, p. 384 (26)) to copy L.’s phrase, and having got so far as to write “*Cou*,” he struck that out and wrote “*Diet*.” This, like an instance already pointed out (note 22) could only come from reading L.’s note while writing, and endeavoring to reproduce it, and attempting, as he went along, to change the phraseology.

Mr. Potter had said that this note was in L.’s note and in the supplement. Mr. Morse points out a matter of importance which he says should be, but is not in the supplement; and on cross-examination he stated that this was one of the “special cases of inaccuracy” he had found in Mr. Potter’s deposition. On the book being put into his hands, he finds it there at full length (pp. 415, 442). (See L. n. 30, and supp.)

“D., note 28, p. 70, is a mere statement of a fact found in L., note 36, attached to the same word of the text. The other statement in D.,

that the Zollverein has charge of the navigation, is not in L., and is not true." (Mr. Potter, p. 199.)

D.'s note says, that "Austria is indirectly included in the Zollverein by the operation of a treaty with Prussia." The argument (p. 72) says, "we hardly think L.'s explanation of Austria's position could have been drawn from D.'s note." L. mentions the treaty with Prussia, giving its date; says that it provided that all States which should at any time belong to the German Zollverein (as well as the Italian States united in a customs-union with Austria,) might accede to it, and that "the relations between the Zollverein and Austria are still regulated by the above treaty," though he says negotiations were about to begin for the *formal* entry of Austria into the Zollverein. It seems to us that it is stated in L. Both L. and D. were published before the events of 1866.

D., note 29, p. 72. An historical statement. See Mr. Potter, p. 199. The argument (p. 104) says, "L.'s note is not at the same place and is quite different." The source of D.'s note is L., note 37, p. 85 attached to the *same word*. D. wrote his note on the interleaf, with L.'s note under his eyes while writing. The following is rather more than half of D.'s note:

L. (p. 85). "It was the 47th article of the Final Act which was invoked by Austria on occasion of the Italian war in 1859, as menacing her territory within the Confederacy. . . . Baron Schleinitz wrote . . . that the Cabinet of Berlin would not regard the Italian question as a Federal affair and that it would not admit the application to it of the 47th article. 'If it was attempted,' he said, 'to raise a question of this nature with the Diet, Prussia would regard any decision of the majority as incompetent to bind her,' etc.

It was on the proposition of the Prussian Minister that . . . the Diet, on the 23d of April, placed the Federal contingents on a war footing. . . .

D. (p. 72). "During the Italian war of 1859, Austria invoked the 47th article of the Final Act on the allegation that her territory within the Confederation was threatened by France and Sardinia.

Prussia refused to consider that war as a matter affecting the Confederation,

and gave official notice that she would not be bound by a decision of the Diet to that effect.

At the same time, she agreed to the Federal contingent being put on a war footing.

On that occasion the most hostile feelings towards France were manifested in Bavaria, Saxony, Grand Ducal Hesse, Würtemberg and Baden."

Then follows the statement of the Prussian opposition, already quoted, and also the following at the end of the paragraph: "Nothing more was done than to develop the defensive resources of the Confederation."

L. quotes from Gortschakoff's despatch remonstrating against the proposed action, and saying, "The German Confederation is a combination purely and exclusively defensive," citing *Annuaire des Deux Mondes*, 1858-9, pp. 596, 1009, 1017.

This is the whole of the first part of D.'s note which originally ended here. (MS. in record, p. 384.) The reference to the *Ann. Reg.* must have been added afterwards by mere guess-work, and without looking at it, for the matter is not referred to in the volume, (Mr. Potter, p. 199; Mr. Morse, 184 cross-ans., p. 451). Mr. Morse said that the statement in the first sentence in L. is not sufficient to authorize a careful writer to state that Austria was threatened by "France and Sardinia" (p. 414).

"*Cross-Int.* 182. Who were the only parties opposed to Austria in the Italian war of 1859?"

Ans. France, and I cannot say certainly whether any Italian States besides Sardinia or not" (p. 450).

Mr. D. did not entertain the doubt which troubled his learned expert.

This note is another example of what they call D.'s "original reflections" (Morse, p. 414). They are merely a statement, in general terms, of the purport of the correspondence given in L. Mr. Morse admits this (123 cross-ans., p. 443,) and the whole value of D.'s statement depends on its being true *in fact*, and not a reflection.

D., note 30, p. 77, is from L., note 38, attached to the same word, and pp. 97, and addenda. (See Mr. Potter, p. 199.) It is an historical note a page long, and with full citations of *Le Nord*, etc. It contains a typo-

graphical error in the date of Le Nord, and some peculiarities in two citations reproduced from L. There are some additions of matters since L. but *without* authorities: *very full* citations so far as L. extends, and furnishes the authorities. The matter since L. is written on different paper, and pasted on in D.'s MS., after that which is taken from L. was written. Some citations were first written in the same order as in L., and then changed so as to stand in the order of dates. (See the MS. given on p. 388-9 and Morse, 244 cross-ans. p. 460.) In the margin of D.'s copy of L., there are pencil marks against the citations from the Ann. Reg. which he has reproduced (Record, p. 385). Mr. Morse says that there is not the "faintest trait of similarity" except that both "necessarily" allude to the same few matters of fact. But the proof of actual transcribing furnished by the MS. only confirms the opinion previously expressed by Mr. Potter.

The opening oral argument contains the following: "The next note I will turn to is note 30, on the 77th page of Dana, on *the German Confederation*. The first part of that note, as your Honors see, contains a very considerable number of facts and citations from the *Annual Register*. It appears that in Mr. Dana's copy of 'Lawrence's Wheaton,' which he used, there are found pencil marks in the margin opposite each one of these facts and citations. It is pointed out in Mr. Potter's deposition that there is a very remarkable coincidence of phraseology between the first part of that note of Mr. Dana, and the first part of Mr. Lawrence's note. For example:—'1848, an attempt was made;' (these words are in Lawrence) — 'Parliament met at Frankfort, May, 1848' — 'with the approbation of the Diet.' Then below, 'Austria, Wurtemberg, Bavaria and Hanover.' These four States are named in Lawrence exactly in the same order in which they re-appear in D. Then the citations from the Annual Register which are found in Lawrence are found reproduced in Dana, with this difference: the Annual Register is a book, each volume of which is made up of two parts, with different paging. One part has simply the numerals, and the other part has the numerals, with a bracket after them, to denote that it is a different part of the volume. Now, a person familiar with those books, and in the habit of going to them, knows that it is essential to put the bracket to the page, in order that the reader may know what part he is to refer to; but a person not familiar with the work, and not knowing what it meant,

might omit the bracket. That is what Mr. Dana has done. All these citations are those which require the bracket to be added, and he omits it; and it is pointed out by Mr. Potter that he almost always omits similar distinguishing marks from citations of some other books of the same character — the *Almanach de Gotha*, and the *Annuaire des Deux Mondes*, for example. From the *Register* of 1849, Mr. Dana cites pp. 347, 364. These are exactly the passages which are cited in Mr. Lawrence. It appears that there is a long account of the matter in question, which extends from page 344 to 370. Mr. Lawrence makes a general allusion to that whole account, and also mentions some details, of no very striking importance, which are found on the 347th and 364th pages, and therefore he cites those pages as being the pages on which those particular details are found, in addition to the general matter. Now, these particular details are not alluded to by Mr. Dana; his references are to the *general* matters; and for that purpose his reference should be from the 344th to the 370th page, because it is between those pages that all these matters are found: but, instead of that, he reproduces the reference exactly as he finds it in Mr. Lawrence's book. His next reference to the 'Annual Register' of 1850 is erroneous in the same respect. There are various references to the 'Annual Register' for the matter there cited. These matters are taken from Mr. Lawrence. Then comes a reference to some matters which have occurred since Mr. Lawrence's book was published. These matters are not taken from Mr. Lawrence, of course; but instead of going to the original sources for them, he does not go to any original source at all, but picks them up from newspapers or from what somebody has told him. Where Mr. Dana is taking facts from Mr. Lawrence, you find in Mr. Dana's note the results of Mr. Lawrence's care; nothing is stated without giving a reference for it; the moment Mr. Dana leaves Mr. Lawrence's notes, he states facts generally, without furnishing any reference or any means for verifying his statement, or enabling the student to go on and study the matter more carefully.

“ On the next page, he refers to some matters previous to Mr. Lawrence's book. Now those matters, involving a good deal of historical knowledge, are all to be found in Mr. Lawrence's corresponding note, from which Mr. Potter says Mr. Dana has simply reproduced them. And there is a striking correspondence in the phrases used, — not so much in the

exact form of the phrases, as something or other of resemblance between the two, which strikes the ear at once, on hearing the two notes read: such a resemblance as could not have appeared in Mr. Dana's note, if he had not read the phrase, or heard it read, a little while before.

"I have said that the citations from the Annual Register in this note were taken from Mr. Lawrence; then comes the passage relating to matters since Mr. Lawrence's book, which was not taken from it; then comes something more which is taken from Mr. Lawrence. Now, upon an examination of the MS., it turns out, that this note was written on different pieces of paper; the two parts which came from Mr. Lawrence on one kind of paper, and the additional part on a different paper and in a different handwriting, and pasted on, so that it would appear that the first writing was a reproduction of Mr. Lawrence's note: and after Mr. Dana had obtained what he wanted from that source, he went to somebody else and took the substance of what he found elsewhere, and he *pasted it in*, making up his note, therefore, in this way, — first taking from Mr. Lawrence and then from another author. The note was made, therefore, not by a thorough study of the whole matter, and writing from a full mind, but by first reproducing substantially what he found in Mr. Lawrence's note, and then going elsewhere, and attaching the two together with the aid of scissors and paste.

"There is a little more evidence from the same note. At the bottom of p. 78, there are a number of citations from 'Le Nord,' a French paper from which Mr. Lawrence has made copious citations, and from which Mr. Dana gives *nothing*, in this note or elsewhere, which could not have been taken from Mr. Lawrence's corresponding notes. Mr. Dana cites 'Le Nord,' Oct. 18; so, too, does Mr. Lawrence. It turns out that this is a mistake; the matter is found in the paper of Oct. 19. Mr. Dana puts all those citations in the order of the dates, that being the way in which he commonly puts citations, where the dates are given. Mr. Lawrence, it appears, taking these matters, not in the order of dates, but in some logical order, cited the proper newspaper reference after each matter, and it so happens that the first matter he cited was a matter taken from the newspaper of Nov. 21, and the first reference he makes is to 'Le Nord' of Nov. 21. Now, it turns out that in Mr. Dana's MS. that citation was written first; then he went on and wrote the others; and then, thinking he had better have them in the order of dates, he struck

out the citation of Nov. 21, and wrote it afterwards in its proper order, following his usual method; but the first thing he wrote was the first thing on Mr. Lawrence's page, from which he was copying."

In the respondents' argument (p. 171) there are some comments on the proof we have drawn from the order in which D. first wrote the citations of *Le Nord*. These comments are entirely founded on misstatements of the facts. Mr. Potter (p. 200) stated that part of D.'s note was copied from L.'s addenda, p. 983. For this proof, our brief (p. 57) referred to Record, p. 389, and Morse, 244 cross-ans., p. 460. On p. 389, it appears that in the MS. they stand thus: [Nov. 21 1862], Aug. 15, Aug. 31, Oct. 18, Nov. 1, Nov. 21, 1862, the first date here put in brackets being afterwards erased. Mr. Morse's 244 cross-ans., p. 460, states that in L., pp. 983-4 they are in the following order: Nov. 21, Aug. 15, Aug. 31, Oct. 18, Nov. 1. Although the matter in L. was thus explicitly pointed out, the argument proceeds to quote another and entirely different set of citations of *Le Nord*, from a different part of L., showing, of course, that D. did not copy from *those*, and says that it is our "only attempt at proof."

D., note 33, pp. 87-88, is a statement of the present Swiss constitution. (See Mr. Potter, p. 200.) L., note 44, attached to the same word, gives the past and present condition of Switzerland. D. copies from it what relates to the present condition. It was stated by Mr. Potter, and not denied, that all D.'s facts and authorities are in L., one of the authorities being the "Annuaire," from which D. has no citation except such as are copied from the corresponding note in L. In the same line with this citation in L., there is another authority for the *previous* condition of Switzerland, a matter discussed in L. but not alluded to by D. It appeared that D. copied *all* these citations into his note, and afterwards erased the first (Morse, 207-209, cross-ans., p. 454). Obviously this could only happen from D.'s reading L.'s note and writing his own from it, *as he read*, and doing it hastily and carelessly. This note is written in the interleaved copy of L. It contains nothing subsequent to L.

"D., note 35, p. 91, is a mere statement of an historical fact found in L., p. 330. L.'s index has, 'Fortifications regulated by treaty, 116: of Russia in Black Sea, 330,' — 116 being the passage of the text to which D.'s note is appended, and 330 the page of L.'s note where the matter of D.'s note is found" (Mr. Potter, p. 200). These facts are not denied.

Mr. Dana testified (p. 318) that his course was not to read through L. or the other hand-books, but to read up each topic separately. Of course, in doing this, he would use L.'s index to find out all that L. has to say on a particular subject. In this case, he seems to have done so, and thus to have been led to take this fact as his only illustration of the point, and to put it at that part of the text which the index suggested as the place where it ought to go.

D., note 37, p. 116, is a purely historical note, taken from L., addenda to note 48, attached to the same word. (See Mr. Potter, p. 200.)

D., note 38, p. 118. (See Mr. Potter, p. 200.) The note is entitled, "Intervention in the Ottoman Empire." It is not denied that all the facts, etc., are in L., brought together by his index under the word "Turkey." We look in vain for the "philosophic deductions" (argument, p. 105), unless they are the statement that the moving cause of intervention was the apprehension that Russia might gain a formidable preponderance if she got control over Turkey. It was supposed by Mr. Potter that this might be written by any "person of ordinary education and intelligence" (p. 232). But the argument (p. 105) "presents this note as one of the best instances of . . . philosophic deductions."

"D., note 39, p. 120, is a mere statement of Heffter's views contained in a paragraph translated in L., note 50, attached to the same word of the text. The French has *son prochain*, in the singular; both L. and D. translate it 'neighbors,' in the plural." (Mr. Potter's deposition, p. 200.) That Heffter applies the right to civil wars is expressly stated in the 7th line of L.'s translation. The other matters in L., note 50, are reproduced in D., note 40, which is on the same page as note 39, and immediately follows it.

D., note 40, p. 120. (See Mr. Potter, pp. 200-201.) The argument (p. 106) says that this is one of those notes which are "in the nature of original essays," and intimates that there is no foundation whatever for the charge of copying. An analysis of this note will show what Mr. Dana considers an original essay.

The whole of this note consists substantially of a collection of instances of mediation, citing many authorities,—not text-books, but Hansard, Martens, etc. It is not made from one, but from two passages of L., one beginning on p. 133, and another on p. 495, and the addenda

thereto, pp. 1009–27. The title of D.'s note is "Mediation." Under that word in L.'s index, those passages are pointed out, and brought together.

"A typographical error in the reference to Hansard, — citing p. 526 instead of 525, — is found in L., and is reproduced in D.

"L., note 53, p. 139, refers to a despatch about Portugal and to a matter of detail not alluded to in D., and cites for it Hansard, 3d series, xcii., 306, 1291. D. gives, as a *general reference* upon the subject of interference in Portugal, pp. 306, 1291.

"L. cites, also, Hansard, xciii. 417–466. D. gives, as a general reference upon the subject, 417–466, exactly as in L. This is apparently intended to cover the whole debate, and is wrong; it should be 382–469. I can see no reason for this citation, 417–466.

"The debate was renewed two days afterwards. L. does not refer to this renewed debate; D. does not.

"The significant fact with regard to the statement about the Queen of Portugal, namely, that a statement found in D. and L. is unintelligible without the previous statement, which is found in L. but omitted in D.; and the error as to France; and the fact that the three authorities cited in that connection in L., and two in another connection, and three in another are found in D. in the same order, and are the only ones there found, have already been noticed. (Record, p. 168.)

"Phill., vol. i., p. 433, has a collection of instances of mediation quite different from the collection in L. and D.; but D. has none that are not in L." (Mr. Potter, p. 201.)

Mr. Potter also stated that all of this note, including twenty citations of despatches, treaties, etc., was in L., except one recent despatch to Mr. Seward in answer to one by Mr. Seward, from which L. had quoted. The only attempts to impugn any of the statements in Mr. Potter's deposition about this note are made by Mr. Morse (p. 415) and Mr. Dana (76 cross-ans., p. 378), and, on the cross-examination of Mr. Morse and Mr. Dana, their charges were admitted to be unfounded. For Mr. Morse's charge (1), see 191 cross-ans., p. 452; for (2), see 192 cross-ans. (This was one of Mr. Dana's attempts to paraphrase, where L. used the technical and correct word, and where D. has fallen into an error showing ignorance.) The statement (3) referred to is a statement of the contents of despatches quoted in L., p. 1009 (addenda). (4) is a mere *general reference* to U. S. Dip. Corr., for 1863, vol. i., as

containing despatches of that year, no page being cited, and therefore not showing any examination of the book.

The quotation from Mr. Dana's testimony, given on p. 106 of his argument, is a most striking illustration of his entire unreliability as a witness. He was asked to point out in his book a citation which he had said was not in L. With the books open before him, he points out Hansard, in the first paragraph of note 40, as not being in L. In answer to the next question, however, he reads it from L., p. 495, line 15. He said that he had a citation of the Statutes which was not in L.; but, in answer to cross-int. 82 (record, p. 379), he read it from L.'s note. And yet in his argument he repeats, *as the basis of the argument*, these statements, made by himself and by Mr. Morse, thus shown by their own cross-examination to be untrue, and makes no allusion to the cross-examination. More than that, the refutation of his statements follows his statements immediately in his deposition (pp. 378-379). Yet, though he quotes at length these statements, in this instance he gives no intimation in what part of his deposition, ninety-two printed pages long, it is to be found.

The respondents often speak of the "original reflections" of Mr. Dana, and the "mere collection of quotations," of which they say Mr. Lawrence's notes are composed.

L., note 51, p. 133. "The difference between a mediator and an arbitrator consists in this: that the arbitrator pronounces a real judgment which is obligatory, and that the mediator can only offer his counsel and advice."

L., p. 495, mentions the offer of the Emperor of Russia, in 1812, and *characterizes it* by quoting from Mackintosh: "A mediator is a common friend who counsels both parties with a weight proportioned to their belief in his integrity, and their respect for his power. But he is not an arbitrator to whose decision they submit their differences, and whose award is binding on them."

D., note 40, p. 120, attached to the same word: "But the term mediator is limited to an offer of advice, or assistance in the way of arbitration, leaving the acceptance of the offer to the free will of the other party."

D., p. 120, mentions the offer of the Emperor of Russia, cites the three authorities in L.'s paragraph, and in the same order, and gives the following *as his own original matter*: "In this case, he did not offer himself as an arbitrator whose award the parties would agree to accept, but as one who, by permission of the parties, after examining into the causes of the controversy, should give advice and recommendations."

Mr. Morse (p. 415) testified that the paragraph last quoted from D. "had no counterpart in L.;" but, on cross-examination, the passage from which D. copied it was pointed out to him, and he admitted his error. Yet the argument (p. 106) says, "D. includes this note among those which he refers to 'as being in the nature of original essays,'" and on p. 63, on p. 106, and again on p. 107, repeats the charge made by Mr. Morse, making no allusion whatever to the complete refutation of it on Mr. Morse's cross-examination (191 cross-ans., p. 452).

L., note 167, p. 495, contains a collection of instances of mediation, or attempted mediation, where the United States has been one of the parties litigant. The corresponding portion of D.'s n. 40 contains no instances, and no authorities or citations, and no facts except such as are in L.'s note. It contains *all* the instances in that note of L., with *one* exception; that exception is the arbitration of the King of the Netherlands, respecting the northeastern boundary. Your Honors will be at a loss to conjecture why that interesting and important affair was omitted. But when you come to think of the matter, or to look at L.'s note, you will find that Mr. Lawrence was the minister who negotiated that submission on behalf of the United States; his note does not quote from or cite any of his own despatches, or make any allusion to the fact of his position, except by citing the first despatch as "Mr. Clay to Mr. W. B. Lawrence," and all the others as "The same to the same," and there would seem to be no reason why those despatches of Mr. Clay should be thought any less valuable than many other despatches taken by L. from MS., and reproduced by D., except that it would be impossible to cite them, or to narrate the transaction, without mentioning the name of the minister to whom they were written. The same delicate sense of literary honor, and the same keen discrimination which made him think it his duty (record, pp. 344, 396) to take from L. every public fact or document that he wanted, and only stop short of an acknowledgment of his indebtedness, compelled him, in this note, and in notes 67-, 112, 128, to rigidly exclude everything which could bring Mr. Lawrence's name to the reader's mind. (See p. 103, *supra*.)

Here as elsewhere D. only follows L.'s directions in arranging his authorities. Though part of D.'s note is copied from L. n. 167, yet that note of L. has cross-references to notes 51, 53, from which the rest of D.'s note is copied. D.'s note 149, p. 366, attached to the same word

as L. n. 167, also contains a cross-reference to D. n. 40, where L.'s notes are reproduced.

The following is from the opening argument: Mr. Potter said (p. 201):

"D., note 41, p. 126, is a long note about 'Intervention in Mexico. The first three pages contain an account of what had taken place prior to the publication of L. This portion of the note contains fifteen citations of American and Foreign diplomatic and State papers, and several quotations. The rest of the note (three pages) is entirely an abstract of Mr. Seward's Dip. Corr., no other authority being cited."

There is one other matter cited, — a speech of Lord Palmerston; but it does not appear that that is not one of the numerous things which Mr. Seward has published in his volumes of Diplomatic Papers. Mr. Dana is generally very free in making his citations from Mr. Seward's published volumes, that not requiring any great amount of research.

I read again from Mr. Potter's deposition:

"All the facts and all the authorities prior to L. are contained in the corresponding notes in L., pp. 156-9, 509, and addenda 997-8, in such a way that the note in D. could readily have been written without looking at any other book, except that to one point where L. cites two despatches of Seward to Dayton, D. cites them and also a third contained in the same volume of Dip. Corr. The Congr. Doc., referred to by L., contains 434 pages of despatches, etc.; of all these, L. has cited only five, and D. has cited the same five and no others."

This is not a case where the whole of Mr. Dana's note is found attached to the same word of the text in L.; Mr. L's annotation is in three different places (two notes and the supplement to them). D.'s title is, "Intervention in Mexico." The index of Mr. Lawrence, under the head "Intervention," refers to the places where are all the passages relating to Mexico, and these are exactly the passages which D. has copied.

The first thing in this note to be pointed out is the third line of the second paragraph, "The claim was declared to be, that bonds of the Mexican government were held by citizens of those countries, for which the Mexican government had failed to provide payment," etc. Mr. Morse pointed that out, as a matter which D. could not have got from L., and for which he must have gone to the original, because it is not found in Mr. Lawrence's note. That is true, undoubtedly; but, on cross-examination, the text of the Tripartite Convention, in which the

declaration which was made is contained, was put into the witness's hands, and it appeared that the claim stated by Mr. Dana *is not found there*, the statement being, "The performance of the obligations contracted towards them by the Republic of Mexico," and *that* claim is found in Mr. Lawrence. This statement that the claim was made upon the "bonds held by citizens," etc., shows that Mr. Dana was ignorant of the matter, and attempting to paraphrase. (Mr. Morse, 195-200 cross-ans. p. 452.)

Then Mr. Lawrence has a long quotation from that treaty, or, more properly, convention, which Mr. Dana has reproduced exactly in the words of Mr. Lawrence. Upon the books being put into Mr. Morse's hands, on cross-examination, it appeared that the translation of the treaty, as given in Mr. Seward's correspondence, was entirely different, though the translations given by Mr. Lawrence and Mr. Dana are identical. (199-200 cross-ans., p. 453.)

The next matter is on p. 127. There are quite a number of despatches there cited, which are all found on one page of Mr. Lawrence's book, and they are cited by Mr. Dana in exactly the same order as found upon Mr. Lawrence's page.

The next is a quotation from the Queen's speech, Feb. 1862. Mr. Lawrence, by some accident, had interpolated into that a word which did not belong there. He had used the word "various," it not being in the original. Mr. Dana's quotation is identical, and repeats that word. Mr. Potter has looked at all the places where it can be found — Hansard, the Times, the Register, etc., — and in none of them is this word to be found in the speech.

The next is a quotation from the instructions of the French Minister to the Admiral commanding the French fleet in the Gulf. Mr. Lawrence, in the first line, has the words "The presence of the allied forces," etc. Mr. Dana's MS. shows that he first wrote these words as in L., and then changed the expression to "The presence of the forces of the allies" (Record, p. 389.)

In the second line below occurred a peculiar idiomatic French expression, having a special meaning — *tenter un effort*; it signifies "to try the effect of an effort," and not "to try to make an effort." Mr. Lawrence translated it literally and correctly "to attempt an effort;" Mr. Dana, who was thinking only of fluent English, and not caring much about strict fidelity to originals, paraphrased L.'s translation and

printed it "to make an effort ;" an error which he would not have made if he had had the original before him, or translated it himself. Mr. Morse, by way of showing that D. did not copy from L., points out this difference of phraseology ; but, unfortunately for Mr. Dana and for Mr. Morse's judgment as to what disproves copying, it appears from Mr. Dana's MS. that he first wrote that "bad phrase" exactly as in L. and changed it afterwards. (Record, p. 389.)

On the next page, there is a quotation from the "Révue des Deux Mondes," and in that translation there is some slight difference in punctuation, and a difference of a word between Mr. Dana and Mr. Lawrence ; it appeared upon Mr. Morse's cross-examination that this also is an error on the part of Mr. Dana, and Mr. Lawrence is correct. The "Révue des Deux Mondes" is a publication which Mr. Dana has cited on two or three occasions in his book, but it appears that he has not taken anything from it either by way of reference, quotation or citation, which could not have been directly copied from the corresponding note of Mr. Lawrence. Your Honors will observe, that this part of the note which is taken from Mr. Lawrence has references to a great many foreign diplomatic papers, requiring an examination of the French yellow book the English despatches, and the French "Révue." It is very marked in its class of citations. The rest of the note, which is since Mr. Lawrence, is entirely from Mr. Seward's published volumes of correspondence.

On p. 380, Mr. Dana undertook to say that a portion of the matter common to L. and D. was also in Halleck, and substantially evaded cross-examination on that point. It appears from Mr. Morse's 228-9 cross-ans., p. 456, that the earliest fact or authority contained in that note did not exist until several months *after* the publication of Halleck's book.

L. p. 159. "Earl Russell in his instructions to Sir C. Wyke of the 30th of March, 1861, admits 'that it has not been the custom to interfere authoritatively on behalf of those who have chosen to lend their money to foreign governments.'"

D. p. 128, end of first paragraph, says, *as if it were the results of his own reflection and learning*, "it has not been the custom for nations to interfere authoritatively in behalf of their citizens who have chosen to lend money to foreign governments."

Mr. Dana copied from L., pp. 156-9, until he had finished what he

wanted from that note of L. He then turned to the *addenda*, found there the matters about Forey and Lorencez, and *interlined* them. (MS. in record, p. 389, sp. 40.) In that *addendum*, he found a cross-reference to L., p. 509. He turned to that, and the next paragraph in his note, at the bottom of p. 128, is taken from L., p. 509, with the additions we have referred to since L.

There is a strong verbal resemblance in this paragraph which more than suggests an attempt simply to paraphrase L.'s language. Without taking space to reproduce the whole, we notice:

L., p. 509. "At a conference of the three powers at Orizaba, the 9th of April, 1862, the Spanish and English commissioners declared that in refusing, etc., France passed the limits which the convention of London assigned . . . and withdrew from all further co-operation."

"France, whose pecuniary claims were the least considerable," etc.

D., p. 128. "At a conference held at Orizaba, on the 9th of April, 1862."

"The Spanish and English commissioners, objecting that the French had gone beyond the terms of the convention in giving, etc., withdrew from further co-operation."

"The French government, whose pecuniary claims upon Mexico were much smaller," etc.

Of the three despatches in D., p. 129, two are from L., p. 997; the other (Seward to Dayton) is *interlined* (MS).

D., note 46, p. 137, is from L., note 56, attached to the same word, and from Story. This note contains the error as to the French law, which not only shows ignorance of the particular authority quoted, but an entire misconception of the French jurisprudence as distinguished from the common law, and the civil law. This is all pointed out in Mr. Lawrence's deposition, p. 129. Mr. Dana attempts to reply to it, by saying that he does not understand the law to be what Mr. Lawrence shows that it is. It was supposed that the error in his note sufficiently showed that he did not understand it, and that his mistake arose from carelessly copying and attempting to paraphrase that which he did not understand. (See Mr. Potter, p. 203.)

Mr. Morse testified (p. 426), "the citations are to be found in Story." On cross-examination, he confesses that Westlake, the very one which we say D. copied, and in connection with which this error arose, is not

in Story. (15 cross ans., p. 429.) There is a pencil mark against L.'s note in the margin of D.'s copy of L. (Record, p. 385, sp. 18.)

D., note 47, p. 139. (See Mr. Potter, p. 203.) The opening oral argument contains the following:

"The next is the 47th note, on p. 139 of Mr. Dana's book. The part of the text to which this is attached treats of the Droit d'aubaine, and this note is a discussion which somebody thought pertinent to attach to that topic. Mr. Lawrence mentions the treaty with France of '23d of February, 1853,' upon the subject, and afterwards gives a list of treaties on the subject, again mentioning that with France. Mr. Dana begins by mentioning the treaty with France of '23 February, 1853,' etc. That date is written in the same way as in Mr. Lawrence's note attached to the same word of the text. He states the law upon the question as mentioned by Mr. Lawrence, and cites the same authorities, and then states that 'treaties exist with France, Russia,' etc., (there being no treaty with France then in existence except the one before mentioned). He gives the citation 'U. S. Laws, 992'; and that is exactly like the note of Mr. Lawrence, except that Mr. Lawrence calls them 'Statutes at large.' And here I desire to call your Honors' attention to the fact, that it appears that Mr. Dana did not use the 'Statutes at large,' where the treaties are pagged with the body of the work, but used the annual pamphlets, where the treaties are pagged separately. Now we find that it is the edition of the statutes used by L. to which Mr. Dana's reference applies and not the edition used by D. this reference being exactly as in L.

"To this part of the text, referring to this particular topic, Mr. Dana has attached a note, the first part of which is devoted to the question whether the treaty making power of the General Government can override State laws, or whether it requires State laws to carry it out: that is a question which cannot arise under the French treaty — the first one mentioned — because that is expressly made subject to State laws. It is a question that arose under the Prussian treaty, to which the opinion of the Attorney General, cited in L. and D., relates. As usual, Mr. D. in each instance copies from L.'s corresponding note merely, and does not attempt a new arrangement or combination. Thus, he has failed to notice two decisions of the Supreme Court, subsequent to that opinion, and which seem to put in doubt the right of the Federal Government to

change by treaty matters peculiarly of State jurisdiction. They are in Lawrence's Wheaton, *addenda*, p. 1000. To another portion of the text, p. 458, Mr. Lawrence has appended a note (155) discussing how far legislative acts of Congress are necessary to give effect to treaties of the United States Government; and, to the same word, Mr. Dana has attached a note, 139, p. 339, with the same authorities cited by Mr. Lawrence.

"Mr. Halleck treats of both these subjects. Mr. Dana states that in Halleck's International Law there are a great many cases cited in support of the treaty-making power of the general government; but it so happens that Mr. Dana and Mr. Lawrence have hit upon exactly the same cases, though, according to Mr. Dana's own statement, there are a great many others.

"Mr. Dana goes on and speaks of the 'Hawaiian Islands.' Mr. Lawrence uses the term 'Sandwich Islands.' Mr. Dana states that he had been there, and knew the correct title, and used it because he wanted to be exact in etiquette. One would have supposed that if he wrote *from knowledge*, and with thought, and not by merely copying from L., he would have written it right at first; but somehow his MS. has 'Sandwich Islands', as Mr. Lawrence has it, and it was afterwards changed in reading proof (Record, p. 385 (20))."

Mr. Dana's MS. of this note affords most conclusive proof of transcribing with L.'s note open before him. It is written on the interleaf, facing L., p. 170, and on p. 170, there is a mark in the margin opposite the treaty with France of 1853; and his citation of this treaty, like all the citations in the MS. of this note, is to the edition which Mr. Lawrence always cited from, and not to the annual edition which Mr. Dana used. (See p. 221, *infra*.)

It appears upon inspection of L., p. 169, and from Mr. Morse's 241 cross-ans., p. 458, that, in a long list of citations of treaties, L. has the following, in the following order: vol. ix., p. 865; ix., p. 868; ix., p. 910; ix., p. 818; ix., p. 830; ix., p. 849, p. 827; ix., p. 902; ix., p. 979; *ib.*, p. 886; x., p. 878.

D.'s MS. (Record, p. 385, sp. 20) has them as follows:

818, 830, 849, 827,
U. S. Laws, viii. *passim*; ix., ^Λ 865, 868, 910, 902, 979; x., 878.

That is to say, he began to copy from L. into his note, and wrote 865, 868, 910; then the next ought to go before 910, in numerical order, and so he interlined it there (818), then 830, 849, next 827; then he found that he could not get them into numerical order by interlineation in that way, and so he went on in the regular line, 902, 979, x., 878; and then he concluded that there were too many references, and he printed it "U. S. Laws, viii., ix., x., and xi., under the name of each nation." (See p. 221, *infra*.)

To the matters copied from L., D. has added a reference to Halleck, and a couple of authorities from Halleck. These were added by interlineation afterwards (p. 385, sp. 21).

This note is a statement of the nature and contents of certain treaties, and of the principles of law applicable to them. All this, except the above authorities, are from L.

D., note 49, p. 142. The substance of D.'s first paragraph is, that most questions involving private rights are determined by commercial domicile, and not political citizenship. Mr. Wheaton states this in the section of the text to which the notes are attached.

In the next paragraph, he says that every nation claims the right to naturalize without the consent of the parent State. Mr. Wheaton says, that the right of the parent State is subject to the exception that another sovereign can naturalize. Mr. Dana says, in substance, that most nations also admit the right of expatriation. Mr. Lawrence (middle of p. 919) says that this is the fact in countries where the English common law does not prevail. Mr. Dana's statement implies, and perhaps fairly states, that a change of residence, and a manifestation of an intention not to return, and an assumption of the obligation of a subject of the foreign country, are necessary to constitute expatriation. This is stated in a quotation in Lawrence, p. 921, introduced to show what constitutes expatriation. Mr. Dana then contrasts with this the English doctrine of perpetual allegiance, and gives a quotation from Dr. Twiss. On pp. 918, 919, L. gives this quotation from Dr. Twiss, and contrasts with the English doctrine the recognition of the right "in all countries where the English common law does not prevail." This quotation is the same in L. and D., except that D. incorrectly changed one word in copying.

The rest of the note, three pages and a half long, is purely a statement of historic facts, the contents of despatches, etc. The respondents'

argument (p. 107) says: "D. includes this note among those in the nature of 'original essays,' to which he says 'I gave as thorough thought, I applied to them as much mental power, as I am capable of giving to anything. However long I may live, I can never expect to try harder, and give more original power to any subject, than I did to these notes' (Dep., p. 313)."

There is hardly any proof of copying short of an exact reprint of the whole which cannot be found in this note. (See Mr. Potter, pp. 204-5.)

The opening argument contained the following:

In Mr. Lawrence's long appendix on naturalization, there are marks in the margin against the following in D.'s copy of L.:

P. 898. *Fœlix*, Rev. de Droit Fr. et Etr. tom. ii., p. 328.

P. 918. Quotation from Twiss, i., ch. ix., § 160, p. 231.

Cass to minister at Berlin, July 8, 1859, — quotation.

P. 919. Kent, vol. ii., p. 49, — quotation.

Story on the Const. iii., p. 3, note 1, — quotation.

Wharton, State Trials, p. 654, — quotation.

P. 920. Op. Att'y Gen'l viii., p. 157, — quotation.

P. 921. Daly on naturalization, p. 26, — quotation.

Mr. Black's opinion in Anthor's case, Aug. 17, 1857, — quotation.

P. 922. *Fœlix*, Droit Intern. liv. i., t. i., tom. i., p. 55.

P. 924. Matters in War of 1812.

P. 925. Citations of Sen. Ex. Doc. 38, p. 167, cited for despatch, Palmerston to Bancroft, Wheaton to Sec. of State, July 29, 1840, *ib.*, p. 7, — quotation.

Mr. Everett to Mr. Barnard, 14th Jan. 1853, *ib.*, p. 54, — quotation.

P. 926. Mr. Webster's note of June 1, 1852. [Statement of its contents, but no quotation.]

Mr. Cass to Mr. Wright at Berlin, July 9, 1859, *ib.*, p. 135, — quotation.

P. 927. Manteuffel to Fay, Oct. 22, 1852, *ib.*, p. 49, — quotation.

Manteuffel to Wright, Nov. 9, 1857, Dept. of State MS.

Walewski to Calhoun, in answer to Mr. Mason's note, of Nov. 25, 1859, *ib.*, p. 214, — quotation.

- P. 928. Faulkner to Thouvenel (Zeiter's ease), April 7, 1860, — quotation.
Decision of the French Court in Zeiter's favor.
- P. 929. Gavino de Liaño, Cong. Doc. *ut supra*, p. 229.
Kosztka's ease.
Tousig's ease, — Marey's despatch, — long quotation, citing
33d Cong. 1st Sess. H. R. Ex. Doc. No. 41. (Record, p. 387, sp. 37.)

Mr. Dana reproduced *all* these in his note. He began by copying, with more or less omissions and changes of form, but without any additions, *all those authorities from which Mr. Lawrence had quotations*, reproducing more or less of the quotation or giving the substance of it. (See Mr. Morse, 203 cross-ans., p. 453.) He copied these exactly in the order in which they are found in L.'s note, with one change: he took out Mr. Cass's despatch from the midst of the quotations from text writers, and put it immediately after them, with the other diplomatic matter. (Mr. Morse, *ut supra*.) L. cited Palmerston to Baneroff, 36, Congr. 1 Sess. Sen. Ex. Doc. 38, p. 167, and further on, for the ease of Gavino de Liaño, he cited "Congr. Doc. *ut supra*, p. 229." These are correct. (Potter, 69 cross-ans., p. 256; 28, 29 ans., p. 261.) Mr. Dana mixed the two; he does not allude to Palmerston's despatch at all, but for Liaño's ease, cites Ex. Doc. 38, p. 167.

Mr. Potter (p. 158) points out that L. *twice quotes* from the same despatch of Mr. Cass; the first time giving the date "July 8," and the second time "July 9"; that Mr. Dana also, in two different passages of his note, reproduces portions of these quotations, and the first time he cites it as of "July 8," and the second time as of "July 9."

The following is from the opening argument:

"The next is a question as to Zeiter's ease, and the first citation as to that is 'correspondence between Mr. Mason and Count Walewski, Nov. 1859.' Mr. Mason died in Oct. 1859, and the correspondence was not, of course, with him, but with somebody else. But it will be found, upon looking at Mr. Lawrence's note, that in the same line, or the line immediately below, Mr. Mason's name is mentioned in connection with the subject, and the copyist of the note connected the two together, in attempting to reproduce this authority, thinking they ought to be connected. If Mr. Dana had looked at the very despatch referred to, he

would have found that it begins with some touching remarks in respect to Mr. Mason's death."

There is a quotation in Mr. Dana's note from that despatch. It turns out that Mr. Lawrence uses the word "has" instead of "had," and that the original has "for their exaction," which are omitted in Mr. Lawrence's note; these two verbal errors in Mr. Lawrence's quotation are exactly reproduced by Mr. Dana in his quotation. In this volume of correspondence to which both refer, there were a great many other despatches about Zeiter's case, about this time. Mr. Lawrence refers to two, and Mr. Dana refers to the same two. The next fact stated is, that the case came before a French judicial tribunal, and was decided in his favor. The same thing is in L., who says that in France this is a matter of judicial cognizance instead of being a matter of administration.

Next is a cluster of citations at the end. "Felix, Rev. Fr. et Etr. ii., p. 328," the first of them, is cited by Mr. Lawrence; but, as Mr. Potter points out, it has nothing to do with the particular matters discussed by Mr. Dana. One of them is Woolsey; and the two or three others that are not to be found in Lawrence are in Woolsey at the section cited.

Next is a citation of what Mr. Dana prints as "*de Beudant*," a French author. Mr. Lawrence cites that author the same way, but the name is "*Beudant*." The "*de*" and the *a* should be left out.

The next is "Westlake, Pr. International Law," — a book from which Mr. Dana has not a single citation or reference which could not be copied from Mr. Lawrence.

Next is "Twiss, Law of Nations." There is not a reference or citation in Mr. Dana's book from this author which could not be taken directly from the corresponding note of Mr. Lawrence.

The next is "New American Cyclopædia," article, "Naturalization." Now it is perfectly clear that Mr. Dana not only did not look at that article, but that he did not look at a previous authority he had cited. He has made, or rather copied from L. where it is found, a quotation from "Daly on Naturalization" as one authority, and then adds, as another authority, "New American Cyclopædia," article, "Naturalization." If he had looked at either of them, he would have known they were the same thing. Judge Daly wrote the article in the Cyclopædia, and had some

copies struck off in pamphlet form. It appears, therefore, that Mr. Dana did not know enough of these two books he was citing to know they were the same thing, and not necessary to be cited twice.

Now, at the end of this note, Mr. Dana says, “on the subject of Naturalization, see,” and names these authors; and Mr. Dana says (in his answer, p. 65), that he meant to point out every writer that he thought it important to refer the student to, in order to enable him to study this matter. One would think, from the manner in which he had marked up Mr. Lawrence’s appendix on this subject, that that was a book of some importance. Mr. Morse speaks of it as “an immense storehouse of historical facts and quotations.” If Mr. Dana was fairly, honestly, in the ordinary way, undertaking to refer to the most important books for the student to study in relation to this matter, certainly he would have referred him to Mr. Lawrence’s book. He knew what was in that book. He knew that, with one or two trifling exceptions, *everything* he had in his own book upon the subject of naturalization was to be found there; yet he does not allude to Mr. Lawrence’s book in any way,—and the Court must conclude there was some reason for this conduct. Perhaps he did not want the reader of his book to go to Mr. Lawrence; because the moment anybody went from Mr. Dana to Mr. Lawrence, they would see where Mr. Dana’s learning came from, and Mr. Dana says that he was writing for reputation. That is a peculiarity which is to be observed, not only in this note, but in every note throughout the book. Notwithstanding he says he has examined Mr. Lawrence’s book and taken down everything he wanted, he does not, even where he has taken the whole of his learning from Mr. Lawrence’s notes, make a single reference or allusion which shall induce the reader of his note to refer to Mr. Lawrence. On the contrary, in his preface he goes out of his way, he hastens to tell the reader that the contributions of Mr. Lawrence form no part of his edition, and that the notes contain nothing but Mr. Dana’s original matter.

Then come the eases arising out of the bombardment of Greytown, Antwerp, and so on. Mr. Potter points out that *all* the details are to be found in Lawrence (p. 204; 70 cross-ans., p. 256). I only desire to call your Honor’s attention to the citations at the bottom of the 145th page: “Hansard’s Parl. Debates, exlvi., 37 - 49, 1045.” Mr. Dana says,

“see speeches of Lord Palmerston and the Attorney General in Parliament, in June and July 1857,” and cites these debates. Now Mr. Lawrence gives exactly that citation, 37 - 49. It turns out, in fact, that the citation, ought to be 35 - 58 for the *whole* debate upon that subject, — if you are to refer to the whole debate, — so that his citation, if for the whole debate, is not correct; and if he designed to refer to the speeches of Lord Palmerston and the Attorney General, the speech of Lord Palmerston is on pp. 40 - 43, and that of the Attorney General on pp. 48 - 9. There is, therefore, no possible reason, either in regard to the whole debate or to the particular speeches for a reference to these pages. Mr. Lawrence had some special reason for referring to those pages; but, as a general citation of those speeches, it should be either to the whole debate, or to the particular pages I have named: if simply transcribed, however, from Mr. Lawrence's note, it would be exactly as Mr. Dana has given it.

Three months after the above argument was delivered, the respondent says: “It is not our object now to show that D.'s note on naturalization is *not* copied from L.'s or is not a paraphrase of L.'s, *for both points are abandoned by the complainant's counsel (brief p. 76), and an inspection by the Court is enough.*” (Mr. Dana's argument, p. 54.)

The argument has quoted from a letter of *Historicus* of Jan. 9, 1868, which of course is not in evidence, and which it is highly improper to refer to; its only effect is, to enable the writer to repeat and call attention to an epithet which *Historicus* applies to D.'s note. Mr. Herrick's deposition shows how entirely worthless *Historicus* is, as a critic, from his intemperance in the use of epithets towards the most distinguished writers, such as Phillimore, etc., simply because the doctrines they lay down do not square with the views which it suits his purpose to maintain. The argument says, that *Historicus* speaks well of this note. He ought to. Except so far as injured in copying, it contains matters of great value, and it is precisely because these matters are valuable that we complain of the theft.*

* As the respondents have referred to *Historicus* for praise of Mr. Dana, and to him and to him alone, with a good deal of ostentation (answer of Miss Wheaton, p. 29), in dispraise of Mr. Lawrence, we reproduce a few of the many extracts given in Mr. Herrick's deposition (the references are to the pages of *Historicus'* pamphlet).

Mr. Charles G. Loring, in his pamphlet on “England's Liability for Indemnity,”

The argument, p. 53, by way of a *reductio ad absurdum*, says that Mr. Potter points out passages in L. over 800 pages apart as the source of D's note. Your Honor would never guess from the argument that the foundation for this is that a part is from the foot note attached to the same word, and a part from the appendix, referred to at that passage of L. Nor would you guess that precisely this distinction of parts was made by D. in writing his note, and the two pieces of MS. mechanically

Boston, 1864, says of Historicus, p. 1: "But the off-hand manner in which he assumes to dispose of some of these is far from satisfactory; while his contemptuous allusions to several of our countrymen, entitled, at the least, to equal consideration with himself, disfigure an argument not less interesting to seekers for truth on this side of the water than to those on his own."

Speaking of Mr. Wheaton, Historicus says: "His treatment, also, of the important precedent of the English Declaration of War, in 1778, is by no means accurate. On this subject, also, Mr. Wheaton's national bias seems to have somewhat warped the habitual soundness of his judgment." p. 30.

Of something in Mr. Hautefeuille's work he says: "This monstrous hypothesis is wholly devoid of historical truth or legal probability; it is a mere audacious fiction, invented to square with a particular theory and to serve the interests of particular parties." "His chapter on the right of visitation and of search is one of the most colossal monuments of nonsense which it is possible to find in the annals of jurisprudence." (p. 175.)

P. 130: "The recent work of Dr. Phillimore is a useful compilation, in which, however, amidst the heterogeneous pile of indiscriminate and undigested material, in which the good, bad, and indifferent is garnered up with laborious impartiality, an inexperienced reader is not unlikely to lose his way." "But what was my astonishment—I will add, my regret—to find that, so far from condemning this monstrosity, Dr. Phillimore actually approves and adopts it." p. 142: "Dr. Phillimore . . . seems to grudge M. Hautefeuille the credit of this precious discovery. I should recommend Dr. Phillimore to leave to M. Hautefeuille the sole responsibility of a theory which is absolutely destructive of the established Law of Nations."

His letter in the London Times, of Feb. 1, 1862, concluded as follows: ". . . whether we turn to the puerile absurdities of Pres. Lincoln's Message, or to the *confused* and *transparent* sophistry of Mr. Seward's despatch, or to the feeble and illogical malice of Mr. Sumner's oration, we see nothing on every side but a melancholy spectacle of impotent violence, and furious incapacity."

Mr. Lawrence has satisfactorily shown (dep., p. 277, quoted *infra*, p. 229) that the strictures on his statement of the doctrine of *Jecker v. Montgomery*, 18 How. 114, are entirely incorrect. It is tolerably clear that Historicus did not examine the case itself, but only read the quotations given by Mr. Lawrence, without understanding the facts of the case; this would explain his errors, and is shown by the fact that, Mr. Lawrence having cited the case as *Jackson vs. Montgomery*, Historicus three times reproduces this error.

joined together. It is remarked that L.'s is very long: Mr. Morse pointed out that L. went back to the days of the Greeks. D. reproduces the latter part about America fully, and the former, not at all. D's. note is not an abridgment, it is a copy of a part.*

D., note 52, p. 150, L., p. 181. To understand this case, the Court must begin at the beginning. D. first cites the same work and section of the work of Story, and states no more than is in L.; he next cites the same work and section of the work of Westlake, though other sections are at least equally applicable (Mr. Potter p. 206), and gives no more than is in L., varying the language, however, but expressing the same idea. He next gives the same matter and no more than is in L. from Heffter. And these three matters and citations are in the same order as in L. with nothing intervening in either. But when D. comes to Heffter, he gives the German title of his work and sections (Europ. Völker. § 36-39), whereas L. had given the title and page of the French translation. Now as D. had taken these in the same order, giving no more in each case, but changing the language to avoid the charge of literal copying, is it not a fair inference that D. would not have thought of Heffter but for seeing it in L.? and the fact of his giving no more than L. shows pretty plainly that he did not examine independently, but that he changed the references and made a blunder in so doing, to give, as Mr. P. believes, the appearance of independent examination. D. then adds some authorities to be found in the passages of Story cited by L. (Mr. Potter, p. 232).

D. evades the main charge. In his carefully prepared deposition, he does not deny his indebtedness to L. He is careful to pass over Mr. Potter's charge of plagiarism, grounded on the fact of the *order* of these topics (Mr. Potter, 192), and confines his attack to the Heffter matter, supposing that to be the most assailable. L. cited "Heffter, Droit Intern. Public, par Bergson, p. 66," this reference being to the French translation. D. cited "Heffter (Europ. Völker, §§ 36-39)," this reference being to the German work. This was called to Mr. Potter's attention on cross-examination. It did not contradict him, for he had never said that the citations were identical in both, but only that the *matter* from

*I said, printing an abridgment of a work was allowed, which was only cutting the horns and tail off the cow. *Johnson*. "No, Sir; 'tis making the cow have a calf."

Boswell, vol. iv., p. 70, 1773, ch. iii.

Heffter, etc., and the order of the citations were the same in both. Mr. Potter was asked (45 cross-int., p. 250) whether this difference did not tend to show that D. had examined the German edition. He answered:

It might show that he had looked at it after being referred to it by Lawrence. If this was the only case, perhaps I should think that Mr. Dana had looked it, but there are so many other cases where Mr. Dana has put together citations from Halleck, Phillimore and others, that I do not consider the fact that he has referred to it by sections any evidence of itself that he looked at it.

In the same answer, he also pointed out that D.'s citation was wrong, and that, if he had examined the German edition, he would have cited § 31 or § 32. This was clearly responsive to the question which called for Mr. Potter's opinion. A month after Mr. Potter had so testified, it was proved that D. had done exactly what Mr. Potter thought he had done. All the editions of Heffter were put into Mr. Morse's hands, and he then testified that § 31 was the proper citation (204 cross-ans., p. 454). Upon the production of D.'s MS., it appeared that he wrote his note on the interleaf, with L.'s under his eye, and that, having given an abstract of the quotation in L., he exactly transcribed L.'s citation of the French edition, and afterwards struck it out and substituted the citation of the German edition. (MS. in Record, p. 454.) It was evidently one of those cases where, having copied from L. both the matter and the citation, he found, in another writer, what he supposed to be a reference to the same passage, and, for a reason which often actuated him, he changed the form.

This explanation was pointed out in our brief (pp. 77, 57.) Yet the respondents permit themselves to say (argument, p. 43) that this is "one of the most striking instances of disingenuousness and extreme bias on the part of Mr. Potter, — indeed we may as well say distinctly, of dishonesty." Thereupon they refer to Mr. Potter's cross-examination, but make no allusion whatever to the proof of actual transcribing, both of the matter and of the citation, afforded by D.'s MS. We submit that this omission would hardly be excusable if the argument were merely directed to proving that D. had not copied from L.; but that it is a suppression wholly inexcusable, in a portion of the argument offered for the professed and sole purpose of attacking Mr. Potter's honesty and soundness of judgment.

D., note 53, p. 151. The argument devotes almost two pages (35-36) to this note in one place, and again alludes to it on pp. 38, 56, 73, 141. It speaks of D.'s note as a "necessary repetition of a section of four lines from a British statute" (p. 36). From beginning to end of the argument, not the slightest allusion is made to the fact that all that D. did about this note, by his own confession, was to give the printer *written directions to reprint* L.'s note, striking out, however, "L." and signing "D." at the end. (Dana, p. 325; Wilson, 17 ans., p. 464.) Mr. Dana cannot tell whether he even attempted to verify the quotation. So far from the two notes being merely a *necessary* repetition of a quotation from a statute, both also contain a citation of Stephen's Blackstone, as authority for it, and Mr. Dana admits that he should not have cited this authority had he not reprinted the whole from L. The notes also contain some slight typographical errors reproduced by D.; naturally, therefore, as often as Mr. Lawrence and Mr. Potter were called upon on cross-examination or otherwise, for a list of notes copied in whole or in part, or for a list of typographical errors, they mentioned this note.

The argument (p. 35) says that this statute is, of course, referred to in all works on marriage, or on the conflict of laws, since its passage. There is not a word in the evidence to support this assertion. The only evidence upon the point is, that Mr. Morse does *not* point out any other book where it is to be found. Whether it is elsewhere or not is immaterial, since D. in fact simply copied from L.

The argument (p. 36) says: "It seems from Mr. Morse's extracts from an article by him in the 'N. A. Review' (Morse, dep., p. 458) that L. had charged in the newspapers an instance of a note copied *verbatim*, but carefully abstained from giving the note."

It seems to us that nothing of the sort appears or can be inferred from the extracts alluded to, and there is no evidence of the contents of the newspaper-letters referred to, though the respondents undoubtedly would have produced them, if anything in them would have supported this charge, or fastened any inconsistency upon Mr. Lawrence. The charge referred to and quoted in Mr. Morse's article is, that Mr. Dana has copied an enormous number of *references, quotations, and translations*, and that "this is still the more extraordinary from the fact, that the typographical errors in such cases are the same," all of which is proved to be true. It was Mr. Morse's reply to this (Record, p. 458) that stated in sub-

stance, that the *only* instance of the reproduction of a typographical error was found in this note, which was reprinted "by an error of the printing office, which escaped the subsequent scrutiny of Mr. Dana," and that "the accident, which originated in the carelessness of others, has given him no less pain than it seems to afford triumph to his adversary," all of which is untrue: what was done was done by Mr. Dana's written directions, and it is not the only instance, but one out of very many instances of the reproduction of clerical errors. It is not to be supposed that the statement as to the cause of the reproduction of this note was made by Mr. Morse with a knowledge of the facts. But such statements are not to be made, unless the utterer knows them to be true. The disregard of duty, in stating as a fact, with such detail and apparent truthfulness, what appeared to him to transfer the blame from his friend's shoulders to the printer's, when the most that can be said in his favor is, that he did not take the trouble to inquire whether it was true or not, shows a bias and a recklessness which entirely unfits Mr. Morse to be presented in this case as an expert upon whom the Court can rely.

In the answer referred to in the respondents' argument (bottom of p. 36), Mr. Potter clearly shows that it is a quotation which is exactly the same in L. and D. The argument gives the impression that Mr. Potter has mentioned this as a note entirely written in Mr. Lawrence's own language.

D., note 55, p. 151, is entirely copied from L., note 64, p. 182.

D.'s notes 52, 53, 54, 55 are all attached to one page of the text. The manner in which D. made his note 52 from L. note 61 attached to the same word has been pointed out. D. note 53 is simply a *reprint* of L.'s note 62, attached to the same word. L. note 65 contains a citation of § 124 of Story; D.'s note 54, attached to the same word, begins by citing that section, and Judge Redfield's note to it, and is a mere list of citations "taken wholly or in great part from Story" (Mr. Potter, p. 232). D., note 55 is attached to a paragraph which treats exclusively of the *French* law, which is entitled "*French Law*." It contains a statement of a celebrated French Marriage case (Jerome Bonaparte). It also contains a citation and extract from Story; a statement of the *British* Royal Marriage Act; a statement of the Sussex Peerage case, with a citation of Westlake; a statement of two British Statutes; of a

U. S. Statute; citations of Bishop, Story, and Op. Attorney General. *All* these facts and authorities are fully stated and cited in L., note 64, attached to the same word.

Mr. Lawrence made his account of the Bonaparte case from French newspapers which he read in Paris at the time; he cites no authority for it, and D. cites none. (Record p. 125.) D. reproduces a whole sentence of L.'s own language: "The Pope refused to annul this marriage on the application of Napoleon [I]." L. cited from the Op. Attorney General the page from which he gave a quotation, and which is in the middle of a long opinion; D. gives it as a general reference, but cites the same page. There is no pretence that the matter of this note has ever been collected in any other book.

The argument (p. 58) refers *seriatim* to certain phrases copied, produced by Mr. Potter in a list in which the sentence above quoted is included, and adds "We believe that these are all the instances out of thirteen notes cited by Mr. Potter of phrases copied" yet both there, and when discussing this note specially, the argument entirely refrains from making any allusion whatever to this instance of a whole sentence copied. The same thing is true of several other phrases which are among the longest and most striking of the list. In the same spirit, the argument (p. 73), professing to state the whole contents of the note, twice enumerates the citations, and both times omits the citation of the Op. Attorney General, the form of which shows that D. simply transcribed it from the note in L. open before him. Nowhere, either in the argument or the depositions of the respondents, is there any allusion to this proof.

The first part of the note, as the argument (p. 73) admits, "is the case of the Bonaparte marriage and the Sussex peerage" and for the latter of these D. cites Westlake. Mr. Potter said in substance that D. had copied from L. his account of the Sussex case, and his citation of Westlake (an author to whom D. has no reference except such as are taken from L.) without even verifying the citation; D.'s MS. confirms that opinion. In a paragraph on p. 183, L. states the Sussex case, and, in the middle of the paragraph cites for it the Ann. Reg. He then states another matter, and at the end of the paragraph cites Westlake, § 348. In D.'s copy of L., there is a pencil mark opposite the account of the Sussex case (Record p. 386, sp. 22). D., in abstracting his note from L., takes the

substance of this account, and, in his haste, overlooks L.'s reference to the Ann. Reg., the authority from which it was taken, and puts down, as the authority, "Westlake, § 348."

Mr. Potter made a list of instances (pp. 166, — 169) where D., in carelessly copying from L., had reproduced a matter found in L. and had appended to it, not the citation which belonged to it, but the citation which L. had given for another and a different matter, and he put this in that list. He said (p. 167) that the Sussex case "is not stated in Westlake"; (p. 296) "neither that section nor any other part of Westlake contains any statement of the Sussex case, nor of what was decided in it." The book was afterwards produced, and it appeared that "in his note to § 348, Westlake makes this remark: 'The Sussex Peerage case is reported in 11 Cl. and F. 85,' and he makes no other reference in text or note to it." (Mr. Potter, 90 cross-ans., p. 261.)

D. in his note pretends that he took his account of the Sussex case from Westlake. Certainly he did not, for there is no account of it there. It is very clear that he did get it from the marked passage in L. and this tallies with the fact that every statement and every citation in the note is found in L.'s note, attached to the same word. In his argument, he admits that he cited Westlake for it. He would not have done this had he even looked at Westlake, for he would then have known that Westlake contains no account of it, and no comments on it. This agrees with the fact that the eight authorities in this note are exactly reproduced from L. and that nothing is derived from them that in any way indicates that he ever saw them. It accords with the fact that D. has in his book about a dozen references to Westlake, copied from L., but has not one allusion to him that required or shows the use of anything except L.'s corresponding note.

The argument makes an attack on Mr. Potter which is entirely based on misstatements and misquotations.

On p. 42, quoting from Mr. Potter's deposition with quotation marks, the argument twice changes the word "stated" to "found" and thus *solely by means of this misquotation* accuses Mr. Potter of having said, on p. 167, that the case was "found" in L. and not "found" in Westlake, whereas he said (p. 167) that L. "states" it, and it is not "stated" in Westlake, — and this is true.

It also accuses him of having said that this was not in the *section* of

Westlake, when in fact it was in a *note* to the section; what he did say was, "neither that section nor any other part of Westlake contains any statement of the Sussex case, nor of what was decided in it" (p. 206), and this is true. The act which they impute to him, and of which he is entirely innocent, is properly characterized as "a verbal *trick*." The respondents' argument, p. 69, is an excellent example of such a trick (unless they are to be excused on the ground of inexcusable carelessness). They there say, that Mr. Potter testified that a certain case was in L., note 15, p. 37, and they say that his note "*does not refer*" to the case. The fact is, that Mr. Potter did not say that it was in "note 15, p. 37," but on "p. 977, addenda to note 15," and it is there.

Again on p. 73, the argument says: "The reprehensible attempt of Mr. Potter to give the impression that the Sussex Peerage case is not noticed in Westlake, for which D. cites that author; and his coercion, after a long cross-examination, and after many evasions, into an admission that he knew, when he made his charge, that Westlake's *note* referred to the case, — all this has been sufficiently exposed." (1) Mr. Potter did not say that the case was not *noticed*, but that it was not *stated* in Westlake; and the whole point of our charge is, that D. has a *statement*, which he could have got from L. and could not have got from Westlake, and that he has not the citation of Cl. and F., the only thing he could have got from Westlake. The respondents nowhere even notice the difference between a *statement* and *citation* of this case, nor do they attempt to meet *this* charge or to explain whence D. derived his statements. (2) Instead of the fact that Westlake *cited* the case appearing "after a long cross-examination and many evasions" and by "coercion," the first question to Mr. Potter simply quoted his direct testimony and asked him (23 cross-int., p. 245),

What do you mean by the matter for which you say Dana cites Westlake and which is not stated in Westlake?

Ans. I mean the Sussex Peerage case. If he had looked at Westlake, he would have seen that Westlake states the Royal Marriage Act, and *merely refers* to the Sussex Peerage case and gives no particulars of it, if I recollect; but refers to the proper report for it, which Mr. Dana does not.

Cross-Int. 24. Did you know the Sussex Peerage case was *referred* to in Westlake, in a note to § 348, when you made this statement in your direct examination?

Ans. I did. (The italics are ours.)

They attempt (p. 42) to fortify their statements by saying that Mr. Potter can give no excuse for the conduct which they improperly ascribe to him, and they quote from 25 cross-ans. They make no allusion to the fact that Mr. Potter said that he did not understand the question when he gave that answer, and that on pp. 260, 261, he explained what he meant.

We have then these facts: Mr. Dana intended to take from L. all the facts and authorities which he wanted (p. 396). His copy of L. is marked to show that this note contains matter which ought to be used. His note consists entirely of facts and authorities. He wrote it on the interleaf with L.'s note before his eyes. He has absolutely nothing which he could not get from L.'s note alone. He has reproduced some peculiarities and made an error, such as could not come except from copying from L. There is no pretence that the matter of this note is all collected elsewhere. One portion of it, L. made from newspapers read at the time in a foreign country; no book is named where this is found. D. has reproduced a whole sentence of L.'s own language. He testifies, "from what source or sources I made my note it would be impossible for me now to tell" (p. 348). Would it be impossible if he had bestowed any thought or study on his note? Will any one except Mr. Dana find it impossible?

D., note 58, p. 153, is a statement of the contents of a passage in the review of M. Fœlix, (with D.'s usual error), of a treaty, and of a passage in Halleck. This last is from Halleck; the rest is from L.'s note 67, attached to the same word, and n. 70. (See Mr. Potter, p. 206.) Instead of stating directly the contents of the treaty, they say:

<p>L. p. 204. "The convention of February 23, 1853 . . . adopts, as to acts of interior discipline, the principle of the French law," &c., the section of the text to which it is attached stating the law of France as to "private vessels."</p>	<p>D., p. 154. "The treaty of 1853, between France and the U. S., adopts, as to private vessels, substantially the distinction made in the French law, as laid down and explained in § 102."</p>
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D., note 60, p. 156, is a citation of two authorities. The facts pointed out by Mr. Potter (p. 207), and not denied, prove copying, and show that the connection of this matter with this portion of the text was *not* first conceived of by D. Westlake, cited here, is one of the authorities to whom D. makes no original referenees. (See Mr. Potter, pp. 181, 188.) (See note 12, *supra*.)

D., note 62, p. 165. Mr. Lawrence thought that a statement of the case of the Creole was the proper annotation for this portion of the text, and Mr. Dana copied this idea. He thought that the Report of the Commissioners under the Treaty of 1853, Webster's Works, vol. vi., and an article by Mr. Wheaton, in the review of M. Fœlix, were the best works to be cited, without referring to any other discussions of the case; and Mr. Dana copied him in this also. Indeed Mr. Morse testifies, (p. 417,) that the matter is narrated by three other publicists,—and by one very fully (though as usual he refrains from naming them), and, if so, these might have been cited.

The paragraph of D.'s note which is devoted to Mr. Wheaton's article is entirely taken from L.; and in copying the citation, Mr. Dana makes his usual mistake in the name of the Review showing that it was a book he knew nothing about. (Mr. Potter, pp. 206, 207, 176.)

Mr. Dana (p. 353), intimates that he and L. took their notes from the same sources,—Webster and the Report. This is impossible, because of course Mr. Wheaton's article is not in those books.

Mr. Morse (p. 417), and the argument (p. 63), say that "D. has several citations which L. has not." The only foundation for this is that L. cites Webster, vi., 303, and D. cites "303-318." In this case, as in the case of note 18, all that D. did was to look at two very accessible books which he happened to own, at the passages to which L. referred him, and as is the case when he looks at the original, both the form of the citation and the matter derived from it differ more or less from L.

The argument (p. 51) has the following paragraph inserted for the professed purpose of showing that Mr. Potter wants common fairness.

"Mr. Potter says (p. 207), that '*there is no such book*' as the one D. cites in his note 62, p. 165, viz: '*Révue Française et Etrangère, ix.*' But there is a '*Révue Etrangère et Française, ix.*' where D.'s citation is to be found; and Potter knew it was there when he made the assertion, '*there is no such book.*'"

This is intended to be a charge that Mr. Potter, knowing the fact that there is a Rev. Etr. and Fr., purposely suppressed it, and that, by that suppression, he made his statement in substance untrue and injurious to Mr. Dana, whereas he knew that a statement of the whole truth would not have been injurious to Mr. Dana: the charge is entirely unfounded. What Mr. Potter did say on page 207 is this: "D. here makes the converse of the mistake previously noticed about Fœlix' Review. He

cites 'Révue Française et Etrangère, ix.' There is no such book. It is Révue Etrangère and Française, ix., being the first series." The fact which the argument accuses him, of dishonestly suppressing, is thus stated by him in the very line from which the argument quotes a part and omits the rest. The "previous notice," which Mr. Potter refers back to, is on pp. 206, 176. It is there stated that the Rev. Etr. and Fr. was a periodical, the *last* volume of which was published in 1843; that this was followed by the Rev. Fr. and Etr., the *first* volume of which was published in 1844; so that there are two different works. It is there pointed out that Mr. Dana, in copying from L., as in this case, constantly gives the name of one, when the matter cited shows that the other was intended, and *vice versa*. Mr. Potter says, as is indeed very obvious, that this shows that Mr. Dana was not aware that there were two different books known by those two names, which of course he would have known if he had studied the book himself. And Mr. Potter has pointed out the sources from which Mr. Dana did obtain all his references to these reviews, at second hand.

D., note 67, p. 175. *Impressment*. — L., note 72, p. 214. The argument (pp. 64, 108) says in substance, that L.'s note is a mere "chronicle," and it refers to D.'s "disengagement of the point at issue from matters which have been improperly connected with it," and his statement of the point, "as among the best specimens of the exercise of his powers in this direction." "See also his logical statement of the position of the Prince Regent's Declaration of 1812." It says that this portion of D.'s note has "no counterpart in L.'s note." We say that every idea, every fact, every illustration, every authority (with two or three exceptions), is copied from L.

The point of D.'s note is (1) That "admitting the validity" of the claim of Great Britain to the services of the sailor, "growing out of the theory of inalienable allegiance asserted by" her, "the question still remains whether it can be enforced on board the vessel of a friendly state at sea." "*It is sufficient to state this proposition to insure its rejection.*" "The right in question has nothing to do with the *belligerent* right of search and capture." No one "pretended that Mason and Slidell could be removed as citizens, rebels or criminals," but only in connection with a capture of the Trent as prize of war.

On p. 217, Mr. Lawrence gives the following as his own matter, and in his own language :

“The pretension of Great Britain to take, under the claim of indefeasible allegiance, her subjects, and particularly her seamen, is not to be confounded with the belligerent right of arresting, on board of neutral vessels, the persons assimilated to contraband of war ”; he says that he shall therefore discuss the Trent case elsewhere. “The right to arrest Messrs. Mason and Slidell, if valid at all, existed *jure belli*, that is to say by the law of nations, and was wholly independent of municipal law ;” while the claim of a right of search for persons owing allegiance “does not rest on a belligerent right under the law of nations, but on a prerogative derived from municipal law, and involves the extravagant supposition that one nation has a right to execute, at all times and in all cases, its municipal laws on board the ships of another nation.” (Part of this Mr. Lawrence quotes from a despatch.)

Mr. Dana says that the Prince Regent's Declaration “reduces the claim from one resting on a general principle to an exception, depending on an *incidental* if not accidental quality.” Mr. Lawrence (p. 216, at bottom) says that Great Britain “never contended for it as a belligerent right,” and that the Prince Regent's declaration “puts it as *incidental* to the right of search for enemy's goods and contraband.” He then proceeds to state that the claim to take Messrs. Mason and Slidell was only rested on a belligerent, and never on any municipal right. Yet the argument (p. 64) says that all this “has no counterpart in L.,” and that D. “thought it out afresh.”

L. has a large number of citations, most of which are of despatches, reviews, etc. Omitting a few references to the U. S. Stats. about the naturalization of seamen, D. copies *all* these with one exception,—that exception is a despatch written by Mr. Lawrence himself, in the course of a long diplomatic correspondence, all the rest of which, written by other ministers, D. reproduces. (*v. pp. 104, 137, supra.*) Nine of these are collected in a cluster at the end of D.'s note as being the authorities “for the diplomatic history of the subject.” One of them, Gallatin to Clay, is taken by L. from MS. With regard to a citation from the Parliamentary Papers, and a citation from one of Mr. Rush's books, D., in copying, so mangles the titles as to make it impossible to identify the volume and paper referred to. Of course he could not have done this if he had even

referred to them himself, or been familiar with the books (Mr. Potter, p. 179). Of one volume, L. and D. cite p. 432; it should be p. 445 (Mr. Potter, p. 158). In a quotation from the Quarterly Review, L. interpolated the words "and he adds" between two sentences. In transcribing this, D., wishing as usual to make a change of form, and supposing that the words signified that the sentences were not continuous, replaced them by dots, to signify the same thing, thus :

L. p. 217.	D. p. 176.
"exercised by our naval officers.'"	"exercised by our naval officers.
The writer adds 'But we do not undertake,' etc. But we do not undertake to justify, etc.' "

In the original, there is nothing between the words "officers" and "But" (Mr. Potter, pp. 207, 170).

To the authorities thus copied, D. adds a quotation from Prof. Bernard's Pamphlet, the valuable statement that Phillimore "dismisses the subject with a single unintelligible remark," and an extract from Mr. Webster's despatch, which Mr. Wheaton had just given in the text.

It is probable that few are so well informed upon this subject, and especially upon its diplomatic history, as Mr. Lawrence. The important negotiations of 1826-8 were in part conducted by him, as the Minister of the United States in London, for upwards of a year, he having been appointed Chargé d'Affaires by the President, on the resignation of Mr. Gallatin, and the remainder were carried on while he was Secretary of Legation, and while it was his especial duty to assist Mr. Gallatin by making a thorough study of the subject.

The respondents' testimony is singularly unfortunate about this note. With reference to the citation of Wait's State Papers in this note, Mr. Morse says (p. 410) that Mr. Potter's statement is "liable grossly to mislead," and Mr. Dana says (p. 352) that Mr. Potter "omits the fact that I add a citation which Mr. Lawrence had not." Mr. Dana, however, cannot point out any citation which is not in L. (83 cross-ans., p. 379), and Mr. Morse acknowledges that Mr. Potter is right, and that the charge against him is only founded on a misstatement by Mr. Morse himself (93 cross-ans., p. 439).

This note and note 79 (D. p. 191, copied from L. n. 78, p. 236) show that

L.'s authorities copied by Mr. Dana are a *selection* made by L., and also that Mr. Dana makes no attempt to study the whole subject for himself, even with the aid of the facts and authorities which he derives from L., but simply reproduces, in each note, the matter of L.'s corresponding note. It appears from L. that, besides other matters, two subjects, on which no result was reached, were confided to Mr. Gallatin in 1826, and to Mr. Barbour in 1828. In n. 72, p. 216, L. refers to and cites, as to one, Mr. Gallatin's despatch to the secretary, and Mr. Clay's instructions to Mr. Barbour, citing the former from MS., and the latter from a Congr. Doc.; and D. reproduces this, except that he does not say whence he obtained the citation of Mr. Gallatin's despatch. In n. 78, p. 243, with regard to the other subject, L. refers to the same diplomatic negotiations. This time, however, he cites also the instructions to Mr. Gallatin, and cites Mr. Barbour's despatch sent home to Mr. Clay, as well as his instructions, and D., copying him in note 79, does the same. In the first note, L. cites Mr. Barbour's instructions from a Congr. Doc., and D. does the same. In the second note, L. mentions that and Mr. Barbour's despatch together, and cites for them "Br. and For. State Papers, 1829-30, p. 1221" and does not cite the Congr. Doc.; in his second note, D. also copies L. in citing "Br. and For. State Papers, 1829-30, p. 1221" and does not cite the Congr. Doc. D., note 79 (*q. v. infra*) like note 67, is entirely taken from L. and, by carelessness in copying from L., D. commits an error in giving the name of a book, which makes it refer to the wrong volume, showing that he did not even verify his citations.

D., note 68, p. 178. (See Mr. Potter, p. 208.) The statement in the argument (p. 74) that Abbott's Manual "is not referred to by L., and probably appeared after L. was published," is not true. It is mentioned and referred to by L., p. 1002, addenda to this very note 73, from which Mr. Potter says that D. wrote his note 68. It does *not* appear (argument, p. 75) that the matters found in D. could be procured from Abbott. It does appear (Record p. 125) that D. copies from L. a citation of a MS. despatch, cited by L. from "MS. State Department"; and to this authority the argument wisely makes no allusion whatever, though it refers to his citations of treaties, as if they were all that are contained in the note. Mr. Morse examined this note to see where it could have been copied from, and the most that he can say is (p. 417) that Halleck cites *many*, and that more are in the *last* edition of Kent (Mr. Dana used an earlier edition, p. 317). Mr. Morse does not allude to Abbott.

The only evidence in the case about Abbott is Mr. Dana's statement: "As to consuls, their powers and duties, I found great aid from Abbott's Manual." (Reeord, p. 353.) No one points out, either in the testimony or the argument, or in the note itself, a single item which they pretend is found in Abbott, nor any passage in Mr. Abbott's book, (a stout 8vo,) whence D. could have taken any part of his note. The statement in the argument, page 75: "It appears that D. could have obtained all his materials from Abbott's Manual, 1863, and the indices to the U. S. Stats." is consequently wholly outside the evidence in this case. We have therefore examined Abbott. We do not find any passage in Abbott from whence D. could have taken his note. We do find on p. 188 of Mr. Abbott's edition of 1868, that for a study of the matters which consuls should know, they are referred among other books to "Wheaton's Elements of International Law, and the notes relating to consuls, pp. 224-230, 423-437,"—those being the pages of Mr. Lawrence's 2nd edition, from which Mr. Dana is charged to have copied in notes 68 and 135. It may be added that Mr. Abbott (edition of 1868) also cites these two annotations of L. seven times, on pp. 25, 29, 33, 34, 39, 114, 150, besides giving many other citations of L.'s editions. He makes no allusion whatever to Mr. Dana's edition, except to add in one note to a list of references on p. 19: "Wheaton's Elements, edited by R. H. Dana"; evidently a mere complimentary mention, because no passage either of text or notes is referred to.

Mr. Dana made in his deposition a statement which he repeats in the argument: "Dana, note 68,—I examined all the treaties cited by me, few, if any, of which I believe are in Mr. Lawrence." (Reeord, p. 351.) Confessedly the last half of this statement, made in a deposition prepared at his leisure, is untrue, for they are *all* in L. The Court must disregard at least the other statement in the same sentence, if not the whole of this portion of his deposition. All the citations in this note are from L.'s and none from D.'s edition of the statutes. (See this matter of the Statutes *infra*.)

There is another proof of mere copying without even verifying. L. gives a citation of U. S. Stats., vol. x., then some more citations by page, designating the volume by "ib." Then he has a reference to vol. iv., and then mentions the Act of March 2, 1829, "Ib. p. 360." D. does not reproduce the former citations, but attempts to reproduce the

last one; and referring back the "ib." to the wrong antecedent, the Act of 1829, appears in his note as cited from "x., 360," whereas of course it should be "iv., 360." (See also note 112, *infra*.)

D., note 76, p. 189, is a quotation from a treaty, copied from L., note 77, attached to the same word. It is true that D. puts the passage in quotation marks, and L. does not; but it is evident, that it is the formal language of a treaty, and the conjecture upon which the use of quotation marks was perhaps based would be much more reasonable than many of D.'s conjectures which he has given as facts in his notes. The most that he claims to have done, however, is to have looked at the passage referred to by L.

D., note 77, pp. 189-90. Mr. Potter, in his affidavit (p. 84), said, "Most of D., note 77 is in L., p. 236. The reference to Mohl is from Woolsey." The only authorities cited are "Mohl's Staatsr. Völk. und Pol. i., 644 *et seq.* Woolsey's Introd., § 78." Mr. Dana (p. 353) testifies as to note 77, "I did not, as Mr. Potter intimates (p. 84), derive all I knew of Mohl from Woolsey. My brother had the volumes, I think all of Mohl, and assisted me by examining them when necessary, which was seldom, on the subject. I do not remember about borrowing Mohl from the libraries." His brother testified (p. 558), "I furnished to my brother . . . Von Mohl's Geschichte und Literatur der Staatswissenschaft," and this is the only book of Mohl's to which either of the brothers, or the argument makes any allusion. The citation which Mr. Potter says is copied from Woolsey is of an entirely different work of Mohl, and of the existence of which both the Messrs. Dana seem to be ignorant.

D., note 78, p. 190, is a collection and classification of the later extradition treaties, and of certain European transactions and diplomatic negotiations relating to extradition, with numerous citations of despatches, etc., and is all taken from L., note 78, attached to the same word. (See Mr. Potter, p. 208.) D. has reproduced a typographical peculiarity found in L.: L. mentioned the Prussian and Bavarian treaty in the same connection, and cited Stats., x., 1002, for the *latter*; in D.'s first paragraph, this re-appears as the citation for the *Prussian* treaty; this citation of the Stats. which is the only one in the note, is to L.'s edition, and not to D.'s. (*V.* "Statutes," p. 222, *infra*.) Both L. and D. give

1862 as the date of the Mexican treaty; it should be 1861 (Stats. 1861-2, p. 260t).

The argument (p. 75) says that D. could easily find these treaties in the index to the U. S. Laws. There is no testimony to this point. In fact, the indices give a list of all the extradition treaties, but do not classify them according to the provisions they contain; and this classification is the substance and the merit of this portion of the notes in L. and D. The treaty with Venezuela, which Mr. Morse and the argument say is not in L., is in the addenda to his note, on p. 1002. Moreover, D. evidently wrote his note first from L.'s foot-note, and then turned to the addenda, and added this citation from that source, for it is interlined in the MS. (Record, p. 389).

The argument states that *most* (not *all*) of the treaties are found in "the last American edition of Kent, which D. says he had sent to him in sheets before it was bound up." No reference is given to D.'s deposition, and there is no such statement in it. We do find, on p. 317, a statement that he used "some edition prior to 1864," (that is, *not* the last edition,) and that advance sheets of Woolsey were sent him. It is only in the *last* edition of Kent, published *since* L., that Mr. Morse pretends that any collection of these treaties is to be found. There is no pretence that the European diplomatic matters common to L. and D. can be found collected anywhere else.

D. note 79, p. 191, consists of a statement of some diplomatic negotiations and treaties which are copied from L., note 78, attached to the same section of the text. (See Mr. Potter p. 208.) Mr. Potter said that L. and D. gave the same instance of a European treaty, though there are many others, and Mr. Morse says that this is true (Morse 211 cross-ans., p. 454); "Phillimore, i., p. 422, gives many others but not this one." For this note, see particularly p. 163, *supra*.

The respondents' argument (p. 76) says: "while L. says *merely*, 'Mr. Barbour was instructed', June 13, 1828, to renew the proposal, 'giving *no intimation* from whom he received the instructions, D. *quotes* Mr. Clay to Mr. Barbour, June 13, 1828.'" (The italics are ours.) The fact is that D. imitates L. in *not* quoting from Mr. Clay's instructions. The incorrectness of the other assertion was exposed long ago, and ought not to have been repeated.

"*Cross-int.* 210. Your deposition, p. 418, D., note 79. Is not the name of the writer to Mr. Barbour readily inferrible from the name of the preceding letter as given in L. ?

Ans. Yes, I suppose it might be easily inferred (Morse, p. 454).

D., note 82, p. 193. The charge made by Mr. Potter (p. 209, and cross-cx. on pp. 256-7) is, that it is taken from the first half page of L., note 80, p. 254, attached to the same word of the text, and therefore under D.'s eyes while writing; that, having taken the note from L., he *afterwards*, as an afterthought, changed *the form* of the citations by copying from Phillimore, etc. A month after Mr. Potter had so testified, D.'s MS. was produced, and it thereupon appeared that he had *first* written them as in L. and then made the changes by crasure and interlineation, that is to say, after the note was once completed (MS., p. 254½ in record, p. 386). This proof was expressly noticed in our brief (p. 79, 57), but is not alluded to in the respondents' argument.

Mr. Potter nowhere said or intimated that D. had copied Abreu from L. Our charge that he did so take it is based on and proved by the MS., produced after Mr. Potter had testified. The statement in the argument (p. 44,) that "of the five authorities in that note, one is not to be found in L., namely Abreu," is not correct. Abreu's work, and his opinion for which D. cites him, are mentioned in L., at the middle of p. 254, from which D. was copying; and the change in the form of the reference was made by subsequent interlineation (Record, p. 386 sp. 24).

Mr. Lawrence (dep. p. 144, 103 ans., *et seq.*) points out an error as to an important fact in our diplomatic history, into which D. could not have fallen had he studied the subject intelligently.

D., note 85, pp. 201-203. (See Mr. Potter, p. 210.) This is a note filled with purely historical and diplomatic matter; it is entirely a statement of facts, requiring the study of a great many details. The whole of it is in L., note 84, attached to the same word, and note 82, with the exception of a statement three and a half lines long, at the top of p. 203, taken from Phillimore at a passage referred to by L., on p. 263. It is *not* true that they are all in Wheaton's text with one exception, as stated in the argument, p. 111. The statements about the Congress of Verona, the English treaties with Sweden, the Netherlands, and Portugal, with Spain of 1835, the references to the correspondence in 1815, and the United States correspondence with Great Britain, the dates of the laws

of the United States and Great Britain, declaring the slave trade to be piracy, the statements about the convention of 1824, the causes which prevented the ratification of the treaty of 1841 by France, are found in L. and D., but *not* in Wheaton's text. D.'s note, therefore, is *not* "a condensed statement of Wheaton's text and notes," but a statement — with omissions — of L.'s notes.

The respondents' argument has stated the authorities which ought to be cited in this note in the opinion of the writer. Only about one-tenth of these are in the note, while *all* that are in the note are in L. (See this *supra* p. 101.)

Mr. Morse could only testify (p. 418) that "the *topic* of this note is discussed fully by Phillimore." The writer of the respondents' argument again permits himself to add a statement which no witness ventured to make. He says (p. 111) that the citations D. uses here are not only in Wheaton's text, but in Phillimore, and probably in every writer. The contents of Wheaton's text we have already considered. There is no evidence in the case as to what is in Phillimore. If your Honors care to go outside the record, you will find that, of the matters common to L. and D., the following are not in Phillimore: the statements as to the statute laws of nine European States "and others." Mr. Phillimore speaks of the treaty of 1841 as a treaty between "Austria, Prussia and Russia," but makes no allusion to the interesting matter of the failure of France to ratify and the influences which led to that failure, all of which is in L., p. 261, and D., p. 202. The diplomatic negotiations of 1815 in Europe, and the matters in the paragraph near the bottom of p. 202 of D. are not in Phillimore.

It was pointed out by Mr. Lawrence (dep., p. 144) that Mr. Dana, in carelessly paraphrasing, had fallen into a serious error. Certain features had been proposed by the English government to be inserted in the treaty of 1824. President Monroe refused to make a treaty with those features (mixed tribunals, where some of the judges were not amenable to the United States), and the English government withdrew their pretensions, and concluded the treaty exactly in the terms proposed by President Monroe; and it was therefore not by his advice, as D. states, that the ratification failed in the Senate. See L. p. 261.

This also is a case in which Mr. Lawrence is aided by his diplomatic reminiscences in establishing, beyond controversy, Mr. Dana's inac-

curacy. That the Senate refused to ratify a treaty in the form proposed by ourselves was, as will be found stated in L., p. 452, the reason why, in the case of the treaties of 1826-7, the ratifications of which were exchanged by Mr. Lawrence himself, the British government refused to give the king's ratification until they had been assured of the previous ratification by the United States.

D., note 89, p. 213. The title of D.'s note is "Slave trade,— Visit and Search." The passages from which D. has copied are pointed out by L.'s index, *nom.* "Visitation and Search, — slave trade." Among the proofs of copying are MSS. despatches; identity of order; typographical error; peculiarity in citing Hautefeuille reproduced. Mr. Morse points out (p. 418) that Halleek resembles L. quite as closely as D. does; this is quite possible, but Halleek always gives credit to L. when he copies from him. (See Morse, 135, 136, 141, cross-ans. p. 445; 159, 160, cross-ans. p. 448.) There are pencil marks opposite the authorities in D.'s copy of L. (See Mr. Potter, p. 210.)

D., note 92, p. 224. D. has a cluster of citations at the end of a dissertation; and, as to the foreign ones, he reproduces the same peculiarities of form that are found in L. D. refers to something as having been said by other publicists, but names no one. It was said by L. in his corresponding note. (Morse 213, 214, cross-ans. p. 455.)

L. cites the French translation of Savigny viii., p. 270. D. cites the German edition, using the German title (System), but cites p. 270, as in L. In this note, Savigny is cited by *page* in both L. and D. In D.'s previous note, D., p. 217, Woolsey and Savigny are cited; and there Savigny is cited by section exactly as he is cited at the place in Woolsey referred to. D. also copies from L. a citation of Westlake (§ 250-252), a writer to whom D. has no reference except such as he has copied from L. Westlake also cites Savigny and does not cite p. 270, but pp. 273-4. (Mr. Potter, pp. 189, 211; *supra*, p. 80.)

D., note 95, p. 227, is from L., note 90, attached to the same word. (See Mr. Potter, p. 211.) D. copies from L. a statement as to the English law and a citation of Westlake, an author to whom he has no original reference. The argument says that he adds something. Mr. Potter said that he added Story, and another authority—a bare citation—copied from Story.

D., note 96, p. 231, is a statement of an English law which constitutes L., note 94, attached to the same word of the text. Undoubtedly it was proper for D. to state this law somewhere, and he probably knew of the existence of such a law. It is not probable that he knew the *date* and chapter of it, "20 and 21 Viet., 85;" it is more than probable that he did not look it up to ascertain the date, but merely read L.'s note which was under his eyes at the moment, and wrote his note from that and attached it to the same word, without any thought about the matter.

D., note 97, p. 236, is four citations. Two are Story, and another copied from Story. The other two are copied from L., p. 295, one being Westlake, from whom D. has no original citation. The part copied from Story and the part copied from L. appear by the MS. to have been written at different times. Mr. Potter, p. 189, shows that D. would have also cited another section of Westlake had he been working independently.

D., note 99, p. 237. This is a good example of what D. calls a *reflection*. It is a statement of some *facts*,—that certain things are regarded as of importance and are much attended to. If the reader should be told that this was spun from Mr. Dana's brains, and that D. had never examined to see whether it was in fact true in *practice*, he would say that such annotations were worthless. The note is valuable only because it is a statement in general terms of a fact, the details and the proof of which appear in L., note 97, attached to the same section.

D., note 101, p. 239, discusses and gives a statement of the views of Phillimore, (including an extract from Burke, given by Phillimore,) and of the views presented by the R. I. Boundary case. The first, of course, is taken from Phillimore. All that he says about the latter can readily be written from, and is in fact a re-statement of what is found in L.'s note, attached to the same word of the text.

D., note 103, p. 254, is two citations copied from L., note 101, attached to the same paragraph. The respondents' argument naturally does not allude to the fact that these citations, exactly copied from L., refer to L.'s edition of the U. S. Stats., while D. had a different edition with a different paging. (See "Statutes," p. 222, *infra*.)

D., note 104, p. 255. (See Mr. Potter, p. 211.) The resemblance is that to the same word of the text (L., note 101, p. 319) both attach the

same historical instance or illustration, and no other, both referring to the statute which bears upon it; that both state that under this act questions arose with Venezuela and Hayti; that both state how the former was settled, but say nothing about any settlement of the latter, and cite the same Congr. Docs. about the matter. As D. wrote with L.'s note before his eyes, this is very strong proof of borrowing. The facts pointed out in the argument (p. 111) *only* show that D. examined the statute to which L. referred him. The argument makes no allusion to the diplomatic discussion and authorities which are not in the statutes, and which are clearly copied from L.

Twelve sections of Mr. Wheaton's text (165-176), covering fifteen pages of D. (240-255), are devoted to "Rights of Property depending upon Conquest and Discovery." To this Mr. Dana attaches two annotations only. Note 103 is a couple of citations of the Stats. clearly copied from L., without verification even. Note 104 is the only attempt to add to or illustrate in any way the facts and principles contained in this long passage of the text, and this is reproduced from L.'s note attached to the same word. Mr. Dana's only labor, besides copying and paraphrasing, has been to examine a U. S. Statute about the Guano Islands, to which Mr. Lawrence referred him. It is inevitable, if he had been making his annotations independently, and had possessed the knowledge and learning which an annotator of Wheaton ought to possess, that he, so different a man from Mr. Lawrence, would have produced something different in substance from L. If he was relying on L. and confined himself to occasionally looking at books to which L. referred him, he would have produced exactly what he has produced.

In this case, as in others, the moment he looks at the authority he gets something different from L. from it. It is not a difference of importance,—neither Mr. Dana nor Mr. Morse, in their examination of the notes in their testimony, noticed it. It is only valuable as showing that in the few cases where he does look at the original, some slight difference from L. finds its way into his note.

D., note 105, pp. 255-6. (See Mr. Potter's deposition, pp. 211-212.) The citations of Hautefeuille are from two different editions. (P. 79, *supra*.)

D., note 108, pp. 258-59-60, is from L. note 105, attached to the same word, and note 84 therein referred to, except one authority which

is in Wheaton's note to the same word. (See Mr. Potter, p. 212.) Mr. Morse "thinks" that some of the citations are in other publicists, but does not say where, except that "some of the same matter is common to Phillimore" (p. 418). Two typographical errors are reproduced from L. This note contains a quotation (with a typographical error) from Dr. Twiss' Cagliari opinion, which is given very fully in L., and which Mr. Morse says he never saw anywhere else (236 cross-ans., p. 457). Mr. Dana "cannot tell" where he got it (37 cross-ans., p. 369).

"D., note 109 and note 110, pp. 261-2, relate to the N. E. Fisheries. The facts and authorities, except one matter in 1865, are in L., note 106, pp. 325-8, attached to the same word as note 110." (Mr. Potter, p. 212.)

"D., note 111, p. 264, is a statement of a couple of treaties, both of which are found in L., note 108, p. 330, attached to the same word of the text, and note 107, though D. appears to have looked at the volume of U. S. Stats. referred to by L." (Mr. Potter, p. 213.)

In this note, L. referred to and described our treaty of "22d February, 1862;" but as it was so recent, he was unable to give the citation from the statutes for it. Here, therefore, there was an apparent and obvious necessity for Mr. Dana to look at a book he had on his table. He did it, and with what result? He inserted a citation of the *annual* edition of the statutes. He corrects Mr. Lawrence's clerical error, and gives the date correctly, "25th February, 1862." This is the only instance of all the clerical errors, Mr. Potter pointed out in L., where there is any apparent necessity for D. to go to the original, or any proof that he did go to it, and in this case he corrected the error, and it is the only case where he has corrected such an error.

The argument says, that L. states what were our rights under the treaty of "1814," [in fact it is the treaty of 1830 that L. speaks of] and says that it has been affirmed by the treaty of 1862, and that D. states what are our rights under the treaty of 1862. Of course this could readily be taken from L.'s remarks about the former treaty. In fact D. says that by the treaty of 1862 "the United States are placed *or rather continued,*" etc.

Mr. Dana's *only* addition has been to give the citation and correct the date of a U. S. treaty referred to by L. In his argument, he says

(p. 113): "Why does Potter admit that D. appears to have examined the treaty for himself unless because he saw that D. had what could not be got from L.'s note? Yet see his charge, p. 232. 'The whole . . . is to be found in L. . . . the whole could be written from L.'" What Mr. Potter said on page 232 was, "The whole (statements and authorities), *except* some mere citations or some trifling or comparatively unimportant matter, is to be found in the corresponding note in L.," etc. This omission of the qualification made by Mr. Potter, this deliberate misquotation, is the whole basis of the attack on Mr. Potter. And yet the respondents ask your Honors to acquit the writer of this argument of the charge of literary piracy, upon the strength of his character for fair dealing!

D., note 112, p. 266, is entirely a statement of facts, negotiations and treaties, relating to the Sound Dues; "all the facts and authorities are in L., note 110, pp. 334-5-7, attached to the same word of the text, though D. has looked at a recent U. S. treaty mentioned by L. The references to Martens' *Receuil* as usual do not designate the series.

"D. refers to Ann. Reg., 1857, pp. 12-40. I cannot find there anything on the subject. He also refers to Ann. Rég., 1858, 830, which contains no such page; the only way of accounting for this is that D., in copying L.'s list of authorities on p. 335, omitted a whole line, thus — it reads in L.: 'Annual Register, [1855, p. 291, Almanach de Gotha, 1856, p. (54), *ib.*] 1857, pp. (12), (16), (23), (40), *ib.* 1858, p. 830.' In D. all the part in brackets — about a line — is omitted, and it is made to read 'Annual Register, 1857, pp. 12-40, and 1858, 830.'" (Mr. Potter, p. 213.) See similar instances on pp. 146, 164, *supra*.

L., p. 333, cites Wheaton's *Histoire*, Leipsic ed., "tom. i., p. 211." Mr. Morse pointed out that D. cited the American edition. In Mr. Dana's MS. it stands thus: "Wheaton's Hist. of Law of Nations, 158 vol. i., p. 211 (Leipsic ed.). Mr. Lawrence's note to p. 333 of the 7th edition of this work." The reference "vol. i., p. 211 (Leipsic ed.);" is struck out, and the 158 (which is the reference to the American edition) was written in, apparently at a different time. The reference to L. was also struck out, but all the *matter* copied from L. was retained. (Record, p. 386, sp. 26.) Mr. Dana was examined on the subject of this MS., but he does not venture to suggest that this note, written in

his interleaved copy of L., was obtained from any source except from L.'s note, attached to the same word. (See p. 103, *supra*.)

Cross-Int. 137. D., note 112, p. 266 of D.: you say the subject is discussed by Halleek and Woolsey. Do they give the same citations that are common to L. and D., and if so, where?

Ans. No, they do not. (Morse, p. 445.)

Speaking of the treaty of 1857, the argument (p. 114) says:

D. says it "*avoids* a recognition of a right to lay duties on passing vessels." L. gives no hint of this. D. says, the payment was put on the ground of indemnity for maintaining lights and buoys by Denmark and not for her renunciation of a right. No hint of this appears in L. D. says that Denmark agreed to levy no more dues, though not admitting the levying to have been wrong. No such explanation appears in L.

This is not correct. At the top of p. 335, L. says that in the negotiations for that treaty, the United States refused to pay any impost "on the ground of *right*," but said that they would pay compensation for expenditures made in improving navigation. At the bottom of p. 335, L. gives an account of the treaty. He says that the navigation is *declared* free; that Denmark "stipulates that the passages shall be lighted and buoyed" etc., and that, "in consideration of these stipulations, the United States agrees to pay", etc.

The treaty of 1861, being very recent, was cited by L. from the National Intelligencer. For *this* D. was therefore obliged to look up the reference to the statutes, and for it he cites the annual edition; but for the treaty of 1857, only a few lines above, in the same note, and where L. gives *all* the information, D., not going to the statutes himself, "cites xi., 719," exactly as in L., the reference being to L.'s edition of the statutes.

The attack on Mr. Potter is based on—if possible—grosser misquotations than in the case of n. 111. The argument says (p. 113):

"All that Potter says of this in his dep., p. 213, is 'All the facts and authorities are in L., n. 110, pp. 234-237.'"

Will your Honors look at the *half page* we have quoted from Mr. Potter's deposition p. 213, and observe the conclusive proof of actual unintelligent transcribing. The respondents quote two lines, stop in the middle of a sentence, suppress all the rest which cannot be answered, and yet say that what they quote is "*all* that Mr. Potter says of this note." They do not stop here. On p. 114, the argument says: "Yet

this note Potter says . . . in dep. 213, '*all the facts and authorities* are in L.'s note 110'; and lastly calls it a note which 'could be written without going beyond L.' All this is simply untrue." (The italics are theirs.) The only thing that D. did not get from L. is the mere *citation* for the treaty of 1861, a comparatively unimportant matter. The only other thing which the argument pretends he could not get from L. is a statement about the treaty of 1857, — and we have shown that he not only could have got this, but that he actually did get it, together with the citation for it, from L. The whole of this charge rests on a quotation of the first half of Mr. Potter's sentence, and a suppression of the very next words which present *exactly* the proper qualification. Mr. Potter, p. 213, said "all the facts and authorities are in L., n. 110, pp. 334-5-7, attached to the same word of the text, *though D. has* looked at a recent U. S. treaty mentioned by L."

For the second statement, put in quotation marks as if taken from Mr. Potter's deposition, no reference to the record is given, and we cannot find it, or anything that is substantially like it, anywhere in his deposition. We ask your Honors to judge between Mr. Potter and his assailant, the writer of the respondent's argument.

D., note 117, p. 277, is a statement of a treaty and a convention stated in L., note 113, attached to the same word; D's note was written on the interleaf. After stating the treaty of 1856, L., p. 350, cites "Martens par Samwer, Nouveau Réceuil, tom. xv., pp. 647, 776," and continues: "The act of navigation . . . was concluded . . . in pursuance of the 17th article of the treaty, on the 7th of November, 1857," and then cites for that and other matters which he mentions "ib. tom., xvi., part ii., p. 75; ib., pp. 622, 632." D., page 277, after speaking of the treaty of 1856 says: "See also Art. 17 of treaty of 1857; Martens Nouveau Réceuil, xv., 647, 776; xvii., 75, 622, 632," thus confusing the Art. 17 of the treaty of 1856 with the act made in pursuance of it in 1857, on account of the collocation of the figures in L.'s note; and also changing "xvi., part ii." to "xvii.," the citation in L. being right (Mr. Potter, p. 177).

For evidence that D. never saw these volumes of Martens, *v. "Martens,"* p. 225, *infra*. That he does not now understand the matter appears from the statement in his argument that "there is no mistake in these references to the treaty of 1857."

Mr. Morse (p. 419) says: This note "bears no resemblance to L. except in topic, and in this respect it bears an equal resemblance to Woolsey. The 'curious mistake' appears to be simply a misprint." The argument (p. 114) improves on this, and states in substance that the note is simply a statement about the treaty of 1856, and might be taken from Woolsey (§ 58) as well as from L. They do not allude to the five citations in which the notes resemble each other as well as in topic, and which are not in Woolsey. Mr. Morse's statement that the mistake is a misprint is not supported by a reference to D.'s MS. Indeed Mr. Dana does not see that there is any error at all.

D., note 118, p. 287, is from L., note 114, attached to the same word. (See Mr. Potter, p. 213.) L.'s note gives statements of certain treaties, etc., relating to the navigation of some great rivers of North and South America. Most of these are U. S. treaties; but L.'s and D.'s notes also include a treaty between Brazil and Peru, a statute law of the Republic of Ecuador, and some account of a controversy between the United States, Peru, and Brazil, as to the navigation of the Amazon. L. has omitted one treaty about the St. John, and Heffter's list of river navigation treaties gives that one, and is otherwise quite different from L.'s list (Record, pp. 189, 214). This is not denied; the statement on which the argument on p. 48 is founded, namely, that L.'s and D.'s list is *necessarily* the same, is therefore entirely incorrect.

Mr. Dana testified: "This note is *entirely* a collection of treaties which I had in a volume of L. and B.'s annual pamphlet laws. I examined them *all*, digested them from this volume," etc. (p. 355). (The italics are ours.) He afterwards confessed that when he made this positive statement he was not testifying from recollection at all. "As a matter of independent memory of the transaction, as I have had occasion to say before on other points, I have not one word to say," and he goes on to complain of counsel for making an attempt to test his memory. Obviously his statement is not correct, for the foreign matters are not in the U. S. Stats. and he finally admits this (90-96 cross-ans., pp. 380-2).

The argument (p. 115) is so framed as to convey the idea that the note contains nothing but United States treaties; it repeats Mr. Dana's statement, and makes no allusion to his cross-examination, and, having thus put out of sight those matters which *must* have been copied from L.

it adds: "*It is therefore proved as to every part of this note that it was not taken from L.* Yet Potter charges as usual, from force of habit perhaps." (The italics are Mr. Dana's.)

The fact adduced in Mr. Dana's favor only shows that he verified L.'s statements of the U. S. statutes. As to the time when he did this, it is significant that the citations, the form of which is relied on, were added in reading proof (MS. p. 386, sp. 27).

D., note 120, p. 291, consists of citations of all those U. S. despatches relating to the recognition of the French Republic and Empire, in 1848 and 1852 which are cited and stated in L., note 117, attached to the same word. They are three in number, and two of them are cited by L. from "Department of State MS." The dates are thus written:

L., p. 377, 31st of March, 1848.	D., p. 291, 31st of March, 1848.
January 12, 1852.	January 12, 1852.
17th February, 1853.	17th February, 1853.

The statement in the argument (p. 78) that L. "cites them by the volume and page," is incorrect, and incorrectly suggests that they are cited from some printed book, whereas the citations from MS. are conclusive proof that D. copied from L. Both might have referred to the recognition of Louis Phillipe, but L. did not, and D. has not, though in a previous passage (D., p. 43), copied from Phillimore, it is referred to.

D., note 121, p. 291, is a short note written on the interleaf, and is from L., note 118, attached to the same word. (See Mr. Potter, p. 214.) One authority from Parliamentary papers is from L.; the date, "23d January, 1862," (not "23rd") being written in exactly the same way in both. The other authority is from Mr. Seward's volume for 1865.

D., note 122, p. 295, is written on an interleaf, and is a statement of a matter of diplomatic practice, with historical illustrations, citations of despatches, etc. It is from L., n. 120, p. 384, and n. 121, p. 386, attached to the same word. (See Mr. Potter, p. 214.) The only point made by the respondents' argument (p. 78) is that D. notices a fact "to which no allusion is found in L.," that fact being something contained in a letter. The argument says, "L. not only does not cite this letter but has nothing upon the subject." In fact this letter, which is the *last* thing in D.'s note, is cited, and precisely the same matter which D. has stated as to its

contents is stated in L., p. 386, the *last* of the pages pointed out by Mr. Potter as the source of D.'s note.

D., note 123, p. 297, is written on an interleaf, and is a statement of a rule of diplomatic practice, and of a reason for it, found in L., note 125, attached to the same word, and addenda to it on p. 1004. (See Mr. Potter, p. 214.)

L., p. 388 (first sentence in note 125). "The Minister of Foreign Affairs may refuse to allow a communication to be read to him by a foreign minister from his government, unless a copy is to be left with him." Quotation from a letter of Mr. Canning. "It was utterly impossible for me to charge my memory with the expressions of a long despatch once read over to me. . . . Yet, by the process now proposed, I was responsible to the king, etc., for the contents of a paper . . . of which the text might be quoted hereafter . . . as bearing a meaning which I did not on the instant attribute to it, and yet which upon bare recollection I could not controvert."

D., p. 297 (the whole of note 123). "It is understood that a Minister of Foreign Affairs may decline to hear a despatch or other written communication read to him by a diplomatic agent unless a copy is left with him.

The reason is, that it puts him to the disadvantage of being obliged to trust to his memory, while the other party to the interview has the writing. In case of verbal communications, the two parties are on an equality."

The argument (p. 78) states that D. gives the rule and the reason for it. That from L. these "might indeed be extracted, but no attempt to do this is made by L.;" and that "the usual contrast between D. and L. is here exhibited." The fact is, that L. states the rule in thirty-two words, and D. in thirty-three words.

D., note 125, p. 301, is a statement of a fact and a citation copied from L., note 127. The name referred to in the argument might well have been added by D. from general knowledge, and in fact it is interlined or written in afterwards in his MS., perhaps by his brother's suggestion. Mr. Morse said (p. 420) that D.'s statement of the second objection made by the Dutch Minister, and which is not in L., proved that "for this Mr. D. must have been indebted to an independent examination of the correspondence." The book being put into Mr. Morse's hands, it appeared that no such objection was ever made in fact (243 cross-ans., p.

460). The respondent again repeats this (p. 78), and makes no allusion whatever to Mr. Morse's cross-examination. It seems to be easier for Mr. Dana to guess than to study. (*v. p. 83, supra.*)

D., note 126, p. 301, consists of a citation copied from L., note 131, attached to the same word. (See Mr. Potter, p. 214.) Mr. Potter does not say that the text "states," but that it "implies" that there are many examples, etc. This is borne out by the text, and is not denied, and shows that D. simply adopted a selection made by L. L. cited "Lord Mahon's" History; D. cited "Lord Stanhope's" Hist.; but in fact D. began to write "Mahon" and then changed it (MS. in Record, p. 386). The name "Stanhope" is in L.'s note, and would naturally suggest the change to one desirous of verbal differences.

D., note 128, p. 303, is from L., note 133. It contains a MS. despatch and a statement of a diplomatic matter nowhere mentioned except in L. (Record, p. 124.) D.'s MS. also cited L.: the *citation*, but none of the *matter* copied, was struck out before printing (MS. in Record, p. 387). (See Mr. Potter, p. 215; p. 103 *supra.*)

D., note 129, p. 303. The actual learning of this note is from L. note 134, attached to the same word. There is a striking identity in the attachment to the text, and in the cross-references. (See Mr. Potter p. 215.)

D., note 131, p. 319. It appears that D. simply directed the printer to reprint a portion of L.'s note (Wilson, 4 cross-ans., p. 465).

"D., note 134, p. 323, is simply a citation of an authority cited and quoted in L., p. 422, note 141, attached to the same word of the text. It is the only authority cited by L. to this point. Halleck, p. 234, cites many others and does not cite this one. It is Klüber" (Potter, p. 215). L.'s matter about Mr. Soulé is copied in D., note 137, *q. v.*

D., note 135, p. 324, is chiefly from L., note 143, p. 423, attached to the same word. Four MS. despatches, etc., are cited. Both cite the same sections of Martens, though others are equally applicable. Both cite *Annuaire*, a book from which D. has no original citations (Mr. Potter, p. 215).

In L.'s note, there is an account of Consul Dillon's case with some citations of despatches taken from MS. in the Department of State.

(Lawrence, p. 125.) These reappear in D. Mr. Dana undertakes to swear that this matter is in Halleck (p. 347). On cross-examination, he cannot point it out in Halleck, and on being pushed he confesses that he made this statement "not from any personal examination of Halleck, but on the authority of some one who examined this subject generally for me, and made a note of the passage or passages in Halleck where it is mentioned, and gave it to me. I mentioned it on that authority substantiated by my own general recollection" (43 cross-ans., p. 372).

He takes the question home with him; but the next morning "has had no opportunity" to find out where it is (48 cross ans., p. 373). Perhaps his time was occupied in preparing the following:

D. R. 3. Can you now state the name of any German publicist to whom you referred as having spoken of your speeches in the Constitutional Convention?

Ans. I have since examined, and learned that one is Von Mohl, in his "Geschichte und Literatur." (See American Encyclopædia at my name.) (See record, p. 391; p. 7, *supra.*)

D., note 136, p. 326, is a statement of a matter of fact.

L., note 145, last sentence. "In fact while in monarchical States it is the custom . . . to give new credentials to ministers on the death or other equivalent change of the monarch on either side, no such practice obtains in regard to the changes in the executive authority of constitutional republics."

D., note 136. The whole note is: "In the United States, and in other constitutional republics, no change or interruption in the functions of diplomatic agents takes place upon the death of the chief magistrate, or the expiration of his term of office, and the inauguration of his successor."

One of the crimes which they accuse Mr. Potter of, is his suggestion that this note was wholly taken from L., and that the two are identical in substance.

D., note 137, p. 326, is from L., note 146, attached to the same word and from note 141. (See Mr. Potter, p. 216.)

The argument (p. 81) says that D.'s note is the statement of two points which "explain the whole subject," and that "the Court will look in vain through the notes L. 141, (p. 421,) 146, (p. 427,) for even an attempt to state either of the points distinctly put by Mr. D."

L., note 141, p. 422. "M. Drouyn de Lhuys refers to the rule of the law of nations which, he assumes, would have required a special agreement to enable him [Mr. Soulé] to represent in his native land the country of his adoption."

D., p. 326. "It has been claimed by European sovereigns, that they cannot be expected to receive, as a diplomatic agent, a former subject, naturalized in the United States, and that a special agreement to receive him should precede his arrival at their court."

This is the second of the points.

The first, that a government may properly refuse to receive an ambassador upon the ground that it thinks it cannot maintain agreeable relations with him personally, is certainly made manifest by the instances, and the reasons for each given in L.'s note 146, and moreover is familiar to any man of "ordinary intelligence and attainments," in consequence of the case of Mr. Burlingame's appointment to Vienna.

D. then gives a list of four historical instances, citing despatches, *Annuaire*, *Congr. Docs.*, etc., for them. These are all in L., note 146 attached to the same word. "This particular sentence of the text speaks of the termination of a mission 'when the court at which the minister resides thinks fit to send him away without waiting for his recall.' Both L. and D. attach to this, as illustrations, the same two instances where our government did *not* send the minister away, but asked for his recall." D. evidently copied these instances or authorities from L. without even taking the trouble to understand them; for though L. states each separately, and thus shows that two (Genet and Poussin) were cases where we asked for their recall, and two (Jackson and Crampton) were cases when we sent their passports to the ministers at once, yet D., with his usual carelessness and inaccuracy, makes no distinction, but speaks of all four as "the principal cases of foreign ministers objected to by the United States and recalled." Moreover, in his note, he speaks of these as the "principal" cases; but in his argument (p. 81), to meet the proof from identity of selection, he permits himself to say, without a word of evidence on which to base the assertion, that "but four cases of recall or dismissal have occurred in the United States."

D., note 138, p. 338, is from L., note 153. (See Mr. Potter, p. 216.) It shows that, in the U. S., a treaty cannot be varied, in the exchange of ratifications, from the form in which it was passed on by the Senate, citing many despatches, etc., all from Lawrence, one being cited by

L. from "Department of State MS." The "point logically stated by D. in three lines, while L. makes no attempt to state it at all" (argument p. 83), seems to us to be precisely stated by L. in the first two and a half lines of his note, and again repeated by him in quotations from or statements of the contents of State papers written by Mr. Wheaton, President Polk, and Mr. Adams. The argument states that "L.'s note 154 has nothing to do with the subject treated of in D.'s note." Mr. Potter had said this, and had also pointed out the fact, to which the argument does not allude, that L.'s note 154 immediately followed 153, on the same page, and that the copyist, not noticing the end of note 153, had put into D.'s note an authority found only in L., note 154. D.'s note was written on the interleaf facing L., note 153, note 154, p. 456 (Record, p. 387, sp. 31).

D., note 139, p. 339, is from L., note 155, attached to the same word. (See Mr. Potter, p. 216.) The first paragraph of D. is a cluster of fourteen citations. Mr. Dana copied twelve from L. and then added a reference to his other handbooks, Phillimore and Halleck. Mr. Morse said that Mr. Potter alleged that D. cited Op. Attorney General as authority for Mr. Wheaton's letter. Mr. Potter did nothing of the kind; but stated a conceded fact to rebut an inference which it was thought might be drawn from D.'s use of the words "Attorney General." On cross-examination (146-148 cross-ans., p. 446), Mr. Morse very frankly confessed his error; but the argument (p. 116) repeats it, making no allusion to the cross-examination.

Mr. Morse was careless enough to say (p. 411): "The citations on D., p. 339 are nearly all in Halleck, and occur there in the same order in which they are given by L. and D." He was forced to admit that instead of *nearly all*, it was only 4 out of 12 that were in Halleck, and that the identity of order, etc., between L. and *Halleck* arose from Halleck's taking them from L. and citing L. for them (140-142 cross-ans., p. 445). And it also appeared that L. had cited U. S. statutes iii., p. 354, instead of p. 255, and that D. had reproduced the error. These statements in Mr. Morse's *direct* examination are quoted and repeated in the argument; but no allusion is made to his cross-examination.

This note affords an excellent example of D.'s blindly following L. in the selection of authorities and illustrations. (Mr. Potter, p. 189;

supra, p. 49.) Some of the authorities relate to foreign governments; but, instead of being attached to the preceding part of the text, which relates to nations generally, they are, in both L. and D., attached to the sentence which relates to the effect of the U. S. Const. on the general doctrine. (Mr. Potter, p. 216.)

A provision in the French Constitution about treaties of *commerce* might be mentioned here, but is not. L. and D. both mention it, giving the same authority for it, in their notes, 247, attached to that part of the text which relates to treaties of *peace* (Mr. Potter p. 216).

D. note 140, p. 341, is a citation of a single case, which is the only authority cited (and its contents stated), in L., note 156.

"D., note 141, p. 342, is two citations found in L., p. 462, note 157, attached to the same word of the text." (Mr. Potter, p. 217.) One is Twiss, from whom D. has no original citations (Mr. Potter, p. 180).

"D. note 142, p. 350. The substance of this, so far as prior to L., is all found in L., note 106, p. 325, except a passage which is referred to in Wheaton's text." (Mr. Potter, p. 217.)

D., note 143, p. 352. This is a very clear case of copying from L. note 160, attached to the same word of the text. D. cites a MS. despatch only printed in L. Lord Derby's Speech is given in Hansard as of Feb. 6: L. and D. cite it as of Feb. 7. This speech relates to one of the matters found in L.'s note and *not* reproduced by D. and does not relate to any matter found in D.'s note. Of a large number of speeches made in Parliament in the same debate, D. cites exactly the same three that L. cited. An important diplomatic discussion directly involving the subject of this note (United States and Great Britain in 1816-18) is not referred to here by L. but is stated in his note 106 for a different purpose. D. also does not refer to it here, but does refer to it in that part of his annotations (note 109, p. 261) which correspond to L., note 106. (See Mr. Potter, p. 217.) This note contains one of D.'s "clusters of citations," taken at second hand.

D., note 145, p. 356. (See Mr. Potter, pp. 178, 183, 193, 218.) The argument, p. 83, says that the first part of the note is a statement of an important principle of law, contradicting Mr. Wheaton's text, and not

found in L. If this were true, it would not be material: the latter part is a statement of facts with two authorities, is clearly copied from L., note 163, attached to the same word (for they are authorities — *Annuaire* and *Al. de Gotha* — from which D. has no citations, except such as he has copied from L.) and is complete in itself. It was originally written and signed "D.", as a complete note, and the first part was added afterwards (See MS. in Record, p. 387, sp. 32). In truth, the first part in D., so far as it is a mere reflection or conjecture as to what we *might expect* the law and practice to be, is very obvious: as a matter of *fact*, it is wrong. The very instance and the only instance referred to, the most recent in history (the Italian war of 1859), shows that though there was much hard feeling, and some diplomatic negotiations with regard to the Swiss mercenaries, no thought was entertained of treating Switzerland as an enemy or party to the war. The learning of D.'s note was copied; the addition which shows want of learning and thought he did not find in L. (See note 201 *infra*, on the same subject.) It appears from the record, (p. 129,) and from Lawrence's *Wheaton*, p. 625, that Mr. Lawrence was in Italy during the war, and frequently conversed with Mr. Kern, the Swiss Plenipotentiary, upon the affairs of Switzerland, so that, if Mr. Dana relied on copying, he could hardly find a better source than L. to copy from. But he copied so carelessly, that he entirely fails to notice that the Swiss regiments had their origin in arrangements made with the separate cantons before the Constitution of 1848, which, in the article quoted in L., expressly forbade military capitulations.

D., note 147, p. 364. In the last paragraph, D. first mentions one historical instance and a diplomatic discussion of a certain principle of international law: for these he refers to two historical works, and cites two pages from each. This illustration, and *exactly* these citations — though it is evident from L.'s note that they are the special pages from which he has selected quotations out of long passages relating to the subject — are found, in the same order, in L., note 165. pp. 490-1 attached to the same word. Then follows a citation of Halleck, also found in L., and then citations of a number of text writers, all of which are exactly found in the passage of Halleck referred to. (Mr. Potter, pp. 218, 233.) Mr. Potter thinks that all of this note which is not from L. is from Halleck, Woolsey, etc., (dep. p. 233.)

D., note 152, p. 372, is chiefly from L., note 169, pp. 511–512, attached to the same word. (See Mr. Potter, p. 218.) It is one of D.'s "leading notes."

The first two sentences in D. distinguish between hostile embargo and civil embargo. This distinction is pointed out in the first two sentences of L.'s note. The next sentence in D. states that the embargo for purely municipal purposes, and not by way of hostility, ought to be acquiesced in by other powers. The last lines of L.'s first paragraph say of such an embargo, that it is "neither hostile in its character, nor justifying, nor inciting, nor leading to hostility with any nation whatever."

D.'s next two sentences refer to the embargo of 1807 as an illustration, and are the same in substance as the last six lines of L.'s first paragraph, which give the same instance. D.'s next two sentences state in substance that foreign powers, who suffer by an embargo, will be likely to inquire whether it is justifiable, and that probably no nation would cut itself off from commerce if it could get along without that step. "Ordinary education and intelligence" would supply this matter. The next two paragraphs contain a re-statement of the paragraph of Wheaton to which the note is appended.

The next long paragraph relates to "Angaria." The first part of this, — the statement of the law, — is in substance the same as L.'s quotations from Hautefeuille, Heffter and Massé. D.'s citation of Azuni appears to be copied from L., bottom of p. 511. The two citations of Massé are in identical form in Phillimore (Mr. Potter, p. 218). Though these references in L. and Phillimore are to the same passage in Massé, yet the form of the citation is different, for *they* did not copy from each other. Next follows a citation of Phillimore, and a statement of his views. L. refers to the same passage of Phillimore, but as D. examined some of L.'s references to *this* writer, his citation is slightly different from L.'s: one cites p. 41, and the other cites p. 42.

Next follows, as illustrations, citations not of *two* (argument, p. 117, Morse, p. 411) but of four U. S. treaties, identical in L. and D., though there are many other treaties in the same volume with identical provisions. (Mr. Potter, p. 190.) The treaty with Venezuela is of 1836; L. here cites it as of 1830, and D. reproduces the error. In a subsequent note (L., p. 770, D., p. 608), L. cites it as of 1836, and D. does the same. Next is a citation of, and a reference to the contents of a

passage in Heffter, cited and quoted in L., near the top of p. 512. The next and last paragraph cites no authority, but is presented as containing Mr. Dana's original views. It is in substance the same as the first part of the quotation from Massé in L., p. 512, presented by L. as a proper statement of the matter in the language of a writer of authority.

D., note 156, p. 387, and note 158, p. 400, are from L., notes 172, 173, 175. (See particularly Mr. Potter's very careful examination of these notes on pp. 218-220.) These are two of the notes of which Mr. Dana specially says: "However long I may live, I can never expect to try harder, or give more original power to any subject than I did to these notes" (p. 319). They relate to somewhat different subjects, but are illustrated by very full statements of, and references to, the governmental acts and orders connected with the Crimean war, citing the English, French and Russian official newspapers. The absolute identity in the details shows actual transcribing, without even an attempt at verification. Mr. Dana (deposition p. 355) says that this is entirely his own, and that it is not worth his while to compare it with L.'s notes. Mr. Morse has examined them and "compared them with the works of the most famous modern publicists," and, as the result of his examination, and as matter useful in rebutting the inference of copying which might be drawn from Mr. Potter's statements (97 ans., p. 440), he points out (p. 408) that the very peculiar citations of newspapers, etc., are all in Halleek, in identical form. Either because, according to the judgment he has exercised in testifying that there is no foundation for Mr. Potter's charges of copying, he thought it of no importance, or because he thought it so very material as *not* to be "useful to the *defendant*" (top of p. 440), he omitted to state, what he *must* have known, that Halleek *expressly* cites them from "note by Lawrence" (135-140 cross-ans., p. 445). This, and the large number of other instances of the same kind, show either a judgment entirely worthless upon the question of copying, or they show a habit of making statements so incomplete and garbled as to tend to help the defendant, when, if truly made, they would afford the most irresistible proof of actual transcribing; and as, in making statements thus garbled as to what is found in another book, and where he *knew* (160 cross-ans., p. 448) that a true transcription of the whole passage would be the strongest proof in favor of the complainant, he *invariably* refrains from pointing out where the passage is to be found

(128 cross-ans., p. 444), the book chiefly referred to (Halleek) being without index, and Mr. Dana declining to point out the passages on the ground that it is so hard to find them (42 cross-ans., p. 372), the Court will not only reject all that portion of his testimony, but will refuse to place any reliance on *any* of his opinions or on *any* of his statements as to the contents of books.

D., p. 417. This case is still worse. Mr. Potter, pp. 157, 220, had pointed out that D. had reproduced L.'s citation of U. S. vs. Guillem. Mr. Morse, as a *direct reply* to that charge, says: "The ease of U. S. vs. Guillem (printed affidavit, p. 59) is familiar. I have met with it in Abdy's Kent, and Halleek, and again fully discussed in the last American edition of Kent" (16 ans., p. 408). Mr. Morse had said (8 ans., p. 403), that of the citations identical in form in L. and D. he has "found a great many of these to be repeated also by other publicists." "A very large number of those citations which Mr. Potter has charged to be common to L. and D., and therefore probably to have been pirated by the latter, I have found frequently in identical form in the works of other well known publicists of modern date;" and in his 2d cross ans., p. 427, he says in substance that his 16th ans. furnishes examples of the general statements previously made, so far as in the nature of things examples could be furnished. On cross-examination, he is forced to admit that though this same *case* is cited by the others mentioned, the citation is nowhere found without an entire and radical difference of form except in L., D. and Abdy, and that Abdy says, *in so many words*, that he takes it from Mr. Lawrence's note attached to the same word to which D. has attached it (See Morse, 128, 141 cross-ans., pp. 444-5; also, 151-6 cross-ans., p. 447, and *supra*, p. 99). After being cross-examined at some length upon a large number of other similar instances of alleged identity between L., D. and others with similar results, his 157, 160 cross-ans. show that this instance correctly represents *all* the cases where he has said that the same thing is found in other writers,— that is he admits that it is there found, either with such radical difference of form as to forbid any inference of copying, or that those writers *professedly* copy it from Lawrence, giving him credit for it. And all Mr. Dana's testimony as to this kind of proof is only a *re-statement of what Mr. Morse has told him* (Dana, 43-49 cross-ans., p. 373).

D., note 160, p. 417. The first part of D.'s note is a statement that in our civil war the same rule applies as in other wars, namely, that a

place is deemed to be enemy's territory or not according as it is in the firm possession and control of the one party or the other; that persons and their property are impressed with the character of their domicile, and that this is without regard to individual loyalty. He cites the "Amy Warwick" in the District Court and in the Supreme Court. He then, in the next paragraph, says that the doctrine that firm possession determines the character of the place, so far as neutrals are concerned, was asserted by us in our relations with Peru. For this he cites Mr. Black's opinion and a despatch. That opinion and that despatch are in L., p. 575, with full statements of their contents, the despatch being taken by L. from "MS." (See Mr. Lawrence's dep., p. 125.) Those statements show the ground distinctly taken, that the rule of firm possession applies to a civil war. The former part of the note is certainly a matter perfectly well known and is distinctly noticed by L. as proved by the decisions in the "Amy Warwick" (p. 536; supp., pp. 20, 33). Unquestionably D. copied his second paragraph from L. The statement in the argument (p. 85) that D. "simply refers to our position respecting Peru," is incorrect upon a vital point; for, besides referring to it, he cites two documents, one of which has never been printed or noticed in any book except L., from which D. *must* have copied it.

"D., note 168, p. 431. The first part contains a general statement of what is found 'in many treaties and decrees,' specifying none and citing no authorities. L., note 187, p. 596, attached to the same word of the text, mentions several ordinances and treaties, and states that they contain the provision referred to. The latter part of the note in D. is a citation of Halleck, and a quotation from the Instructions to the U. S. Armies." (Mr. Potter, p. 220).

D., note 173, p. 453, is what Mr. Dana calls one of his most original notes. "This is a very elaborate historical note, four pages long, upon the subject of privatizing. It cites no less than twenty-four treaties, despatches, and orders of foreign governments during the period 1785-1862 (prior to L). All the facts, and all these authorities are found fully stated in L., note 192, p. 628, attached to the same word of the text, except that D. cites and quotes more at length than L. does from the Seward-Adams correspondence found in the volume of U. S. Dip. Corr. for 1861." Mr. Potter's deposition, pp. 221-2 should be carefully read.

The table appended to the brief shows that Mr. Potter mentions this note in thirteen different places. (*v. supra*, p. 73.)

"L., p. 640, cites Pres. Message and Does., pp. 22-35. D., note 173, p. 454, cites Pres. Message, pp. 22-35. It is an error in both. It should be "p. 22 and p. 35." The only references to the matter are in the Message, on pp. 22-3, and Does. on p. 35, *et. seq.* From p. 23 to p. 35 there is nothing alluding to or bearing upon the subject. There are not 35 pages in the message" (p. 159).

On p. 161, he mentions the matter about the "Paris Moniteur," *q. v. supra*, p. 75.

P. 163. In this note, L. twice refers to the same volume of Congr. Does. with certain peculiarities and differences of form, and D. reproduces them in the same order, and with the same peculiarities respectively. D. shortened the form by omission and abbreviation; he says that when "copying directly" his citations from L. and others he "abbreviated excessively" (32 ans. pp., 339-340) but the ear marks remained.

P. 164. The four dates, being dates of despatches, etc., copied from L., are written in D., with varying forms, *exactly* as in L.

P. 171. D. has cited a despatch taken by L. from MS. in the Department of State (Mr. Lawrence, p. 125).

P. 178. In copying two citations from L., and in trying to abbreviate, D. has omitted a part of the citation which is absolutely essential to identify the passage cited.

P. 186. D. has copied from L. two references to a book from which he has no original citations.

P. 193. In naming the five powers who approved of the Marey amendment, D. puts them in the same order as L. The facts and these five despatches were procured by L. from the Department of State (Mr. Lawrence, p. 125).

On p. 221, Mr. Potter examines the whole note; on p. 243, he places it, where it belongs, in the list of notes copied from L.

The writer of the argument permits himself to say (p. 62) that "the authorities of D. are common to all publicists who have touched the subject of late." There is not a scintilla of evidence on which to found this most material statement. On the contrary, all that Mr. Morse ventured to state was, that "the resemblance [between L. and D.] is confined to the statement of a few facts [clearly this is untrue]; than which

there are few matters of history better known. The subject is discussed by nearly all publicists [but he does not say that there is any identity of substance or form in their discussions or citations] who cover different portions [he does not say the whole] of the historical matter common to L. and D." (p. 422.)

Mr. Potter had pointed out that the citations near the bottom of D., p. 454, were copied from L. Afterwards, D.'s MS. was produced, and, as usual, it showed the correctness of Mr. Potter's judgment.

L., p. 639. "Mr. Marcy, in a D.'s MS., Record, p. 389. "Mr. despatch of Dec. 8, 1856, to Mr. Marcy, in a despatch to Mr. Mason, Mason, at Paris, proposes to for- the U. S. Minister at Paris, of Dec. malize," etc. 8, 1856, proposes to"

[This was from Dept. of State MS.]

D. began his sentence in the same form as L.; having gone as far as above quoted, he struck it all out, and interlined a simple citation of the despatch in another place.

D., note 174, p. 458. (See Mr. Potter, p. 222.) In this note, D. reproduces from L., note 103, attached to the same word, a citation of the old four-volume, and now obsolete edition of Hautefeuille, which L. had reprinted from his edition of Wheaton of 1855. (See p. 79, *supra*.) Mr. Dana had "the latest Hautefeuille" (argument, p. 30).

D., note 176, p. 467. (See Mr. Potter, p. 222; 79-83 cross-ans., p. 259; 27 ans., p. 261; 91 cross-ans., p. 262). Mr. Potter says that the first portion of the note is from L., note 194, attached to the same word. Now it is true (1) that this portion is from L., (2) that it is a portion requiring great study for its preparation, though it occupies only one line. It is a statement that in England a prize act is passed at the beginning of *every* war. This was true when L. wrote, and was a matter of considerable importance, as bearing upon the distinction between the British system and our own; *but when D. wrote it had all been changed*. The preamble of the British Naval Prize Act of June 23rd, 1864 is: "Whereas it is expedient to enact permanently . . . such provisions . . . as have heretofore been usually passed at the beginning of a war." He alludes to the existence of this act, for another purpose, but never read it intelligently enough to appreciate it. Such instances, we submit, show that the merest mechanical, ignorant copying and nothing else was employed in the production of

this note. These notes relate to capture, and are attached to the same word of the text which is devoted exclusively to salvage on *recapture*, and does not mention the subject of capture.

D., note 178, p. 470, is a statement of the law of France, and is from L., note 197, and Halleck. In this note, L. cites the three-volume edition of Hautefeuille and D. does the same, whereas in note 174 both cited the four-volume edition. Halleck also cited Hautefeuille, but in a different manner, and D. rolls the two citations into one (Potter, p. 222).

D., note 179, p. 471. (See Mr. Potter, p. 222.) This note appears as if it were a statement of the contents of a passage in Phill. 'the authority cited. The last half of it is not in Phill. The *whole*, including the citation of Phill., is in L., n. 198, attached to the same passage.

D., note 183, p. 475, commented on in the argument (p. 117) is obviously included in Mr. Potter's list on p. 232 by mistake. He does not allude to it in his examination of the notes, nor anywhere in his deposition. It is perhaps a mistake for 173 to which he devotes a page and a half on p. 221, and which has already been examined at length in this argument, and which is all copied from L., with the exception of a reference to Mr. Seward's Dip. Corr.

Whether this was an accidental mistake on the part of Mr. Potter, or not, the comments made in the argument (p. 117) and the statements on which they are based are grossly incorrect. Mr. Potter's affidavit said that "the facts and authorities are in L., note 199, and addenda, 1020." The first statement in the argument is, that L.'s note has a page of matter before the case of the Emily St. Pierre. True: but nearly all of that is occupied with a statement of the case of the "Experience" and the correspondence relating to it, which is also in D. It is interesting to observe that this very important matter had been discovered by L. before it was brought to light in the correspondence between Earl Russell and Mr. Adams; it was not until L. came to write his addenda (p. 1020) that he was enabled to state that "a copy of Mr. Pickering's letter was furnished by Mr. Adams to Lord Russell, who communicated in return Lord Granville's instructions of October 21, 1799, to Mr. Liston:" yet the argument says: "Mr. D. states that the papers respecting the 'Experience' were searched for and exchanged between the two governments by both Earl Russell and Mr. Adams. No hint of this act appears in L." The argument also says that "L. refers to no note or document

whatever, not knowing or informing his reader where the case can be found; while D. cites it elaborately" from Dip. Corr. 1862, and that "the authentic volumes are not even referred to by L." On p. 1021, L. cites for it, "Papers relating to Foreign Affairs, 1862, p. 148," having previously, before the discovery of the case of the Experience by the two governments, cited it from Wait's State Papers, ix. 7, 11. Undoubtedly D. looked at the volume of Dip. Corr., and, as we believe would always be the case when he looked at the authority, his note bears the marks of his having done so. But we submit that D. has nothing of importance which is not in L.

We do not judge the writer of the respondents' argument with the judgment he uses towards Mr. Potter. It is enough to invite your Honors to consider whether, in this cause, he has not shown such a habit of reporting incorrectly the contents of passages he professes to report that no dependence can be placed on his statements. Certainly his constant errors suggest a grave suspicion that his habit of giving his own impressions of a writer's views, instead of quoting the writer's language, has not only led him to the errors pointed out on page 84, *supra*, but has made his whole book entirely unreliable.

D., note 185, p. 478, is from L. note 202, p. 670, attached to the same word. (See Mr. Potter, p. 222.) L. connected with this portion of the text a statement that a convention between England and France in the Crimean War provided that prize adjudications should be with the country of the superior officer in cases of joint capture. In attempting to paraphrase this, D. makes an error of ignorance, describing it as a convention between the "allies," whereas only two of them were parties to it (Morse, 220 cross-ans. p. 445).

The argument (p. 85) says, that "at this point Mr. D. makes the distinction that such an adjudication is sufficient only *as between allies*," and they say that this is one of those principles extracted by D. for which they often praise him and which makes this "a clear case of an independent note." Mr. Dana evidently *now* thinks (whether rightly or wrongly is not material), that this is a sound principle of law, and ought to be stated in the note. If in writing his note, instead of copying L. and trying to add such crude notions couched in the form of generalizations or statements of principles of law as occurred to him at the moment, he had bestowed as much thought upon his work as he now has, he would

probably have added it. But it is not in his note. Having stated the convention, he adds "but *this*" — that is the convention and the effect of it—"was only as between the allies. Neutrals could not object to a condemnation made otherwise, if sanctioned by the law of nations; nor on the other hand would a neutral be bound by it if not so sanctioned." Thus he does not intimate an opinion as to the sufficiency of the adjudication, but only says that its sufficiency depends on the law of nations, and that that law is not changed as to neutrals by a regulation of a belligerent, to which they do not assent. This is the merest truism, and Mr. Morse cannot deny that it is (219 cross-ans., p. 455). D. seems to have mistaken it for an idea. It may perhaps be cruel to remind him, that, if he will advert to the recognized doctrine that co-belligerent powers, in the operations of war, form but one State, he will see that, in his haste to differ from L. he would have gone astray as usual. If he had ever read intelligently the British Naval Prize Act of 1864 (see p. 190, *supra*), he would have seen that so sound is the principle of law involved in that convention, that § 35 of the Act is based upon it.

"D., note 201, p. 510, is a short historical note about Swiss mercenaries. D. has two notes upon this subject, this one, and note 145, to which this has a cross-reference. L. has two notes upon the subject: note 211, attached to the same word as D. 201, and 163 (to which 211 gives a cross-reference) attached to the same word as D.'s 145. There is no fact or authority in these two notes of D. which is not in the two notes in L."

D., note 202, p. 514, is from L., n. 212, p. 704, attached to the same word. (See Mr. Potter, p. 223.) It is a purely historical note. It is referred to a great many times by Mr. Potter, because it affords instances of nearly if not quite all the different kinds of proof — typographical error, references to *Almanach de Gotha* and *Le Nord*, etc., books from which D. has no citations except such as are copied from L., and one of which is an authority *never* referred to by any other publicist (Morse, 115 cross-ans., p. 442; 150 cross-ans., p. 447).

D.'s mistake about Savoy was pointed out by Mr. Potter, as showing a very hasty reading of L.'s note and ignorance of the subject. Mr. Dana, on p. 348, in a deposition prepared at his leisure and carefully written out, attempts an explanation. But he seems conscious of his want of knowledge on the subject; for, upon the first touch of cross-examination on precisely the matter he had been testifying about, it appears that

he knows just enough about it to refer to it on his direct examination, but little enough to shield himself from cross-examination upon the plea of want of memory. So anxious is he to put forward this shield, that he thrusts it out in his very first sentence, though the question (cross-int. 52, p. 374) merely asked him to state what was in his own note. The fact pointed out by L. and Mr. Potter is, that at that time *all* of Savoy belonged to Sardinia, and that the question of neutralization related only to the portion included in Faucigny and Châblais and in the territory north of the town of Ugino, being the territory adjacent to Switzerland, — whereas D.'s statement that it related to the Sardinian portion of Savoy is nonsensical. Mr. Lawrence had had occasion to pay particular attention to the subject of this note, from his acquaintance with the Swiss Minister, who had charge of the affair. (Record, p. 129.)

Considering Mr. Dana's lack of memory as to the sources of his notes, and the fact that this note does not afford the slightest internal evidence of the use of anything except L.'s note, his statements as to what study he bestowed on it are of no value. In fact his mistake shows that, if he studied this subject, his study brought him very little profit.

D., note 204, p. 519, is a short historical note from L., n. 213, p. 712, attached to the same word, and p. 492, to which note 213 gives a cross-reference, with some additions from Halleek (Mr. Potter, p. 223). D. cites Treseot, his only citations of whom he copies from L.

D., note 205, p. 520, is from L., n. 214, p. 714, attached to the same word, and from Halleek. (See Mr. Potter, p. 223.)

D., note 210. It is evidently an accidental error to include this in the list on p. 232, for it is not alluded to in Mr. Potter's examination of the notes, and is included by him, on p. 233, among the cross-references.

D., note 213, p. 532, is from L., note 218, p. 726, attached to the same word, and from Halleek. (See Mr. Potter, p. 224.) From Gen. Halleek, he takes citations merely; the statements as to the contents of the authorities which make the body of the note are from L. (*v.* p. 53, *supra.*) Among those from Halleek, he cites Hautefeuille, tit. 6, ch. 2, exactly as in Halleek, and like Halleek he gives no statement of the contents. In the same note he cites Hautefeuille, tom. i., p. 380, [in fact a part of ch. 2] exactly as in L., and *this* time he gives a statement of the contents as in L.

D., note 215, p. 536. Mr. Potter's statement as to this note is, that a certain paragraph containing historical and diplomatic matter is taken from L., and more is taken from Mr. Bemis. This is proved by the reproduction from L. of a typographical error — p. 485 instead of p. 475 — in a citation from the *Annuaire*, a work from which D. has no citations except such as he has copied from L. The context shows that D. used this citation without knowing the contents of the passage cited. (See Mr. Potter, pp. 176, 224; L. pp. 95, 727.)

“D., note 218, p. 550, cites four authorities and states the contents of Hautefeuille, one of them. Hautefeuille and Ortolan could have been taken from L., note 221, p. 736, attached to the same paragraph of the text. The other two are Woolsey, and an authority cited in Woolsey. The citation of Ortolan is from the second edition of 1853, just as it is in L.” (Mr. Potter, p. 225.) Mr. Dana testifies (p. 313) that he had the Ortolan of 1864, and the argument (p. 30) says that he had “an Ortolan, later than L.”

D., note 220, p. 581, is taken from his note 223, to which it refers and which see, *post*.

D., note 221, p. 584 (Mr. Potter, p. 225). D.'s note is, in substance, a reproduction of an authority in L., note 226, attached to the same word, and under D.'s eyes while writing. Jenkinson — the family name of Lord Liverpool — is used by Mr. Wheaton a few lines above.

D., n. 222, p. 585, consists of two citations copied from L., n. 227, p. 745, attached to the same word (Mr. Potter, p. 225). No possible foundation can be found in the evidence for the statement that Treseot is one of the books Mr. D. had. He nowhere mentions it in his deposition. It appears that he must be ignorant of Treseot's books, for he confounds the two (see note 204). This note contains one of the copied citations of Lord Mahon, *q. v. supra* p. 79.

“D., note 223, p. 606, is a note seven pages long, chiefly historical, upon the subject of ‘Free Ships, Free Goods.’ It gives a sketch of the negotiations and treaties upon the subject, and contains a very large number of authorities, treaties, despatches, reference to debates, etc. It is in the Lawrence style, — authorities scattered through the note and their contents stated. Some of the authorities — text-books — and one

or two facts and treaties are not in L.; they are, however, except some things from Mr. Seward's published volume, in Phillimore, Woolsey, and Halleck, at the places cited. A typographical error in the citation of Loccenius, copied from Wheaton by Halleck, is reproduced in D.; all the rest are in L., note 228, p. 766, attached to the same word of the text, and the addenda to that note, on p. 1025, and on pp. 814-15, and, with the exceptions mentioned, this note could readily be taken from L." (Mr. Potter, p. 225.) (See Mr. Lawrence's dep. p. 133.)

As usual, the matter copied from Halleck consists of bare citations, the typographical error being reproduced by Halleck from Wheaton's note.

On p. 770, line 17, L. mentions the treaty of 1794, with England, and immediately under it is, — thus, — 1795, the date of the treaty with Spain. D. mentions the treaty of "1795" with England. Mr. Potter suggested that this arose from the copyist's eye catching the wrong date while copying, and he pointed out that the date, 1795, does not appear anywhere in connection with the treaty in the U. S. Statutes. In D.'s interleaved copy of L., there is a mark in the margin opposite these dates. The respondents' argument, p. 155, does not represent this correctly; because, owing to the size of type in the argument, the two dates are two lines apart and at opposite sides of the page in the quotation, as there given. The argument accuses Mr. Potter of "not allowing for error of MS. or print." The writer, it is to be hoped, forgot that he ought not to charge the error on the *printer* without looking at the MS., because if he had looked he would have found the fact to be that it is "1795" in his MS.; Mr. Potter's charge was of an error of MS., arising from careless copying. This date is on D., p. 607. The treaty with Spain is not noticed until p. 608, and in a list of treaties of a different character, and after nine intervening citations, comprising a separate class.

In commenting on this note, the argument (p. 155), as a clincher to the whole, says: "see how independent D. is of L. throughout the note, and in his citations of treaties, with their dates." (The italics are ours.) Mr. Potter said (p. 225): "This note contains several lists of treaties given as lists of treaties containing certain provisions. None of these lists contain any treaties except such as are mentioned in L. as containing

those provisions. In fact there are others not mentioned in L. or D. which might be added to each list." Mr. Potter then names ten U. S. treaties which ought to be included in three of the lists.

D. makes a *general* reference to two Parliamentary debates, citing Hansard; the *pages* cited are those cited in L. for certain quotations from those debates, and are not the proper pages to be cited for a *general* reference, — e.g.: for a debate extending from p. 1091 to p. 1138, both cite p. 1098. There were two other interesting debates upon the same subject; L. refers to them in note 160, and D. also refers to them in note 143, attached to the same word as L.'s note 160; but in this note 223, and L. note 228, attached to the same word, they are omitted. Certainly this is not proof of *independence*.

Mr. Morse says, on direct examination (p. 423), that "a few matters of notoriety, discussed by many other publicists, are common to L. and D.;" but on cross-examination he cannot point them out in other publicists, and can only say that others have "several" and "a few" of them (222 cross-ans., p. 456); and his "few matters," common to L. and D. include upwards of 40 treaties, and a large number of despatches, debates, etc. His 223 cross-ans., p. 456, also discloses a typographical error in a quotation from the U. S. Statutes, found in L. and reproduced in D. Mr. Potter had pointed out (p. 171) that, by hastily copying L., D. had included in a list, as containing a certain provision, treaties which contained *exactly the opposite* provision. With his usual impulse to explain away Mr. Potter's statements, Mr. Morse (top of p. 425) says that "D. has simply referred, according to his custom, to treaties on both sides of the question." Undoubtedly, it is customary for him to make just such blunders as this, but probably neither his reputation nor the sale of the book would be improved by a general knowledge that such was his habit. Mr. Dana's testimony (p. 356) is to the same general effect as Mr. Morse's; he does not deny actual copying even, and he takes no notice of the reproduction of typographical errors and other specific proof of actual transcribing pointed out by Mr. Potter.

The comments on p. 151 of the respondents' argument are incorrect as statements of fact and absurd as argument. Mr. Potter's remarks are in substance, that the *same* debate is twice referred to in different parts of L. That in note 228 (on p. 775) he cites it as p. 482,

whereas the proper citation would be 481; that subsequently, on p. 815, referring to the same debate, he gives some quotations from the *speeches of Earl Derby and some others*, and cites this time p. 522. And he might have added that the first time L. gives the date, "May 22, 1856," and that with the second citation, he gives no date. Mr. Potter then points out that in the paragraph of D., note 223, (p. 611) which is copied from L., p. 775, he refers generally to the debate, cites the same volume as L., and the same wrong page, 482, and he might have added, gives the date "May 22, 1856"; that in the very next paragraph D. gives a *general* reference to the same debate, and this time calls it "speeches of Earl Derby and others," and cites, Mr. Potter says, p. 522, and he might have added that, like L. in the passage here copied from, this time he does not give the date. As these references are to the *same* debate, they necessarily refer to the same volume, there being about 1,500 pages in a volume of Hansard.

The point of this is, that D., giving merely *general* references to the debate, only a dozen or twenty lines apart in his note, would make his citation both times in the same way if he had read Hansard, and would have cited it probably as p. 481, that being, Mr. Potter says (p. 159) the first page; whereas in merely copying from L., without verification, he would have it just as it is.

The corresponding passages are L., p. 775, D., p. 611, both citing p., 482, and L., p. 815, D., 612, both citing p. 522. On p. 611, D. cites vol. exlii., 482. The argument points out that in note 228, that is p. 775, L. cites vol. exlii. Certainly this is identity. The argument also states that on p. 612 D. cites vol. exliii., and that L. (p. 815) cites exliii. It is not denied that the references are to the *same debate*, and *ought* to be to the same volume. The result is, that the argument does us the favor to point out that one of these citations in L. is right, and that the other contains a typographical error, and that D. has *exactly reproduced them*, errors and all! This is the absurd part of the argument.

The argument (p. 151) says: "It is not true, as Potter here says, that L., on p. 815, cites p. 522 of the same volume as in note 228." As usual, where there is a difference between Mr. Potter and the argument, it is not Mr. Potter's statement that is untrue, for L. does cite vol. exlii. in both cases,—p. 775, 8 lines from bottom, p. 815, end of second para-

graph. At least this is the case in our copy. But, either because of a difference in the copies, or probably on account of an infirmity of eyesight, Mr. Dana *in writing his note, as in writing his argument*, read the citation on L., p. 815, as vol. cxliii., and both in his note and in his argument has exactly reproduced what he read, and what he now says is there.

The other charge is, that D. cites p. 52, and not p. 522, and that "by changing it to 522" "a false appearance of copying is created" by Mr. Potter. Mr. Potter has stated (affdt. p. 95, record p. 154) that there are in D.'s book many mistakes in citations which he attributes to typographical errors, and does not allude to them. If 52, instead of 522, was a mistake of the printing office, Mr. Potter was right in considering D.'s citation as p. 522. Evidently it must be; for the question was between 522 and 481, and no printer's mistake could transform 481 to 52. If the writer of the argument knew, or even if he could have known by the examination he was bound to make that this was a printer's error, he was guilty of an attempt to mislead the Court, or of a carelessness particularly inexcusable, in an attack on the credit of a witness. We had actually pointed out to him that it was a printer's error. On p. 389 of the record (bottom line), it will be found proved by the *cross-examination of Mr. Dana himself* that this citation stands "522" in Mr. Dana's MS.

With reference to Mr. Potter's charge that this note was copied from L. in the sense of the law of copyright, the argument (p. 56) says that "nothing else appears than that in D.'s note of 6½ pages and L.'s two notes of 17 pages, in statements of public historical matters, three dates, two proper names, and three collocations of two or three short words are the same;" and it refers for this to his 61-64 cross-ans., p. 254. This is a portion of a long *cross-examination* of Mr. Potter, *expressly* confined to one short paragraph in that note, being the paragraph about the English treaties at the middle of p. 607 (see 52 cross-int., p. 251), and every attempt Mr. Potter made to refer to any other portion of the note was objected to as irresponsive (56 cross-ans., p. 253), and yet, having restricted him to that portion of the note, they say this, his remarks about that portion are all that he can say about the whole note, — which in fact is not true. (See p. 14, *supra*.)

It is evident that that paragraph, which is an historical statement involving and requiring an examination by some one of all the English

treaties down to 1854, is not the result of any such examination by Mr. Dana, but was made by taking the facts from L. In Mr. Dana's long deposition, taken partly in answer to Mr. Potter's, there is no pretence to the contrary.

D., note 226, p. 629, is a long note on contraband of war. See Mr. Potter's full examination of this note on p. 226. This note contains much historical matter, and many citations of treaties, orders, debates, etc. This portion, and much of the rest of the note, is from L., note 229, attached to the same word. L. has many citations of Hautefeuille; some of them are reproduced from L.'s edition of 1855, and are to the four-volume edition of H.; the others are to the three-volume edition. D. exactly reproduces those from both editions, and adds, or rather combines with them, a citation copied from Halleck. (See p. 79, *supra*.)

There are some comments on this on p. 144 of the respondents' argument. The page of L. there referred to is obviously a misprint, occasioned by repeating the previous reference to L. It should be p. 798. This matter is fully pointed out by Mr. Potter on p. 182, in the part of the deposition devoted exclusively to citations of Hautefeuille, and on p. 226, in the examination of note 226. It is there stated that D. cites Hautefeuille, tit. 8, § 2, tom. ii., pp. 84, 101, 154, 412; that the tit. 8, § 2, is copied from Halleck, and the rest is copied from Lawrence, p. 798. Mr. Potter says, "The citation should be pp. 84-101, and not pp. 84, 101. Those two pages contain nothing specially material; the reference was to the whole of § 2, which extends from p. 84 to p. 101, and all of which is devoted to a discussion of the matter. The other references are to pages where the matter is specially noticed."

The argument (p. 144) intimates that Mr. Potter has concealed the fact that D. cites § 2, and says that D. does refer to the whole section, and then to especial pages within and without that section. Undoubtedly this is what he *thought* he was doing when he copied and combined the citations in L. and Halleck; but the essential fact pointed out by Mr. Potter is, that p. 84 and p. 101 contain nothing *material*, and that Mr. Lawrence could only have put them into the note as his way of citing the whole section, and by a typographical error, left out the hyphen, and D. copied this error. Mr. Potter does *not* conceal the fact that D. cites § 2, for he gives the whole citation; but if he did not give

it, it would be a proper omission, inasmuch as in no event is "pp. 84, 101," a proper citation.

"Both L. and D. refer to and quote from a debate in the House of Lords. D. has nothing which is not in L. L. does not cite Hansard for this, and D. does not. It is in Hansard, 3d series, clxii., p. 2077. L. says that this debate was on the 26th. D. says that it was on the 26th. In fact it was on the 16th. Parliament was not in session on the 26th. L. quotes from this same debate again, note 235, there giving the date correctly. D., note 233, attached to the same word as L., 235, also quotes the same matter and there gives the date correctly." (Mr. Potter, p. 227.)

Mr. Dana (p. 356) testifies that "all Mr. Potter says is, that all my important facts are mentioned in L., in different passages between pages 698 and 813." So far from this being true, Mr. Potter (p. 226) says, that "*all* the historical and diplomatic matter, and some of the authorities are in L., note 229, attached to the *same word of the text*." Instead of that being "all" he says, he also points out a considerable number of extraordinary typographical errors and peculiarities found in L., and *exactly reproduced in D.*, and other proofs of unintelligent copying. Mr. Dana, in his deposition, attempts to answer, or rather says it is not worth while for him to answer a charge which he puts into Mr. Potter's mouth; but he makes no attempt to answer the specific charges and proofs which *are* contained in Mr. Potter's deposition.

Mr. Morse says that most of the common matter is in other modern publicists (p. 423); but, as usual, on cross-examination, "other modern publicists" dwindle down to Halleck (225 cross-ans., p. 456), and Mr. Morse's references to Halleck are in cases where Halleck has professedly copied from L. (160 cross-ans., p. 448.) He does not pretend that *all* is in Halleck, or that any of it is in *the same form* in Halleck (157 cross-ans., p. 447).

"Dr. Twiss has a long discussion of this matter, with references to a large number of treaties bearing upon it. L. does not cite Twiss (published after L.), and does not refer to those treaties. D. does not cite Twiss, or refer to any of those treaties" (Mr. Potter, p. 227).

In D.'s copy of L., there are marks in the margin opposite the authorities he has reproduced (Record, p. 387, sp. 35).

D., note 228, p. 639. L., note 230, attached to the same word, begins by referring to certain State papers to show that despatches have been classed as contraband. L.'s index, p. 1055, has the following:

"*Despatches* . . . carrying of, exception to the otherwise freedom of commerce in the Crimean war, 805; in the English and Spanish declarations of neutrality in the civil war in the United States, carrying of, expressly forbidden, 698, 699; case of the Trent, 217, 797, 939."

The first authorities in D.'s note are some quotations from State papers to show that despatches have been classed as contraband. They are first, a quotation from the English "declaration" of "28th March, 1854," and a statement that "that of France was to the same effect." Both these are the first things referred to in L., note 230, p. 805, attached to the same word. The text is not there given; but on p. 771 (from which D. had largely copied in note 223), L. gives the text of the English "declaration" of the "28th of March," 1854, and says that the French was the same. Mr. Dana then turned to pp. 698, 699 in obedience to the index. He there found, and thence copied, a sentence from the English "proclamation" of "13th of May, 1861," calling it also the "proclamation" of "13th May, 1861." The next thing in L. (p. 699) is a translation of "the French decree as published in the *Moniteur*, June 1861," not giving the date of the "decree." D. copies three lines and a half of this translation, calls it a "decree," and does not give the date. Mr. Potter says that this decree is not found in Mr. Seward's volume, nor in the Annual Register; that it differs by one phrase from a newspaper translation he has seen, and that the translation in D. is identical with that in L.: the respondents do not point out any book or paper whatever in which this translation is found. Their argument suggests that L. and D. both copied from the same newspaper. As they wrote three years apart, this is highly improbable; and the change of phrase made by L. and reproduced by D., shows that in fact D. copied from him. Mr. Potter also says that in the original the phrase used is "declaration" and not "decree."

Next in L. comes the Spanish "decree" of 17th of June, 1861. Mr. Dana copies a line and a half of this. This is identical with the translation in L., and differs from the translation in Mr. Seward's volume of 1861-2, p. 264. Mr. Dana testified (p. 349) that he "had little doubt"

that he obtained this from Mr. Seward's volume. On cross-examination, however (58 cross-ans., p. 375), he confessed that he "had no recollection whatever of the transaction," and that his belief was entirely founded on the fact that they were the same with the exception of one word. Identity in translation seemed to us also to be good ground for the belief that he had copied, and so we asked him whether his translation was not identical with L. *without that or any other exception*. He answered that it was; and made no further attempt to explain or suggest whence he copied.

Having thus copied from all the State papers on pp. 698, 699, Mr. Dana, following the index, turned to the appendix on the Trent case p. 939. The only mention there made of State papers which relate to the right to carry enemy's despatches is on p. 951.

L., p. 951, "the questions raised by the affair of the Trent did not enter, in any manner, into the declaration of the Congress of Paris."

"The proposed international code of Spanish America, while recognizing the principles of the declaration of Paris, inserts a provision that, 'Besides the articles qualified as such are to be held as contraband of war, the commissioners of every description sent by belligerents, and the despatches of which they are the bearers.' La Cronica, 6 de Octubre, 1862."

D., p. 639.

"The Declaration of Paris of 1856 is silent on this subject."

The proposed international code of Spanish America, of 1862, in connection with its recognition of the Declaration of Paris, had this provision: 'Besides the articles qualified as such are to be deemed contraband of war, commissioners of every description sent by belligerents, and the despatches of which they are the bearers.'

Mr. Potter says that he has never seen this except in this newspaper which he sent to L. at the time, and in these notes, and there is no pretence that it is to be found in any other book. Because the translation given of the Spanish decree was almost identical with Mr. Seward's, Mr. Dana was ready to swear that he "had little doubt" that he took it from Mr. Seward's volume and not from L. The same rule would seem to apply here, but as, in this case, it would prove copying from L., Mr. Dana only testifies "I have no recollection where I obtained the passage from the proposed Spanish American code." He had no recollection, it turns out, in either case. Where he thought it in his favor, he, a witness, and a party, speaking of a matter which certainly was once in his own

knowledge, testifies to what turns out to be a mere inference, and an erroneous inference, from facts. In the very next line, where the same inference would be against him, he does not allude to it. Perhaps this is natural, considering his position in the case, but it is not what comes from a witness whose statements the Court is entitled to rely on. It is argument and not testimony. Mr. Morse admitted that he had never seen any of these translations elsewhere (227 cross-ans., p. 456).

It will be observed that two words, which we have put in italics, were changed by D. He transcribed, in his final MS., exactly as in L., and then changed by erasure and interlineation (MS. in Record, p. 390, sp. 45).

"There are other proclamations, made with reference to our civil war, which make similar references to despatches, — Prussia, Dip. Corr. 1861-2, p. 43; Netherlands, *ib.*, p. 354. These are not found in L.; they are not found in D" (Mr. Potter, p. 227).

Further on in D.'s note, on p. 659, some space is devoted to "Postal vessels and Mail bags." The same subject is considered in L., note 230, attached to the same word, on p. 805. L. says, "See among others" the treaty of 1848 between the United States and Great Britain, for which he cites Stats. ix., p. 965, and he refers to no other treaty, though his statement implies that there are others. D., p. 659, refers to this treaty and no other, and also cites ix., 965. This reference is to the bound volumes, and not to D.'s annual edition. See p. 221, *infra.*) The treaty begins on p. 965; the article in question is on p. 969 (Art. xx.): both cite 965. These sentences follow the citation in both:

L., p. 805. "During the war with Mexico, British postal steamers were allowed to go to Vera Cruz."

D., p. 659. "During the Mexican war, British mail steamers were allowed by the United States forces to pass in and out of Vera Cruz."

L. cites no authority for this, and D. does not. L. cites no other historical instance prior to our civil war, and D. does not.

Mr. Dana testified (p. 346):

Carrying Hostile Persons and Papers, No. 228. — I understand from the depositions that I am charged with having derived something of this note from Mr. Lawrence. The charge is light; but I desire to make it an example.

He then makes some statements which go to show that he did not rely on L. for the whole of his long note. No one ever said he did. The specific charges made by Mr. Potter (p. 227) and Mr. Lawrence (p. 131) that certain facts and quotations were copied from L., and used for the same purpose as in L., he does not allude to.

The respondents' argument makes some unfounded comments on Mr. Potter's testimony. Mr. Potter did not say that D. had copied the whole French declaration, but "several lines" from it. (Dep., bottom of p. 227). In fact he gives about four lines. Mr. Potter did not say that it was an "error" to copy L. in calling the French paper a "decree." He put this instance in a list of errors and *peculiarities* reproduced by D. where it certainly belongs. Of itself it might not be conclusive, but it is one of a number of peculiarities in L. *all* of which D. has reproduced in half a page in this note.

D., note 230, p. 663. (See Mr. Potter, p. 228.) It contains very few authorities. The foreign ones are from L., p. 808. Mr. Morse said (p. 423), that it resembled L. only in one citation: his 230 cross-ans., p. 457, shows that D. has two foreign ones on one page, and that both are from L.

For some striking proof that all Mr. Dana's notes on blockade (232 *et seq.*) are copied from L., see pp. 49, 50, *supra*.

D., note 232, p. 671. (See Mr. Potter, p. 228.) This is a long note upon the subject of Commercial Blockades, with much historical matter, despatches, speeches, etc., and the opinions of a large number of text writers; all of these are in L., note 233, sp. 821, p. 844, by the use of which alone D.'s note could be written.

The points and distinctions which Mr. Dana (argument p. 87) points out as original with him are certainly suggested, if not distinctly stated, in the quotations found in Mr. Lawrence's note. Confessedly not a fact or authority, — and there are many references to historical and diplomatic matter and foreign writers, — is in D. except such as could be taken from L.'s note without an hour of research, or the use of any other book. As to Cobden's address, the argument relies on Morse's *direct* examination. Here as elsewhere it makes no reference to Mr. Morse's *cross-examination*, wherein it appears that the statement relied on is untrue (231 cross-ans., p. 457).

The charges about list on p. 193 are based entirely on misstatements.

On p. 228, Mr. Potter says: "That the long list of writers at the bottom of D., p. 673, gives the names in substantially the same order as in L., has been noticed, *ante*, p. 193." On p. 193, of Mr. Potter's deposition is the following:

L., p. 820.	D., p. 673,
The <i>commentators</i> cited are in this order: L. Palli, Hautefeuille, Westlake, Massé, Ortolan, Phillimore, Wildman, Manning, Heffter, Wheaton, Westlake, and sup. 844, Casimir Périer.	Gives a list of <i>commentators</i> , L. Palli, Hautefeuille, Massé, Ortolan, Manning, Heffter, Kent, Wheaton, Phillimore, Wildman, Westlake, Casimir Périer (same quotation as that on L., 844).

The argument (p. 88) charges, that in order to show that D. follows L.'s list of authorities, Mr. Potter omits some citations of L., and strikes out passages of L. not found in D.

The first detail which they point out is, that "L.'s citations begin with *Martens* omitted by Potter." *Martens N. Réceuil* is a list of treaties, and is not a commentary, and therefore ought not to be in the list of commentators. But in fact, in *both* L. and D., the *same* citation of *Martens* immediately precedes the reference to L. Palli; so that if Mr. Potter was wrong in omitting it, it is an error in D.'s favor. Both give *identical* translations of the matter found in *Martens*, differing from any other known translation (Berlin decree; Mr. Potter, p. 160). So also, *Dumont* is not a commentator. The list Mr. Potter gives is exactly the list of *commentators* in exactly the order in which they are found in L., omitting *none*, and Mr. Potter expressly states that C. Périer is *not* with the others, but is found 24 pages further on; it is evident from the form of the sentence in D., in which this citation appears, that it was added after the rest was written,—probably when, in his progress through L.'s book, he came to p. 844. Undoubtedly he never looked at the *Révue*, as all his references to it are copied from L., and he has none since L. (see p. 87, *supra*; Mr. Potter, p. 183). Instead of citing it by volume they cite: L. p. 844. 15 Janvier, 1862, p. 434. D. p. 674. 15th January, 1862, p. 434.

The argument states that "D. gives references to the authorities that differ from Luchesi Palli, by volume and page." So far from this being true, the fact is that he names *nine* consecutively as differing from Luchesi Palli, and *does not refer to volume or page of any one of them*, all of the names being copied from L. His reference to the page of Westlake is shown by Mr. Potter to be an error made in transcribing from L. (Mr. Potter, p. 174.)

The diplomatic authorities in L., mentioned at the bottom of p. 88 of the argument, are all copied into the earlier part of D.'s note.

Upon the production of D.'s copy of L., it appeared that he had made a pencil mark in the margin against each one of these authorities which Mr. Potter had previously shown, from internal evidence, to have been copied from L. (MS., p. 820; Record, p. 387.)

L., pp. 639, 642, from which D. copied freely in his note 173, on Privateering, shows that the United States properly called for the immunity of private property at sea, as the legitimate development of the true spirit of the declaration of Paris, and as necessary to the equality of nations having navies not proportioned to their commercial marine, and refers to this note.

L., p. 821. "The restriction of the belligerent right of blockade was, as we have seen, deemed by President Buchanan a necessary concomitant of the doctrine of the immunity of private property at sea."

L., p. 819. "One of the causes alleged by Napoleon I. for his Berlin decree was, that England 'extended the right of blockade to unfortified cities and ports, to harbors and the mouths of rivers; while,' as he maintained, 'this right, according to reason and the usage of civilized nations, is only applicable to fortified places.'— (Martens, Nouveau Réueil, tom. i, p. 439.)" [This translation differs from all other known translations, but is exactly reproduced by D. See Mr. Potter, p. 160.]

L., p. 821, cites two U. S. despatches containing such intimations, and says, that though the subject of blockade is referred to in several U. S. treaties, they contain no provision in this connection.

D., p. 673. "When the parties to the Declaration of Paris proposed to abolish privateering, the United States contended that both equality and the interests of neutrals required the surrender of the right to capture enemy's property at sea;

and the next step in the reasoning was, that such a surrender involved that of commercial blockades. . . .

As to the legality of commercial blockades, Napoleon assigned as one of the defences of his Berlin decree that England 'extended the right of blockade to unfortified cities and ports, to harbors and the mouths of rivers; while this right, according to reason and the usage of civilized nations, is only applicable to fortified places.'— (Martens, tom. i, p. 439.)

[D. makes his usual mistake about the series of Martens.]

But in this position, Napoleon is without support. Occasionally in the American despatches there have been intimations of that sort, *arguendo*, but no national act has been founded on that position; and the United States have recognized such blockades, and established

understood in their strictly literal signification, to establish a lawful blockade would be almost physically impossible."

scientific and in its literal sense requires an impossibility," the declaration of Paris being the subject of both remarks.

The rest of the page in D. is entirely occupied with quotations from speeches, despatches, etc. It is of this matter that the argument says that "*nothing of the kind is to be found in L.'s note.*"

In D. they are (p. 674):
Earl Russell, 9th March, 1857.

Earl Granville, May 16, 1861.

Lord Brougham.
Earl Russell's despatch of Feb. 15, 1862.

L., p. 829. Lord John Russell, 9th March, 1857. Then, after some other matters,
Earl Granville, May 16, 1861.
Earl of Derby.
Lord Brougham.
Speech of Earl Russell, in which there is a quotation from his despatch of Feb. 15, 1862. Supplement, on p. 46, is directed to be inserted immediately after this. It contains:

Earl Russell to Mr. Mason, Feb. 17, 1863. (Parliamentary papers, 1863.)
M. Rouher, in Sept. 1861. (Moniteur Universel, Sept. 1861.) [*Day* not stated]
Wheaton to Buchanan, July 1, 1846.

Earl Russell to Mr. Mason, Feb. 10, 1863, and Feb. 27, 1863. "Parliamentary papers, 1863." p. 833.
M. Rouher, in Sept. 1861. (Moniteur Universel, Sept. 1861.) [*Day* not stated.]
L., p. 828. Wheaton to Buchanan, July 1, 1846, MS.

(Observe that *all* these dates are in identical form in L. and D. The extract in D. from the letter, Russell to Mason, shows that he meant to cite the letters of Feb. 10 and 27, and confounded or combined the two dates.) *All* that is quoted or stated from or about these debates and papers in D.'s note is in L.'s note, and many of these authorities are marked in pencil in the margin of D.'s copy of L.

What is stated by D. as the contents of Earl Russell's letter to Mr. Mason is found in the quotations L. gives from the two letters he refers to. Mr. Morse on direct examination says, that "this despatch by the way is easily accessible to any one." On cross-examination, he confesses that he never saw it in print, and never heard of its being printed anywhere, but only "*believes*" that "all Lord Russell's public letters concerning our war have been very widely published in the newspapers" (19, 20 cross-ans., p. 429).

The next paragraph is short, and cites six speeches and despatches. Five are in L.'s note, pp. 829, 830, 831, 832, Supp. p. 46, in the same order. The other one which is not in L. was interlined after the note was completed.

It thus appears also that, instead of L.'s "ignoring" the declaration of 1856, *all* that D. has about it is a series of quotations and extracts, *every one* of which is found in L., and a remark which is the same as is found in L. One of them is a translation, *in identical* words, of a line from the French State paper quoted from the *Moniteur*.

The next portion of the note relates to neutral vessels of war. The first paragraph contains five citations of authorities. Four are in L., p. 828; the other (Dip. Corr.) is from Mr. Seward's published volumes, and is interlined in D.'s MS.

Both L. and D. state in substance that during our civil war neutral ships of war were allowed to pass the blockade, not as a matter of right, but as a matter of privilege accorded them, and for this they cite one and the same authority — a despatch of Lord Lyons to Admiral Milne. L. cites no book for this despatch and D. does not. The argument attempts to show that there is some difference in their statements; but there is none, unless D.'s language means that a new and special order was required for each passage through the lines. It will not bear that construction; if it would, this would probably be like the many other cases of difference which Mr. Morse had to confess were generally cases of D.'s errors (Morse, 193 cross-ans., p. 452, *supra*, p. 84). The remark in the argument that in this D. is right and L. wrong is improperly made, inasmuch as there is no evidence whatever about this particular matter. It is inconceivable how all these statements can be made, for the argument (p. 90) says: "D. next gives over half a page to the discussion of a question of which there is no trace in L.'s note. . . . He takes up the theory of Hautefeuille and Ortolan. . . . Not only is this subject nowhere touched by Mr. L. but the references to Hautefeuille and Ortolan, where their theory is stated, are not in L.," and of this topic also and its authorities the argument says "there is *no hint in L.*" It is inconceivable how all these statements can be made, for the last paragraph on p. 831 of L. contains exactly those citations of Hautefeuille and Ortolan, and a full statement of their theory, — and from it this portion of D.'s note could readily have been prepared. Mr.

Dana (dep. p. 313) says that he had the Ortolan of 1864. L.'s citations necessarily refer to an edition prior to 1863, but here D. cites the same *page* as L.

The next and last paragraph of D.'s note is a statement of a judicial decision fully stated in the last paragraph but one of L.'s note.

The argument (p. 48) makes the following extraordinary statement:

"Of D.'s note, 233, p. 674, on 'Effective Blockade,' Mr. Potter says (dep. 228), 'It is all in L., note 235, p. 827, and sup. p. 46, except one or two despatches of Mr. Seward and perhaps one speech;' and in his affidavit (p. 95) he says, 'It may be said to be entirely from L.' To support this, he cites detached passages of L., between pp. 533 and 863." "And to support the statement Mr. Potter is obliged, as we have seen, to dip into parts of L. within a range of 330 pages."

In the affidavit (p. 95), *all* the referenees to L., as the places whence D.'s note 233 is taken, are various pages from 828 to 836 and sup. p. 45, these being, as already stated, all included in L.'s note, 235. Neither page 533 nor page 863 is cited by Mr. Potter as any part of the source of this note of D.

All the referenees to L. in Mr. Potter's deposition are to note 235, p. 827, and supplement to the same, p. 46, and to certain pages from 829 to 835, included in that note 235. If by "dipping into parts of L. within a range of 330 pages" the argument refers to the statement that part of the matter is in note 235, on p. 827, and part is in the *supplement to that note*, on p. 46 of the supplementary matter, though the statement may be literally true, yet it is in effect an untrue suggestion and untrue statement, particularly in view of Mr. Dana's testimony, that in the margin of his copy of L. he made pencil referenees to L.'s supplement for the purpose of reading each foot-note and its supplement together as one note, as indeed they are (p. 318).

With reference to this note, Mr. Dana swears, in that portion of his deposition written out in his own study, that he became familiar with the subject in arguing prize cases, "the more important of which," he says (argument, p. 89), "will be reported in 2 Sprague's Dec.," and he "does not think that there was any source of information on this subject referred to by Mr. Lawrence which I was not familiar with before I began my work of annotating." If this were true, it is incomprehensible that he should not have cited in his note those authorities, — text-writers and judicial decisions, — which counsel would be likely to cite in arguing a cause at the bar, especially some of the decisions in the cases

(if there were any) where he says the questions arose and were argued. But the fact is that Ortolan and Hautefeuille are the only text-writers mentioned, and the only decision is one in the Crimean war, — *all* these being copied from L.'s note. With these few exceptions, the whole of the note is based upon Parliamentary speeches and State papers, copied from L., — authorities not usually cited at the bar. Although Mr. Dana does not point out what the cases were where these questions arose, yet if we credit his statement that there were such cases, the contents of this note show that whatever knowledge he may have had, he did not bring it to bear on the preparation of this annotation, but simply copied from L. without any more thought than was necessary to shorten and paraphrase L.'s note.

That he was familiar with all the matters contained in it may be true, so far as that familiarity was derived from a study of L.'s note, but not otherwise, for he gives quotations, several lines long, from two despatches or letters not found in any printed book except in L.

In his argument (p. 94), he gives a list of the authorities and classes of authorities which he would expect a writer to refer to, in a note on Effective Blockade. The fact is, that this note contains only about one-third of those; and half the authorities it does contain are not in that list. That list is based on Mr. Dana's ideas, but the note is the result of L.'s judgment and learning. (See this *supra*, p. 100.)

D., note 235, p. 681. (See Mr. Potter, p. 229.) This is in part a repetition of what is in D., pp. 389, 400, and there copied from L., and in part from L., note 238, p. 842. It is of the same general character as the preceding. It reproduces a typographical error in citing from U. S. Stats. (x., p. 862 instead of p. 882), and exhibits some striking instances of identity in selection from U. S. Treaties. The citations from vol. x. of the Stats. have the same paging as in L. and not the paging of D.'s annuals. Mr. Morse says (p. 424) that "it resembles L. only in subject-matter;" but as usual on cross-examination he has to admit that the fact is entirely otherwise. It contains a large number of references to State papers, etc., *all* of which are from L. D.'s additions are confined to some prize cases.

Mr. Morse (p. 411) says that L.'s and D.'s citations of Hautefeuille are not the same. Mr. Potter said (p. 183) that L. cited p. 216, D. cited p. 214, and that it should be 216. It is 216 in D.'s MS.

D., note 237, p. 686. (See Mr. Potter, p. 229.) This is from L., note 240, p. 845. L. states Hautefeuille's views, and states that H. himself admits that he is contradicted by all the authorities,—so that D.'s note is only a re-statement of this. D. does *not* "cite *four* judicial decisions." He cites three, they being those alluded to by Mr. Potter, as not being copied from L. It appears from D.'s MS. that his note as first written contained only the matter about Hautefeuille, copied from L., and that these decisions were added afterwards, apparently by copying from Upton; one of them was reversed in 1863, but D. only cites the first decision. (See p. 50, *supra*.)

The argument (p. 91) is unfortunate in calling attention to the details of this note. It says that it is only "a brief re-statement" of some matters in note 233: "he re-states Hautefeuille's theory." All the statement in note 233 about Hautefeuille's views is found in L., p. 831, the citation in both being tom. iii., p. 120. In note 237, all the statement is found in L., note 240; in this case, the same theory is referred to, but here the citation in both is tom. ii., pp. 239, 244. This is not only a proof of copying, without studying Hautefeuille, but is a good illustration of the fact that even in referring to an author for one particular point there is great opportunity for difference, and great differences in fact as to the passage to be cited.

D., note 239, p. 687. (See Mr. Potter, p. 229.) It is from L., note 241, attached to the same word. The particular subject of this note is not referred to in the text. It contains much historical and diplomatic matter reproduced from L., with an error arising from hasty transcribing from L., and other physical proof of copying. L., p. 846, speaks of the Instructions to Mr. Erving, and, in the next line, gives a date, "Sept. 26, 1816," which is not the date of the instructions. In D. it appears, "Instructions to Mr. Erving, Sept. 26, 1816."

D., note 240, p. 688. (See Mr. Potter, p. 230.) This note has an account of the opinions of Phillimore and Twiss in the Cagliari case found in no book except L.'s (see D., note 108 *ante*). Mr. Morse could not find any passage in L., even "with the help of the index, whence D. could have derived any essential aid, if, indeed, any at all" (p. 424); but on cross-examination he had to admit that these opinions are found *nowhere* except in L.; that "The Cagliari" is the title of D.'s note, and that the passages in L. containing them are pointed out by his index

under the word "Cagliari." It appears that the statements about these opinions, being the portions of the note copied from L., were written at a different time from the rest of the note (MS. in Record, p. 390).

D., note 241, p. 690, is from L., note 242, attached to the same word. L.'s first paragraph calls attention to the fact that Hautefeuille makes a distinction not noticed by Mr. Wheaton, and states what that distinction is, and the grounds on which Hautefeuille rests it. Mr. Dana states the fact of the distinction. L.'s second paragraph relates to a different matter, contains another citation of Hautefeuille and is not reproduced by D. The respondents' comments are therefore unsound. Mr. Dana does not "cite" Hautefeuille's pamphlet in this or any other note, but merely has a general reference to it, not giving any page, as he probably would have done if he had examined it. Mr. Dana's argument (p. 92) says: "L. gives no opinion upon them, [Hautefeuille's positions] while D. criticises them, and gives an opinion against them, and declares them unsupported by authority." It is inconceivable that the writer of the argument could have made this remark if he had read Mr. Potter's deposition. Mr. Potter shows that this "criticism" is merely a careless and unintelligent reproduction of a sentence in L.'s note, which required a good deal of learning. He says (p. 230):

L. states that Hautefeuille "does not confine himself to the practice of nations nor the opinion of previous institutional writers."	D. states that Hautefeuille's views "find no support either in the practice of nations or the works of publicists."
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L. does not allude specially to treaties or judicial decisions and D. does not.

The statement in L., I believe to be strictly true. The omission of the word *previous* makes the statement in D. untrue, and seems to show that he could not have examined upon this subject the works even of the most prominent English publicists of the present day. Phillimore, vol. iii., p. 420-424, published *since* Hautefeuille adopts the distinction. In fact Halleck, p. 599, states that Phillimore defends this distinction, and D., p. 217, cites Halleck 495-605, and *there* D. states that Phillimore defends the distinction.*

In this note, L., instead of citing Hautefeuille by volume and page, cites merely "tits. 11, 12," and D. does the same.

* "Steal! to be sure they may; and, egad, serve your best thoughts as gypsies do stolen children, disfigure them to make them pass for their own."

The Critic, Act. i., sc. 1.

D., note 244, p. 703. See Mr. Potter, p. 230. This note is entirely occasioned by a typographical error in punctuation which crept into Mr. Lawrence's edition, and which D. ignorantly imputed to Mr. Wheaton.

D., note 245, p. 708. (See Mr. Potter, p. 230.) It is from L., note 245, p. 867, attached to the same word, and from Halleek. It contains some typographical errors, reproduced from L. in the quotation from the case of the Nereide (Mr. Potter, p. 160).

D., note 247, p. 712, is from L., n. 247, p. 872, attached to the same word. The respondents' argument (p. 92) says that "no attempt is made to show that D. did get his materials from L.: . . . nothing is in its favor except the bigoted belief of Mr. Potter," etc., "they cite different years and pages of the 'Annuaire.'"

Mr. Potter said: "D., note 247, p. 712, is a short statement as to the internal constitution of the French government and certain changes therein, citing "Annuaire," "Ann. Reg." "Tripiet, Code Politique." All this is found in L., note 247, p. 872, attached to the same word of the text." He then shows that the difference in the years of the "Annuaire" cited, arose from D.'s carelessness in copying from L., and continues: "The citation of the 'Annual Register' (which contains a typographical error in L., reproduced in D., — 227 for 229) is only an authority for a matter stated in L., but not alluded to in D., and does not relate to the subject-matter of D.'s note. Both cite the authorities in the same order. Both cite "Annuaire," p. 952. It should be p. 951. The text relates solely to treaties of *peace*. Both L. and D. attach to this a statement of a provision of the French law, which relates solely to treaties of *commerce*, and which properly belongs in D., note 139, L., note 155 (both attached to the same word), where neither mentions it." (See that note.) It is not true that they cite different pages of the "Annuaire," except that D. omits one of L.'s three citations. On p. 187, Mr. Potter pointed out that D. had not in his whole book a single reference to the "Annuaire," except such as could be taken from the corresponding note of L. Surely this is an *attempt* at least to show copying. The facts stated in D.'s note are all in L.

Mr. Wheaton described the treaty-making power under the French monarchy. L. and D. describe the subsequent condition of things.

L., p. 872. "He had the power of declaring war, making treaties of peace, of alliance, and of com- D., p. 712. "The establishment of the empire in 1852 has changed the French constitution.

merce;" "it was expressly provided that treaties of commerce . . . should have the force of law in modifying the existing tariffs. This power was exercised by the Emperor, in carrying out," etc.

The power to make treaties is now solely in the Emperor; and a treaty of commerce has the legal effect of a legislative act in respect to duties, and the importation and exportation of goods." (This is the whole of the text of D.'s note.)

The argument (p. 92) says that D.'s statement, that the power to make treaties is now solely in the Emperor, is not found in L., "though it may perhaps be inferred indistinctly from the half page he gives to the subject." Mr. Dana does not do justice to his powers of drawing inferences to save the trouble of studying a subject. Indeed he did not even study L.'s note carefully. As appears from L.'s note, most of the change was made by the Constitution of Jan. 14, 1852, which was, in this respect, simply continued in force upon the establishment of the empire in Nov., 1852, and the other portion of the change was made by a *senatus-consulte*, after the establishment of the empire, whereas D. gives the idea that the establishment of the empire wrought the whole change.

PART VIII.

SOME SPECIAL MATTERS.

§1. THE TESTIMONY — *Mr. Morse*. — The testimony on both sides, on the question of piracy, consists chiefly of statements as to the contents of various books and passages in books. This secondary evidence, we said in our brief and oral opening argument, is only admissible upon the ground of convenience, and upon condition that the witness so identifies the passages referred to that the opposite party can examine them. If this is done, and the statements are not contradicted, the Court can rely on them. If this is not done, if no reasonable means for examining them is afforded, and it turns out, in such cases as are examined, that the statements are incorrect, or partial, and therefore substantially untrue, even if they are technically admissible, they are wholly unreliable. We said that whereas Mr. Potter's deposition gave volume and page for

every statement made, Mr. Dana's and Mr. Morse's, with few exceptions, never did so, and their testimony was expressly objected to on that ground at the time the depositions were taken.

Upon cross-examination, Mr. Dana was unable, or unwilling, generally, to point out the passages, but enough was elicited to show his unreliability as to such matters. One very extraordinary result arrived at upon Mr. Morse's cross-examination, by making him identify the passages, and then putting the books in his hands, has been alluded to on pp. 84, 99, 186, *supra*. These omissions, and the effect produced on Mr. Morse's direct testimony by his cross-examination are the more remarkable, inasmuch as the whole of his direct testimony, questions and answers, and a large part of Mr. Dana's, were brought in all carefully written out at their leisure.

Mr. Morse occupies a very unfortunate position. It appears that he prepared D.'s index, and in doing it copied from L.'s index more carelessly even than D. had copied in the body of the work. (*v. supra* p. 86.) Immediately upon its appearance, he wrote a review of the book, and from the remarks about D.'s book in the early part of his deposition and the extracts from his accompanying article (Record, p. 458), it may perhaps be inferred that it was not free from indiscriminate eulogy. Not content with that, he published in the "North American Review" an article on Mr. Lawrence's charges of plagiarism, and, in that article, he expressed an opinion, in language as strong as a somewhat violent rhetoric could make it, as to the utter groundlessness of Mr. Lawrence's charges. We have already commented upon some errors of fact contained in the extracts from that article on p. 458 of the record (p. 154, *supra*). In it, and to support the assertion that identity of citations was the result of necessity and no proof of copying, he made some statements as to the number of books which could be cited from. If your Honors will compare those statements with the uncontradicted facts rehearsed on p. 96, *supra*, you may be led to doubt, not that Mr. Morse believes that he has mastered the literature of the science as well as he says he has (2 ans., p. 400), but whether he is in fact even at all aware of the existence of any such literature.

It is natural for an expert to entertain a decided opinion, after a long examination of the matter with such results as are embodied in Mr. Potter's testimony; but it is certainly unfortunate for the witness himself,

though it may be fortunate for the party, that he has publicly expressed a strongly worded opinion before he began his examination. Your Honors will find Mr. Morse's testimony to be of the character which would be expected under the circumstances, even where the witness is not actuated by motives in the least dishonest. His comments upon Mr. Potter's deposition are such as should never be found in the testimony of an expert. He exhibits an habitual carelessness, a quickness to see matters favorable to Mr. Dana, a habit of stating a part when a part is useful and the whole unfavorable, and an entire want of judgment as to what constitutes proof or disproof of copying which required a cross-examination, long, but fruitful of results, and to which we invite your Honors' attention. His comments on Mr. Potter's deposition were generally founded on his own mistakes, which were for the most part pointed out on his cross-examination. For some instances see pp. 81, 84, 85, 86, 92, 94, 99, 137, 154, 162, 176, 178, 197, *supra*.

§ 2. *Mr. Dana.* — Many defects of Mr. Dana's testimony, his disposition to overstate, to substitute conjecture for facts, or allow his belief to take the place of a verification easy to be made if his belief were well founded, and to present the whole as of his own knowledge, have already been alluded to. For his evasion of cross-examination, see also, 67, 69, 84, 93 cross-ans., etc., and the matter of the Statutes and Stapleton, *infra*. That no reliance is to be placed on his statements of the contents of books is shown, among many other instances, by his account of having taken some matters of history from a book which was published before they occurred (*v. n.* 41, *supra*, p. 140), and his inability to find in L., even with the page open before him, some citations which he had copied from L. (See 76, 77, 82, 83 cross-ans. p. 379; also pp. 64, 67, 136, 162, 203, *supra*.)

As he had completed his copying from L. before his notes went to the printer, it can be of no importance whether he and his brother and father looked at L. while correcting his notes and reading proof, except that the fact that his father and brother did not see L. explains why no one checked him in the course he was pursuing. It would have been proper enough, however, for him to testify that they did not read L.'s notes on those occasions. But Mr. Dana's appreciation of rhetoric is stronger than his fidelity to facts; he testifies (p. 315), "I will add that during the entire time, from the beginning to the end of the examination of my

notes, we did not *have before us, or in the house*, nor did we look at either edition of L." Unhappily a large number of the notes were written on the fly-leaves of D.'s interleaved copy of Lawrence's Wheaton, and a very simple computation from the time occupied in printing and the amount of MS. or proof read each time will show that there could hardly have been a single examination without many of these notes of D. and the notes of L., from which they were copied, being actually in the hands of the reader. We alluded to this in our brief merely as an illustration of his "singular carelessness and inaccuracy" in testifying, and we submit that the epithets were selected with moderation. (See also, pp. 3-5 of this argument.)

§ 3. *Stapleton's Books, Rush's Books, etc.*—Mr. Potter (p. 178) said that Mr. Dana constantly confounded different books with similar titles, in such a manner as to show entire ignorance of them. As one of several instances, he said:

There were two books written by *Stapleton*. One is "Political Life of Canning," in three volumes, and the other is "George Canning and his Times," in one volume. With reference to the recognition of Greece and the South American Republics, and the Monroe doctrine, the citations are:

L., 978. "Stapleton, Canning and his Times, p. 476."	D., 39. "Stapleton's Life of Canning, 476."
"Canning and his Times, p. 399."	"Canning's Life, 399."
L., 990. "Stapleton, Canning and his Times."	D., 112. "Stapleton's Life of Canning."

The point of this is (1) a resemblance in form between L. and D., in mentioning Stapleton's name the first and third time, and not the second time; (2) that, in copying the citations, he made, in all of them, a change which would seem to an ignorant or careless person to be immaterial, but which a person who had looked at the books would know designated a different work. It afterwards appeared that the citations ought to be p. 475, and p. 397 (Dana, 71, 72 cross-ans., p. 377), so that he *must* have procured *those* citations by copying, and the only question is about the third.

Mr. Morse testified (p. 409) "the statements on p. 69 of the affidavit concerning Stapleton's books are literally correct; yet it may be noted that D. is consistent in his method of citation in all three instances."

If this means anything, it means that though he may have written the title incorrectly, yet that he always gives the same title, "Life," etc., and thereby shows that he always referred to the same book. Undoubtedly this is what he thought he was doing. Next Mr. Dana testifies (p. 351): "I had the use of one or both of Stapleton's books, and he is constantly cited as to the Monroe doctrine in the pamphlets written by Mr. Buchanan and Mr. Everett, and in the article in the North American Review on the Monroe doctrine, all of which I studied carefully." That article was published in 1856 (Dana, 70 cross-ans., p. 377), and Mr. Dana intimates that from that he took the reference in the note on p. 112 about the Monroe doctrine. (Observe this carefully prepared written statement by an acute lawyer. He will not venture to say *which* book he "had the use of"; he does say that he "studied" the Review, but nowhere says that he so much as read a word in the books themselves.)

In note 36, p. 112, there is no reference to any volume or page, so that we cannot tell from internal evidence which book is referred to. It appears, however, from Mr. Dana's cross-examination, after some answers untrue in point of fact, but evidently proceeding from his having copied the facts and authorities from L., without knowing the contents, that the other citations refer to "George Canning and his Times." (Mr. Dana, 60-63, 71-73 cross-ans., pp. 375-7.) According to Mr. Morse, therefore, the citation in note 36—which gives precisely the same name as that on p. 39—must also refer to "George Canning and his Times." Mr. Dana cannot tell which it refers to (64 cross-ans., p. 376). All that can be learned from considerable cross-examination (p. 376) is, that the book referred to in note 36 is, "whichever of the books contains the fullest presentation of the matter of the Monroe doctrine." On the interleaf in D.'s copy of L., under the head of "The Monroe doctrine," is written: "App. 989 gives Mr. Canning's exposition" (Record p. 385). On pp. 989, 990, of L. is a long quotation from Stapleton's "George Canning and his Times," giving Canning's view and Stapleton's views. Besides Mr. Morse's statement, therefore, we have here Mr. Dana's footsteps, leading directly to L.'s extracts from and citations of the book of 1859. Can there be any doubt, therefore, that he thought he was referring to the book of 1859, cited by L., though he now undertakes to give the impression that he took this from a review of 1856?

But in either view which he chooses to take of the citation on p. 112, he is in a dilemma. As Mr. Morse very properly pointed out, by the sentence we have quoted, and as is evident from the precise identity of his two citations — “Stapleton’s Life of Canning” — he thought that the same book was referred to on p. 112, and on p. 39. As matter of fact, the citation, and the matter cited from it on p. 39, shows that that reference is really to the book of 1859, and was entirely copied from L. If that was the book he thought he was referring to on p. 112, then his statement that he took the citation from the review of 1856 is a departure from the fact. If, on the other hand, he thought, when he used the title, “Life of Canning,” that he was referring to the book of 1831, it is plain that on p. 39 he simply copied from L. without even verifying the citations, and in entire ignorance as to the books.

Perhaps it is a reasonable conjecture that on p. 39 he simply copied from L., and, on p. 112, he learned all he wanted to know from L., p. 989, and then, upon reading the article in the review, and finding the title, “Stapleton’s Life of Canning,” put at full length at the head of the review, as is the custom, not having even verified the citations, and not knowing that there were two books, he supposed that all the references were to the book of 1831, and in order to be consistent, he gave, in each case, the title which he found in the review.

In a similar manner, he has confounded *Rush’s* two books, “Memoranda of a Residence in London,” Phil. 1833, “A Residence at the Court of London,” London, 1845. He has also confounded the “*Révue Etrangère et Française*” with the “*Révue du Droit Française et Etranger*.” (p. 159, *supra*.) He nowhere undertakes to answer Mr. Potter’s charge of ignorance of these works.

§ 4, *U. S. Statutes*. In discussing note 68, p. 78, of our brief, we said:

D., note 68, p. 178. Same section. A MS. despatch. Neither Halleck nor Kent, in treating this subject, cite *all* the treaties that are common to L. and D. Mr. Dana states that *he always used* the annual edition of the U. S. Statutes where the treaties are paged separately, and that Mr. Lawrence used the bound volumes where the treaties are paged with the statutes, (Dana p. 355, Morse 54 cross-ans., p. 434.) As the references in this note, and oftentimes in other notes (Morse, 56–7 cross-ans., p. 434), are to the *same page* as in L., it is evident that in these cases D. simply copied from L. and did not “use” his own Statutes.

Our remarks, like Mr. Morse's, on p. 406, and Mr. Dana's, on pp. 351, 355, are of course to be understood as applied to the volumes of which there are two editions, that is, to those since vol. viii., 1845. Indeed, our remarks were made with reference to note 68, where all the citations which give the page are to vols. x., xi., of L.'s bound edition, while Mr. Dana (p. 351), speaking of the same note, said that he usually cited them in a different manner from L. His statement is entirely wrong as regards that note, and also taken as a general statement. Mr. Morse likewise (p. 406) spoke of Mr. Dana's "general rule," but on cross-examination he receded from this and testified, "I should say 'frequently' rather than 'habitually.'" "In a large number of instances the paging of these citations in L. and D. is the same" (55-56 cross-ans., p. 434).

The argument proceeds to state that it is not true that D. always used, or that he said that he always used the bound annuals. It says "that he used the one or the other, according as he happened to be in his own study, or in his professional office, or some library." It adds: "We wish to know something respecting the pure *invention* of the statement that D. 'always used' the bound annuals,—an assertion not only without evidence, but directly against evidence."

It is stated in the argument (p. 120), and is proved in this case that "many of the volumes in D.'s library had been specially bound as annuals." In our remarks about note 68, the reference should be to Record p. 351. We there find that the following is the whole of Mr. Dana's testimony about this note:

Dana. Note 68.—I examined all the treaties cited by me, few, if any, of which I believe are in Mr. Lawrence. I had in my study, all the treaties made by the United States from the beginning to the time of writing, and always examined them carefully. It will be found that I usually cite them in a different manner from Mr. Lawrence.

"I always examined *them*," to wit, the treaties which "I had in my study" that is, the bound annuals. This, and the last sentence, must be taken as general statements, because, as applied to that note they are entirely untrue, inasmuch as all the citations in note 68 are to the bound volumes since vol. viii., and not one is to the annuals. This fully bears out our remarks. It is undoubtedly a correct statement as to the edition he used, when he used any. He testifies: "except

when in a library, I did my work at my study in Cambridge" (p. 316). It appears that he only went to a library when the books were not in his study (ans., p. 65; dep., p. 319). From beginning to end of the testimony there is not an allusion to an hour's work done at his office; nor does it anywhere appear what edition he had at his office. The suggestion in the argument, therefore, and upon which it is made to hinge, is not only without evidence, but is directly against his own testimony.

We said that in other notes, D.'s citations were from L.'s edition of the volumes since vol. viii. Among them are; D., p. 139, L., p. 170; D., p. 178, L., p. 225; D., p. 190, L., p. 237 [this contains an error made in copying from L. — see note 78]; D., p. 254, L., p. 319; D., p. 266, L., p. 334; D., p. 659, L., p. 805; D., p. 683, L., p. 842 [both cite x., 862, 895, — it should be x., 882, 895.] In his MS. of note 47, there are no less than ten references to vols. ix., x., copied from L. The cases where he deviates from L. are instructive: L., pp. 272, 329, 337, cited very recent treaties from the "National Intelligencer" etc.; in these cases, D. was obliged to look up the Statutes, and in *all* these cases he cites from the annuals.

The respondents' testimony does not appear very well with regard to this matter of the statutes. The first statement in Mr. Dana's deposition about note 68, that, of the treaties cited by him, "few if any" are in L., is confessedly untrue; for they are all in L. The statement made in a paragraph especially devoted to this note, that he usually cited them in a different manner from L., coming after Mr. Morse's deposition, where the difference of editions was pointed out, would naturally lead the Court to understand that in *this note* his citations were from the annuals, whereas they are *all* from the other edition. His statement on p. 355, repeated in the argument, that note 118 "is *entirely* a collection of treaties," which he examined and digested from the statutes, has been shown to be strictly untrue; for besides those treaties, that note contains matters to be found in no book except L. His whole statement about this note is entirely a conjecture. (See 93 cross-ans., p. 381, and p. 176, *supra*.) The fact seems to be that they discovered one instance of this difference in the form of the citations (note 118), and based all their general statements on that and the three cases where L. cites the Nat. Intell., for these are the only instances they point out. Indeed, it rather appears

that Mr. Morse did not understand the difference until he was taught on cross-examination (p. 433). Even where the difference exists, it only shows that D. verified L.'s work. In most cases where treaties are copied from L., D. gives merely the date and no citation. See note 223, where, out of nearly forty treaties clearly copied from L., D. gives citations for eight only.

§ 5, *Martens' Recueil, Supplements, etc.* — Mr. Potter said (p. 176):

"The largest collection of treaties, and those chiefly used and cited, are the different series of books with which the name of Martens is connected. This consists of Martens' *Recueil* of 8 volumes, *Supplement* to Martens' *Recueil*, 4 vols., numbered and cited *Supplement*, vols. 1, 2, 3, 4. This extends to 1808. Martens' *Nouveau Recueil*, by various editors, in 16 vols., numbered vols. 1-16, and reaching to 1839. Some of these are in two parts, each of which is separate, and two of which are paged as separate books, making 20 books. Martens' *Nouveau Recueil Général par Murhard*, 13 vols., numbered 1-13, coming down to 1849. *Nouveaux Supplémens par Murhard*, 3 vols. *Nouveau Recueil Général par Samwer*, to the present time, numbered and cited vol. 14, *et seq.*

Thus, in order to identify the volume to be cited, it must be stated whether it is *Recueil*, or *Supplement*, or *Nouveau Recueil*, or *Nouveau Recueil Général*, or *Nouveau Supplement*, or which "part" of certain volumes, or the name of the editor must be given."

Mr. Potter then pointed out that, in copying from L. the citations of the Murhard and Samwer series, D. omits the name of the editor, as if he believed that the name merely served to designate different *editions*, and did not know that it designated entirely different books, with different treaties. He said that this showed that D. could not have examined the books even enough to verify the citations.

Mr. Dana, in the part of his deposition prepared at home, says that he had 15 vols. of Martens and ditto supplement. That is evidently the *Recueil*, 8 vols., *Supplement*, 4 vols., *Nouveau Supplement*, 3 vols., and it does not include the *Nouveau Recueil*, or either of the series where it is necessary to use the names of Murhard or Samwer to designate the book, and with regard to which all the mistakes pointed out by Mr. Potter occur. In our brief, p. 98, we called attention to this point. Mr. Dana tries to meet it in his argument (p. 30) by making a statement entirely different from the one he had previously sworn to, and if any-

thing was wanting to show his ignorance of these books, his argument has furnished it. The whole series of Martens contains 62 books, enumerated by Mr. Potter, and Mr. Dana's list in his deposition only mentioned 15 of them. In the argument, he says that he had "the principal works of G. F. De Martens, Charles De Martens, the supplements and registers by Saalfeld and Mouchard." We should like very much to have asked him where he got such books as the supplements and "registers," by "Saalfeld" and "Mouchard."

Mr. Dana's library grows very fast. It would seem that the necessities of this argument require him to possess a great many more books than were needed to prepare his notes. But *then* he had that interleaved copy of L., which was so "very convenient." * When his deposition was taken, he said, "I had a respectable collection of works bearing on my subject" (p. 316). "My own library has a respectable body of working books on international law and cognate topics" (p. 352); but besides the sudden enlargement of his series of Martens, the argument (p. 30) says that he had "all the English and American writers on international law, constitutional law, and conflict of laws." We should like very much to ask him whether these works could go on one shelf of that not very large bookcase, which Mr. Morse thought would hold the works of "all the publicists of any note whatsoever" (Mr. Morse's magazine article, record, p. 459). Mr. Dana's collection, however, lacked one book certainly. He testified (p. 354) that to the best of his knowledge he had never seen Mr. Lawrence's "Visitation and Search." It is true that in his argument (p. 29) he is pleased to refer to Dr. Lieber, Dr. Woolsey, and General Halleck, as the "only living American commentators on international law;" but by this time your Honors are probably aware that there was one other American commentator on international law whom Mr. Dana knew something about.

* Perhaps this increase is due to those efforts which Mr. Morse speaks of in his magazine article (record, p. 460), as having been made by the energetic publishers of D.'s book to procure the requisite works for his use from abroad. Mr. Morse, who derived some of the materials for that article from Mr. Little (240 cross-ans., p. 458), seems to appreciate their exertions more highly than Mr. Dana, the recipient of their favors. Indeed Mr. Dana had the same difficulty with them about extra proof corrections that Mr. Lawrence had (15 cross-ans., p., 364), and felt sure at the outset that he could get no assistance from them in the way of procuring books, etc. (p. 310).

The argument also says (p. 30) that he had "the use of all the books and other documents belonging to the Wheaton family." The writer probably forgot that the very despatches of Mr. Wheaton from which Mr. Lawrence has made the extracts which D. has copied from him are still in Mr. Lawrence's possession (Mr. Lawrence 39-40 cross-ans., p. 142). There is no pretence that D. has any references to Mr. Wheaton's despatches, or any MS. despatches, except such as he has copied from L.

In our brief (pp. 36-7), we alluded to the manner in which, and the pretence upon which, Mr. Lawrence was asked to return these despatches when they were really wanted for Mr. Dana's use, and to Mr. Parsons' statement, that "he wasn't surprised that they had got into trouble, because he told them that whatever they did should be done openly and above-board," as showing "a deliberate intention to conceal their doings from Mr. Lawrence, as far as they could, until he should have left the country" (he was then intending to go abroad to publish the French edition for which *they* had been paid in advance, by Mr. Brockhäuſ, the publisher. In the closing argument of the senior counsel (p. 57), it was said that they acted "without giving notice to Mr. Lawrence, without any consultation with him, and in a manner which led Mr. Parsons to make the remark proved in this case, that he told them 'they would get into trouble, if they did not do things above-board.'" Yet the respondents' argument (p. 180) says: "In the bill Mr. L. makes a charge that the respondents, including D., tried to conceal the fact that D. was engaged in annotating this work. This charge is abandoned by the complainant's counsel." Mr. Lawrence properly retained them to use in the preparation of the Brockhaus edition.

§ 6. "*Captures at Kiel*."—Mr. Lawrence called attention to this matter, as showing the amount of knowledge, and of attention brought to bear by Mr. Dana upon the historical portion of his work which an annotator of Mr. Wheaton ought to be particularly familiar with. So much has been said about this by Mr. Dana that it requires a fuller notice than would otherwise be given to it.

Mr. Lawrence's preface, p. xlii., contained the following:

The special subject confided to Mr. Wheaton was the obtaining of an indemnity for the alleged spoliations on our commerce by Denmark, during the latter years of the European War. (See Part IV., ch. 3, § 32.)

The Treaty of Indemnity was signed on the 28th of March, 1830. By it, including what was paid in 1827-8, on account of the seizure, in 1810,

of certain vessels at Kiel, (on the cargoes of which, though they were liberated, a duty in kind of fifty per cent was imposed during the pendency of the proceedings), and the renunciation of claims against the United States, about three quarters of a million of dollars were secured for our merchants. . . . But, what was infinitely more important, Mr. Wheaton's treaty was the pioneer of the conventions with France and Naples.

Mr. Dana's whole notice in his preface of the great event of Mr. Wheaton's diplomatic career is the following (preface p. viii):

During the twenty years that Mr. Wheaton resided abroad in the diplomatic service, he was engaged in negotiations of great importance to his own country and Europe. He conducted the well-known controversy respecting the captures at Kiel, which ended in the Treaty of Indemnity of 1830 (see this work, §§ 530-537), and led the way to other treaties of indemnity to the U. S. based on a similar principle.

This passage is a statement, as clear as words can make it, that Mr. Wheaton's great negotiation related to "captures at Kiel," and that it was the controversy about the affair at Kiel that resulted in the Treaty of Indemnity of 1830. This is precisely the blunder he is charged with.

Mr. Lawrence pointed out (Record, p. 134) that the affair at Kiel was the seizure, in 1810, of certain vessels on the cargoes of which, though they were liberated, a duty in kind of fifty per cent was imposed. It was a violent sequestration of property, made by virtue of decrees which Denmark was induced or compelled to make to carry out the continental system of the Emperor Napoleon, and a recompense for which would have been claimed under Mr. Rives' treaty of 1831, had it not been previously made by Denmark, without the formality of a convention, and long before the treaty of 1830; whereas the only matters included in the Treaty of Indemnity of 1830 were the captures under the Danish Ordinance of 1810 for alleged violation of neutral duty in sailing under enemy's convoy. The affairs were entirely distinct in time, place, the grounds upon which they were rested, the principles of law involved in the claim for redress, and the manner in which recompense was made. The argument (p. 40) substantially admits this; and Mr. Lawrence, from his connection with the claims under the French treaty, could not be in error about it. It is obvious, also, upon reading the paragraph written by L., and observing how the two matters are brought together, that a person paraphrasing L., as Mr. Dana was apparently doing in the

sentences quoted, and doing it as carelessly as he constantly does, and not familiar with the subject, would be likely to fall into just the mistake which he has made.

The argument (p. 40) says that if Mr. Lawrence, in his deposition (p. 134), had not omitted D.'s reference to the Treaty of Indemnity, and to §§ 530-537, it would have appeared that D. understood the two affairs and the distinction between them. Mr. Lawrence did not omit D.'s reference to the treaty, but included it in his quotation (Record, p. 134). The references, §§ 530, 537 (which are the same as the reference in L.'s preface), show exactly what Mr. Lawrence stated, that the treaty related solely to the maritime captures under the ordinance of 1810, and not to the affair at Kiel, which is not mentioned in Mr. Wheaton's text, or in Mr. Lawrence's foot-note, and consequently is not in Mr. Dana's foot-note, but is only mentioned in the passages above quoted from Mr. Lawrence's preface, and from Mr. Dana's preface.

We submit that it is quite evident that D. had read something about the maritime captures in Wheaton's text and L.'s note, and not having a very precise knowledge of the facts connected with them, and having no knowledge of the affair at Kiel, he supposed both to be the same thing and included in the same treaty. Even as late as his cross-examination he says, with regard to the passage in his preface, "nothing occurs to me now as incorrect. The captures may not *all* have been 'at' or 'of' Kiel" (57 cross-ans., p. 375), showing that he had not even then learned that the two matters were entirely distinct.

The argument says that a reference to note 245 would have shown that Mr. Dana entirely understood the matter. That note nowhere alludes to the affair at Kiel, and it is somewhat significant that the note to which he appeals to clear himself from a charge of ignorant copying should contain only the authorities found in L.'s note on the same subject, attached to the same word, and in a passage in Gen. Halleck's book, and that a quotation printed by Mr. Lawrence, containing five verbal errors, should be exactly reproduced, with all those errors, in D.'s note (Record, p. 160; see this note *supra*, p. 216).

Your Honors know that this treaty, and Mr. Rives' French treaty to which it led, and the adjudication of the claims under them, involved the most elaborate and careful examination of the whole question of the rights of belligerents and neutrals, both as respects captures and seiz-

ures, and as respects the question of ultimate responsibility, where one belligerent is the ally, or the vassal, or acts under the compulsion of a co-belligerent. Mr. Lawrence was engaged for many years, as counsel, upon these cases; and the studies then made furnished materials which have done much towards making his notes on the law of nations, in time of war, worthy for any writer to copy from, if he feels himself under no restraint in that respect (Mr. Lawrence, 5 ans., p. 71). One of his printed arguments in "the Hamburg cases," which is now before us, dated Nov. 18, 1834, was in support of a reclamation for the value of some colonial wares which, by these very Danish decrees, were required, under penalty of confiscation, to be exported from Kiel into Hamburg, then held by the French, where they were sequestered under the name of an enormous tariff duty, payable in kind.

This affair is of importance; for it is one of many illustrations of that which renders Mr. Lawrence's book peculiarly valuable, namely, that it is not the result of "cramming," for the purpose of preparing a book, but contains the fruits, not only of his general study, but of a most precise and accurate examination of the subject, and enriched by thirty years' subsequent attention to it. Mr. Dana's mistake is not a mere error of a name or a date; he confounds two matters which are even more widely different in the principles involved and in their relation to international law than in their historical circumstances. It is a mistake of ignorance rather than of carelessness.

§ 7. *Historicus*. In the answer of Miss Wheaton and the deposition of Mr. Little, a criticism of Mr. Lawrence's work by "Historiens" is referred to and quoted; it is the only reference to Mr. Lawrence's book to be found anywhere, so far as the researches made in this case show, which does not speak of it in terms of commendation. We have already (pp. 149, *supra*) shown the character of Mr. Harcourt as a critic. The following is from Mr. Lawrence's deposition, (record p. 277):

Int. 2. Please look at respondents' Exhibit, No. 4, containing the extract from *Historicus*, and explain the true meaning of the case, your interpretation of which is the special subject of *Historicus*' remarks.

[*Objected to, as incompetent.*]

Ans. The extract from *Historicus*, I presume, is what is referred to in the answer of Miss Wheaton, page 29, as the opinion of a leading writer on International Law, and as an apology for the conduct which Mr. Little, in concurrence with Mr. Dana, compelled her to pursue in reference to the complainant. It is, I cannot but think, the highest

compliment to my work, that the sole criticism in any way disrespectful to it comes from the same identical source that condemns Mr. Wheaton, and all the contemporary publicists of England and France of any note or consideration.

The references to the different passages of *Historicus*, which have been presented on behalf of the complainant in this case, sufficiently show that he does not entertain a more unfavorable opinion of my annotations than he does of their works.

As, however, Mr. Harcourt has thought proper, besides dealing in generalities to point out what he deems a specific error, it may be permitted to me to show that my statement, at which he takes exception, is not only strictly applicable for the purpose for which it is addressed, but that it is made in the very language of the Supreme Court of the United States.

The proposition which I wished to illustrate, in the case of the *Trent*, as bearing on the doctrine of continuous voyages, was that the interposition of an intermediate port could not legalize a traffic otherwise illegal. For that purpose, a case of a trade with an enemy, through a neutral port, stands precisely on the same footing as the interposition of an intermediate neutral port in the case of contraband. Having given the case of the *Commercen* (1 *Wheat. Rep.* 382), which was one of contraband, the applicability of which with some hesitation is admitted by *Historicus*, I add "and in a case during the Mexican War, of illegal trade with the enemy, it was decided by the Supreme Court of the United States, on the authority of Sir W. Scott in *Rob. Adm. Rep.* vol. iv., p. 82, the '*Jonge Pieter*,' that the interposition of a neutral port would not render the transaction legal. Howard's Reports, vol. xviii., p. 114. Jackson [*Jecker*] *vs.* *Montgomery*" (*Lawrence's Wheaton*, ed., 1863, 957).

Historicus says: "In the first place, of the two authorities on which Mr. Lawrence relies, one is wholly beside the point in support of which it is cited. The case of Jackson *vs.* Montgomery was one of trade on the part of a subject of the belligerent captor with the enemy which is necessarily and universally unlawful, in whatever manner it may be conducted, — a state of things which offers no analogy and furnishes no precedent whatever for the questions which arise as between neutrals and belligerents. It is the more remarkable that Mr. Lawrence should have fallen into such an elementary error, because this distinction is insisted upon at large in the case of the '*Jonge Pieter*,' before Lord Stowell, upon the authority of which Jackson *vs.* Montgomery was decided." *Additional Letters by Historicus*, pp. 27-30.

It might be sufficient to dispose of this criticism by referring to the fact, apparent on the face of the article itself, that the writer never saw the case on the applicability of which he passes. By mistake I cited Jackson *vs.* Montgomery, instead of *Jecker vs. Montgomery*, and this title is reproduced by *Historicus* no less than three times. The language of the Supreme Court is equally applicable to all cases of attempts to carry on an illegal trade, by the interposition of an intermediate port, and is

so treated by me. "Attempts have been made," the Court say, "to evade the rule of public law, by the interposition of a neutral port between the shipment from the belligerent port and their ultimate destination in the enemy's country; but in all such cases the goods have been condemned as having been taken in a course of commerce rendering them liable to confiscation; and it has been ruled *that the interposition of a neutral port makes no difference.*"

Jeeker *vs.* Montgomery, 18 Howard, 114.

And in the case of the *Jonge Pieter*, 4 C. Rob. 82, to which the Court referred, Sir W. Scott said: "The interposition of a prior port makes no difference; all trade with the enemy is illegal, and the *circumstance that the goods are to go first to a neutral port will not make it lawful.*"

§ 8. The following is from Mr. Lawrence's deposition, p. 129:

Dana's note 46, p. 137, corresponding with Lawrence's note 56, p. 165, contains a most extraordinary collection of blunders. This note is attached to the text of Wheaton, which states that, as a general rule, except in the United States and England, where the common law prevails, the forms of conveyance of real property are according to the *lex loci contractus*, and that the exception is peculiar to American and British law. The object of a portion of Mr. Dana's note is to contradict the text; and for that he refers, without stating what Redfield's own opinion is, to Redfield's edition of Story's Conflict of Laws. Reference to the sections of Story indicated will sustain Mr. Wheaton's views, the distinction between countries having the common law and the civil law being there stated. In this same work, there is a literal citation from my note of a passage from Westlake's International Law. The whole citation and authority has been literally transcribed. The object of this passage of Westlake was to show that the rule of the civil law yielded in the case of a transfer of property to the *lex situs*, when the positive law of the country required it. Dana then refers to the French law of March 1855, which, he says, requires the transfer *inter vivos* of real property and of corporeal personal property to be recorded in the Bureau of Hypothecations. It is impossible to conceive of a grosser blunder than is contained in this passage from Dana. At the same time, it establishes most conclusively his system of plagiarism, and the mode to which he resorted to carry it out, as well as the origin of his blunder. The law in question has nothing to do with personal property, while the general French system forbids the mortgage of personal property. The words of the law of 1855 are: "The transfer *inter vivos* of real property or of real rights (*droits réels*) susceptible of hypothecation in the Bureau des Hypothèques."

It so happens that in translating from Tripier, from which work I cited the law, the word "real" before rights was accidentally omitted by me, but the omission, as will appear, was in no wise important as regards the sense. The Code Civil, Art. 2114, shows that only real property and real rights are susceptible of mortgage or hypothecation. Dana trans-

lates (page 137), "droits réels," or real rights, "corporeal, personal property," thereby showing that he took the note from mine, and second, that he never referred to the authorities which he attempts to paraphrase, and thirdly, that he was utterly ignorant of the French law, which, differing as well before as since the Code from the old Roman civil law, does not permit the mortgage of personal property, except under peculiar circumstances as connected with real property.

§ 9. A great deal has been said in the argument about the knowledge of prize law and international law relating to war, which Mr. Dana's friends assumed and expected that his official position would have enabled him to acquire. We submit that the deficiencies of his book upon this subject are such as to show an habitual want of research and knowledge. We do find a few citations of prize causes decided in this district; and wherever there is a citation of Upton's Prize Law we find also a list of prize causes adjudged in the District Court in New York; but, certainly in one case (the *Mersey*), he does not seem to have been sufficiently familiar with the subject to know that the decision he cited had been since reversed, long before his book was published. His preface is dated July 2, 1866. Your Honors know, and the world knows, that before that time the Supreme Court of the United States had made some decisions on questions of prize law and of international law relating to war, growing out of the late contest. Every one of these ought to find a place in Mr. Dana's notes the moment it was promulgated. The decisions during that time are reported in Black, and volumes 1, 2, 3 of Wallace. Yet, if your Honors will examine Mr. Dana's table of cases, you will find that he has cited only two decisions of that Court since the commencement of the war. One is *Baldwin vs. Hale*, 1 Wall., which does not relate to war, and of which Mr. Dana's notes 93, 94, give a bare citation, copied, with a whole block of other citations, from Judge Redfield's note to Story (Mr. Potter, p. 232); and the other is the *Prize Causes*, from 2 Black. The opinions in these causes were first printed by Mr. Lawrence in his supplement, from copies furnished him for the purpose by the Judges who delivered them.

It would seem that D. ought to be expected to know thoroughly the English Naval Prize Act, passed June 23, 1864, which made some considerable changes in the British system; but it has already been shown that in two notes, 176, 185, he has simply copied from L. what was true at the time L. wrote, without so much as noticing matters which a single intelligent perusal of the present Act would have taught him.

For the manner in which his long notes on blockade have been copied from L., and the entire insignificance of his additions, *v.* pp. 49-50, 205, *supra*. See also notes 156, 158, and note 173, on Privateering. The argument says that one of his notes was relied on by Judge Betts in the case of the Meteor. Judge Betts' decision has since been reversed by Judge Nelson in the Circuit Court.

PART IX.

SUMMARY OF THE LAW APPLICABLE TO THIS CASE.

I. L.'S WORK IS THE SUBJECT OF COPYRIGHT, AND D.'S BOOK IS AN INFRINGEMENT THEREON.

A comparison of the work of Mr. Lawrence and Mr. Dana cannot be complete without careful attention to the nature of the work. It consisted in the selection of such passages of the text as admitted or required additional or qualifying matter, and the selection and arrangement of such new matter in the form of notes to the passages selected for annotation. It is only by reason of knowledge which the author did not possess, and which the annotator has acquired, that he can discern what passages of the text admit or require annotation, and the acquisition, selection and arrangement of this additional knowledge, and its reduction to the form of notes to the appropriate passages, constitute his work.

It is obvious that when the annotator has selected a passage to be annotated, and has supplied, in the form of a note, the new and additional matter to illustrate, supplement, correct or qualify the text, he has performed the work of an author, and his note is the subject of a copyright.

Greene vs. Bishop, and the authorities cited in the opinion of the Court.

And it is equally obvious that when a subsequent annotator, having the work of the first before him, selects the same passage of the text as a subject for a note, and uses the matter which the first had collected,

selected and arranged in the form of a note to that passage, the second avails himself of the labors of the first unlawfully and in violation of the rights of the first. It is not material that the second adds new matter not given by the first, or that he does not copy the very language of the first. For it is too clear to require argument that one man cannot lawfully appropriate the property of another by adding something of his own, or by using his ingenuity to disguise what he has taken.

In the case of *Greene vs. Bishop*, in this Court, it was decided that a writer had a copyright, where his labor consisted merely in selecting old materials, from different sources, and combining them together for the purpose of thereby compiling a treatise; and that, though a second writer might do the same work, he must do it for himself, and not save himself the labor or supply his own want of learning by availing himself of the exertions of his predecessor. It would, therefore, be superfluous to argue the point. We cited on our brief:

- Greene vs. Bishop*, in this Court.
- Folsom vs. Marsh*, 2 Story, 100.
- Gray vs. Russell*, 1 Story, 11.
- Emerson vs. Davies*, 3 Story, 768.
- Kelley vs. Morris*, Law. Rep. 1 Eq. 697.
- Scott vs. Stanford*, Law Rep. 3 Eq. 718.
- Lewis vs. Fullarton*, 2 Beavan, 8.
- Curtis on Copyright*, chaps. 5, 9, pp. 263, 277-284, and cases cited.
- 2 Kent, p. *383.
- Longman vs. Winchester*, 16 Ves. 269.
- Wilkins vs. Aiken*, 17 Ves. 424.
- Cary vs. Faden*, 5 Ves. 23, note.
- Hodges vs. Welsh*, 2 Irish Eq. 266.
- Blunt vs. Patten*, 2 Paine, C. C. 397.

II. THE DEFENCE OF A FAIR USE IS NOT TENABLE OR EVEN OPEN IN THIS CASE.

§1. *It is not tenable under the law of copyright.* No instance can be found in which a use at all resembling that made by D. of L.'s work, has been deemed a fair-use. On the contrary, the cases are numerous

in which a use far less extensive and important has been decided to be unfair and illegal. See the cases already cited.

Wilkins vs. Aiken, 17 Ves. 422. The plaintiff's book was on the Antiquities of Greece, with plates; the defendants published a work on Doric Architecture, and copied some, but not many, of the plates.

Lewis vs. Fullarton, 2 Beav. 9. A substantial part of the defendant's book was original, and he had applied labor in arranging the matter pirated in the form best suited to his own purposes. The decree was for the plaintiff.

Jarrold vs. Houlston, 3 Kay and Johnson 708. The book was a collection of questions with answers to them, on all kinds of scientific subjects. The plaintiff procured the answers by studying the standard works on the different subjects, but a substantial part of the value of his work consisted in the judgment exercised in selecting such questions as people who used the book would desire to know the answers to. The Vice-Chancellor said that the defendant had taken much, and much [about half] was his own; even the process of altering and transposing the plaintiff's questions and other matter must have been laborious. Yet an injunction was granted upon the ground that the defendant had availed himself of the plaintiff's labors. See particularly the remarks of the Vice-Chancellor on p. 713 as to originality and infringement.

Campbell vs. Scott, 11 Simons, 31. The plaintiff owned the copyright of Campbell's poems. The defendant published a "Book of the Poets" containing 790 pages, with comments, etc. Of this, 733 lines were from Campbell's poems, and an injunction was granted.

Hodges vs. Welsh, 2 Irish Eq., 266, is a very strong case. The plaintiff published some volumes of law reports. The defendant published a collection of cases relating to voting and the right to vote. He did not publish any cases in full, but only head notes. These were not copied literally, but made from the plaintiff's books, citing those books as authority. It was claimed that the purposes and objects of the two works were entirely different, and it appeared that only twenty-three out of ninety-four cases and thirty-seven out of two hundred and eighty-five pages of the defendant's book were procured in this way, but the injunction was granted. On page 287, the Court made some remarks as to the class of works which were protected by the law of copyright. In that case also (p. 289) the defendants claimed to have acted with the

consent of the holder of the legal title, but the Court interfered at the instance of the equitable owner, who had no legal title for want of a formal assignment. On page 289, the Court said: "It is said that the defendant's publication will be useful to the profession, to the public, and to members of parliament; perhaps it would be so, but in cases of this kind the Court has not, in my opinion, a right to entertain any such question. If such a principle is established, each case will depend on the taste or caprice of the Judge, or his, perhaps, erroneous opinion of the utility of the work."

Emerson vs. Davies, 3 Story, 768, is a very important case in every respect. One defence set up was that the books were of a different scope and purpose. Judge Story held that it was not material that "taking the entire volume, the other parts might not be executed upon the same plan as the plaintiff's." "The plaintiff's volume consists but of forty-eight pages, but if it turns out that twenty or more of them have been imitated by the defendant Davies, and that it superseded that of the plaintiff, it will be difficult to say that it is not an infringement of his copyright." In that case, as in this, the defendant urged that his book was the best, that there was no literal transcription, that the differences were of substantial value, due to original thought on the part of the defendant, but Judge Story (the cause not having gone to a master) came to the conclusion that a considerable portion of the defendant's book was due, not to his own original labor, but to the use he had made of the plaintiff's book, and upon that state of facts he had no hesitation in ordering a decree for the plaintiff. The case is of the more importance because, though the Court came to its conclusions unflinchingly, the position of the defendant makes it certain that nothing was omitted in his defence, and that all that can ever be urged on the score of character was urged in his behalf. (See respondent's argument, p. 16.)

In *Scott vs. Stanford*, 3 Eq., 718, the portion copied was very small.

D'Almaine vs. Boosey, 1 Y. and Coll. 288. From an air in the plaintiff's opera, the defendant, by the exercise of very considerable skill, and with a good many changes, arranged some music for dancing, but as the merit of the original air made the dancing music pleasing to the ear, an injunction was granted.

§ 2. The pretence that L.'s work was in the nature of a cyclopædia or

digest to which D. might properly resort, is unfounded in point of fact. L.'s work, as already shown, (p. 234, and Part III, *supra*), consisted in the selection of passages to be annotated, and the selection, combination, and arrangement of the matter of the notes. D. used this work and reproduced it as his own.

§ 3. *The defence of a "fair" use is not tenable, under the agreement of June, 1863.* Mrs. Wheaton's agreement was "to make no use of Mr. Lawrence's notes in a new edition without his written consent," (record p. 516). One object of that agreement was to secure to Mr. Lawrence the *exclusive* use of the "great amount of valuable learning which he had gathered with great labor from a wide variety of sources." (Mr. Parsons' dep., p. 302).

§ 4. *The defence of a fair use is not open to D.* He not only failed to give credit to L. for what he copied from him, but he expressly denied that he had copied from him, (p. 30, § 6; p. 60, § 3, *supra*); he paraphrased enough of L.'s notes to show his desire for concealment (see also pp. 103-4, 148, *supra*). To present copied matter as original is not a fair use.

Speaking of the use of another book when there is no question of copyright, Mr. Richard Grant White says, as if referring to the contrast between the claim in this preface, and the performance in the book.

"I do not understand how gentlemen and scholars can claim an edition as their own, and take no small proportion of their text and notes from other editors without a word of acknowledgment." (*Shakespeare*, vol. i. p. xxii.)

And speaking of taking mere hints from another author, Goldsmith says:

"A trifling acknowledgment would have made that lawful prize which may now be considered as plunder." (*Life of Parnell*, Little, Brown & Co.'s edition, p. xxxix.)

Burton (Democritus to the Reader) says:

"I have laboriously collected this Cento out of divers writers, and that *sine injuria*, I have wronged no authors, but given every man his own; which Hierom so much commends in Nepotian; he stole not whole verses, pages, tracts, as some do now-a-days, concealing their author's names, but still said this was Cyprian's, that Laetantius, that Hilarius, so said Minutius Felix, so Victorinus, thus far Arnobius. I cite and quote mine authors (which, howsoever some illiterate scribblers account

pedantical, as a cloak of ignorance, and opposite to their affected fine style, I must and will use), *sumpsi non surripui.*" *

It was Mr. Dickens's keen observation of human nature that prompted him to say:

"Many authors entertain not only a foolish, but a really dishonest objection to acknowledge the sources from which they derive much valuable information." *Pickwick Papers*, vol. i., ch. iv.

The true rule and the true distinction, as to what use may be made, is laid down in the greatest compilation of modern times. Dr. Worcester says:

"With respect to a few words of doubtful origin, Dr. Webster's etymology is noted in connection with that of other etymologists; but in no case, so far as is known, without giving him credit. In other respects the rule adopted and adhered to, as to Dr. Webster's Dictionary, has been to take no word, no definition of a word, *no citation, no name as an authority* from that work." *Dictionary*, Preface, p. vi.

Authors write for reputation and for profit. The first cannot be better promoted than by constant references to their books as authorities, or constant acknowledgments of the value of their work; while no advertisement can be so good as such references and acknowledgment. The second of these considerations is certainly within the view of the copyright law, and courts have paid some substantial regard to the former. (Curtis on Copyright, p. 279.) A Court of Equity as well as the party may let these advantages balance a use which it would otherwise think injurious to the party and entitling him to protection. Courts habitually take this view.

Tinsley vs. Lacy, 1 Hem. & Miller, 747. The defendant dramatised one of Miss Braddon's novels, introducing some original matter.

* On pp. 186, 217, *supra*, we have alluded to the habit of the respondents of reporting part, where a part is more useful than the whole; it seems to follow them in unimportant as well as in important matters. Among other quotations, their argument, on p. 212, has what is presented as a quotation from Burton, as descriptive of the defendant's and other similar books. They stop in the middle of a sentence; the rest of it is: "and as those old Romans robbed all cities of the world to set out their bad-sited Rome, we skim off the cream of other men's wits, pick the choice flowers of their tilled gardens, to set out our own sterile plots." The respondent's remark, that the merit is in the combination of the old materials, is generally true, but does not apply to Mr. Dana's book; for in note after note he has simply adopted Mr. Lawrence's selection and combination.

Vice-Chancellor Sir W. P. Wood said (p. 754): "*The authorities by which fair abridgments have been sanctioned have no application. The Court has gone far enough in that direction, and it is difficult to acquiesce in the reasons sometimes given that the compiler of an abridgment is a benefactor to mankind by assisting in the diffusion of knowledge. But these plays do not profess to be abridgments of the works of Miss Braddon, but are published as the original work of another author.*" An injunction was granted, though it appeared that the damages were hardly more than nominal.

Sweet vs. Shaw, 3 Jurist, 319. The defendants advertised that their reports were prepared by a competent barrister employed for the purpose, whereas, in fact, they were prepared by the use of the plaintiff's reports. The Court said, "Certainly that is a most *unfair* statement."

Wilkins vs. Aiken, 17 Ves. 426. With reference to the defence of a fair use, Lord Eldon said: "Upon inspection of the different works, I observe a considerable portion taken from the plaintiffs' that is acknowledged, but also much that is not; and *in determining whether the former is within the doctrine on this subject, the case must be considered as also presenting the latter circumstance.*"

Jerrold vs. Houlston, 3 Kay & J., 708. In some dicta, the Court puts extreme cases as to what might possibly be allowed, only by way of showing that the defendant is not within them, and grants the injunction. They do not, however, reach this case. With regard to the defence of a fair use, the Vice-Chancellor says (p. 715): "The defendant says, 'I deny that I copied or took any idea or language from the work of Dr. Brewer'; *the question of fair use is therefore almost excluded.*" Page 722: "I have also this strong fact; and I confess I rely upon it as one which ought to have considerable bearing on my decision, that Mr. Philip has taken upon himself to deny by his affidavit, that he has copied, or taken any idea or language from the plaintiffs' book. I find it impossible to come to a conclusion in his favor on the issue he has so tendered; and that being so, the very circumstance of that denial on his part is a very strong indication of an *animus furandi.*" The Vice-Chancellor (p. 716) defined the *animus furandi*, as "an intention to take for the purpose of saving himself labor." He said: "I take the illegitimate use as opposed to the legitimate use of another man's work on subject matters of this description to be this: If, knowing that a person whose work is pro-

ected by copyright has, with considerable labor, compiled from various sources a work in itself not original, but which he has digested and arranged, you, being minded to compile a work of like description, instead of taking the pains of searching into all the common sources and obtaining your subject matter from them, avail yourself of the labor of your predecessor, adopt his arrangements, adopt, moreover, the very questions he has asked, or adopt them with but a slight degree of colorable variation, and thus save yourself pains and labor by availing yourself of the pains and labor he has employed, that I take to be an illegitimate use."

The cases put by Courts as illustrating what is a fair use, are quotations and extracts for the bona-fide and avowed purpose of comment or criticism, or for the purpose of presenting the views of the writer as an authority (*Bell vs. Whitehead*, 8 Law Times, n. s., 144), and not to make it a pretext for pirating the other (Lord Ellenborough, in *Cary vs. Kearsley*, 4 Esp. 168). In *Bell vs. Whitehead*, Lord Cottenham said that the reviews constantly inserted extracts "for the purpose of explaining their criticisms on the works. The insertion of such extracts, moreover, tends to extend the sale of the works reviewed." A similar view was taken in *Story's Ex'rs vs. Holcomb*, 4 McLean, 309, where the defences of the character of the defendant, and the value of his work, were evidently urged with vigor, but without effect, for the injunction was granted.

§4. Your Honors will examine the cases cited by the respondents, if necessary, but some inaccuracies should be noticed. On p. 200, in quoting from the case of *Murray vs. Bogue*, 1 Drewry, 353, 368, they have printed the name of the defendant three times instead of the name of Bødeker, so that the acts mentioned instead of being those of the defendant, who was acquitted, were the acts of Bødeker, a German writer, and the court intimated that Bødeker's conduct was reprehensible. On the same page they quote from *Cornish vs. Upton*, 4, Law Times, 862; Sir W. P. Wood said that the *plaintiff* was "at liberty to avail himself, as a skeleton, or starting point, of matters patent to all the world, when he employed his own labor, time and expense on the matter and had acquired original information of value." He then went on to say "this is what the defendant ought to have done for himself."

Cary vs. Kearsley, 4 Esp. 168, your Honors will observe, was a *nisi prius* case.

Wilkins vs. Aiken, 17 Ves. 422, was a motion for a preliminary injunction; it was refused upon the ground that there was a doubt, but the defendant was ordered to keep an account.

In *Hodges vs. Welsh*, 2 Ir. Eq. 266, (argt. p. 205) it will be found that the defendant did *not* publish *in full* any of the plaintiffs' reports. See p. 274.

III. THE REVISED TEXT.

The value and importance of Mr. Lawrence's revision of the text — we might almost say his manufacture of a new text from materials left by Mr. Wheaton, — according to the views which his long intimacy with Mr. Wheaton, as well as his knowledge of the subject assure us were, beyond question, the views entertained by Mr. Wheaton at the time of his death, as well as Mr. Lawrence's claims to this text, and the respondents' exact reproduction of it, have already been considered (Part II., pp. 20–23, *supra*). It is sufficient now to say that we strenuously insist on those rights. With regard to this matter also, the defence of a fair use is neither open or tenable, for the reasons already alluded to. Indeed it is not attempted; for the respondents have, simply and solely, exactly reprinted all that Mr. Lawrence did in this respect. Instead of making the slightest acknowledgment of what Mr. Lawrence had done, Mr. Dana says in his preface (p. v.): "As the text of this work may be supposed to have now become, by the death of Mr. Wheaton, unalterable," etc. "This edition contains nothing but the text of Mr. Wheaton according to *his* last revision, his notes, and the original matter contributed by the editor" [the italics are ours]. "This edition . . . is confined, as has been said, to the text and notes of the author, and the notes of the present editor." (p. xi.)

IV. REPLY TO SOME MATTERS IN THE RESPONDENT'S ARGUMENT.

§1. It is objected, in the defendant's argument, that Mr. Lawrence has not actually on sale any copies of his book. No such defence is set up in the answers; it should have been, if relied on, because it is a matter to be met by evidence, showing whether or not Mr. Lawrence has copies on sale, or is preparing to publish a new edition with all

possible expedition. It appears that the fact that the edition of 1863 was exhausted, was concealed from him by the defendants until shortly before their book was published, and the Court cannot but infer that one object was, by this means, to have their book in the market before it was possible for Mr. Lawrence to carry out his avowed purpose of publishing a work in which the matter now pirated by D. was to find its place, and their success in this is certainly no ground for allowing them to inflict further injury upon him. Mr. Lawrence was thereupon entitled to settle the question, whether his rights were to be protected, before embarking in so expensive an undertaking as the publication of his work. He could not make an advantageous bargain with any bookseller, until his rights were settled. It appears, moreover, that his time has been constantly employed in preparing a new edition now going through the press, and, though it is in French, it can easily be translated, or copies of it can be, and undoubtedly will be sold in this country, unless it shall be found that the sale is injured by reason of the public being able to find the same matter or a part of the same matter copied into some other work.

There is no provision in the statute requiring copies to be kept on sale, and certainly, under the circumstances of this case, as the complainant is actually engaged in preparing a new edition, for the pecuniary benefit of the respondents, there can be no substantial foundation for the objection.

The agreement of June, 1863, does not require Mr. Lawrence to use his notes; it simply compels the defendants to abstain from using them.

§2. Mr. Lawrence may use his notes, with or without such changes of form as may be convenient, in a reprint or new edition of Lawrence's Wheaton. The copyrights of 1836 and 1846 are void, both because they were taken out in a District where Mr. Wheaton did not reside, (Bill, p. 12; Mr. Lawrence, 78 ans. p. 104; Exhibits, p. 272,) and because no notice has been published on the back of the title page of the editions of 1855, 1863, 1866 (Record, p. 549), and because the copyright of 1836 has expired by lapse of time. (See Part II. p. 20, *supra*.) He may also connect them with Wheaton's History; it appears (Record pp. 538, 540) that he was to re-arrange them for Mr. Brochaüs so that they could be published in separate volumes, and be connected both with the Elements and the History, and this has actually been done. (See

p. 115, *supra*.) He may also use them in connection with the History, and it was known to the respondents that he had commenced negotiations with that view (Record, p. 521). He may embody them in an entirely new work. If the Wheatons owned any copyright in the text he would be in a position to treat with them for a sale or purchase or for a joint publication. Indeed he occupies at least as favorable a position as the inventor of an improvement on a machine, and no one ever heard it claimed that a patent for such an improvement was invalid because it could not be used without the use of a previously patented machine.

In whatever way, or in whatever form he uses them, the book will be in demand because it contains the matters found in his notes of 1863; its sale will be injured just so far as the public are able to find the same matters in the defendants' book; and the defendants' book, besides, or in spite of the merits or demerits due to Mr. Dana, be they what they may, will compete with it by reason of an unfair use made of the results of Mr. Lawrence's learning, research, and judgment.

Respectfully submitted by

B. R. CURTIS,
J. J. STORROW,
of Counsel for the Complainant.

APPENDIX.

The following is from Mr. Lawrence's affidavits :

Not having confidence in my own judgment in a matter in which my feelings were intensely excited, and which involved a question of law, as well as of expediency, I went, as soon as practicable, after obtaining a copy of D., to Saratoga, where Chancellor Walworth resides. I asked his opinion, to guide my action, as to the existence of a piratical invasion of my rights by the respondents, and of the appropriate means of protecting them. After a delay of a fortnight, during which, as he assured me, he had been constantly engaged in comparing the different editions of Wheaton, and having before him the memorandum of June 14, 1863, as well as Wheaton's edition of 1846, my two editions of 1855 and 1863, and Dana's edition, he sent me the opinion which is annexed.

OPINION OF CHANCELLOR WALWORTH.

Our distinguished fellow-citizen and eminent publicist, Henry Wheaton, LL.D., died in March 1848. During his long sojourn in Europe, as one of the diplomatic representatives of the United States, he compiled his first edition of the "Elements of International Law," which was published at Philadelphia and at London in 1836. The copyright of the Philadelphia edition expired in 1864, and was not renewed in the name of his widow or heirs.

In 1846, a new edition, with some additions and corrections was published in Philadelphia, and was attempted to be copyrighted there in the name of the author. But, as Mr. Wheaton was not a resident of that District, that copyright was probably void, and gave no exclusive right to the author's additions and corrections. Mr. Wheaton's latest

additions to his *Elements of International Law* were made in 1847, and were published in 1848, in French, at Paris and at Leipsic, in what has been called the fifth edition of his work.

In 1855, his long tried and devoted friend, William Beach Lawrence, who for a time had been one of his diplomatic colleagues in Europe, for the purpose of aiding the widow and children of the then deceased author of *Wheaton's International Law*, prepared a new edition thereof, called the sixth edition. In this edition the editor made many alterations in, or rather additions to, the text of former English editions of the work; most of which additions were the editor's own translations from Mr. Wheaton's additions in French, and published, for the first time, at Paris and at Leipsic in 1848. And he added very copious notes of his own, in reference to questions of international law, which had arisen since the publication of Mr. Wheaton's last edition, as well as in some that had arisen previously thereto. The editor's notes also contained numerous references to published works of writers on the subject of international law, explaining, confirming, or elucidating the text of Mr. Wheaton's work, and also the notes of the editor of this sixth edition. And many original references to public documents, treaties, diplomatic correspondence, etc., were made by the editor, which added very considerably to the value of Mr. Wheaton's most excellent work.

This sixth edition was published at Boston in 1855, with the editor's English additions and notes; with nearly two hundred pages of introductory remarks by the editor, containing a brief history of the life, character, literary productions, diplomatic achievements, etc., of the author of the original text of the work. The copyright of the whole of this edition was, with the assent of Mr. Lawrence, taken out in the name of Mrs. Catherine Wheaton, who was then the widow of the eminent publicist; one of whose daughters was the wife of Mr. Little, of Boston, then and now a member of the firm of Little, Brown & Company, who were the publishers of that sixth edition. Mr. Lawrence afterwards prepared and edited a second annotated edition of *Wheaton's Elements of International Law*; including his notes to the sixth edition, with some slight corrections. To those notes, very extensive new notes were added, not only in reference to the subject-matters discussed in the body of the work, but also in reference to many international questions which had arisen, and been discussed or acted upon, since

the preparation of that sixth edition; particularly in reference to questions arising out of the civil war in the United States. Most of the "Introductory remarks" contained in the annotated edition of 1855, were either embraced in a re-written notice of Mr. Wheaton, by the editor, or were incorporated into the editor's notes to this last edition. It was published in 1863, at Boston, by Little, Brown & Company, and simultaneously at London, by Sampson, Low, Son & Company. And the American copyright, as in the previous edition edited by Mr. Lawrence, was entered or taken out in the name of Catherine Wheaton, who was then living, but has since died.

As the second annotated edition was going through the press, the editor's notes, in connection with the text, were sent to Mr. Brockhäus, at Leipsic, who had published the French edition of 1848. And he offered Mr. Lawrence, as an *honorarium*, or voluntary and honorary allowance for the anticipated profits to be derived from the publication of a French translation of those notes in connection with the work, the privilege of drawing on him for six thousand francs. Mr. Lawrence was anxious to obtain this *honorarium* for the benefit of Mrs. Wheaton and her unmarried daughter; but was not willing to have a French edition of his notes published unless he had the supervision of their translation. And as that translation, and the corrections of his notes, would require at least six months of his time and labor, and considerable pecuniary expense, he thought he ought, as an equivalent therefor, to have the exclusive right thereafter to use his own notes, as copyrighted, without any interference by any one, and that they should not thereafter be used by Mrs. Wheaton, or her representatives or assigns, without his consent. But upon those terms he was willing to give her the benefit of the offered *honorarium*, and to authorize her to draw for the same, by his giving to Mr. Brockhäus the assurance that he would furnish him with the desired French translation of his (Mr. Lawrence's) notes for publication. All this he communicated to Miss Martha B. Wheaton, the unmarried daughter, who was acting for her mother, as well as for her own benefit. It resulted in the following memorandum of the agreement or understanding of the parties, which memorandum was drawn up by Professor Parsons, of the Law School at Harvard College, as the friend of Mrs. Wheaton and her daughters, and was signed by Miss Martha B. Wheaton, who professed to act for her mother:

"Mr. Lawrence will write to Mr. Brockhäus in terms to bring to Mrs. Wheaton the right to draw on Mr. Brockhaus at once for six thousand francs. He will also endeavor to get from Mr. Brockhäus as much as he can towards the actual expense of having the translation into French made here. And so much of that expense as he fails to get of Mr. Brockhäus, Mrs. Wheaton will pay from the proceeds of the draft on Brockhäus.

"Mrs. Wheaton, on the payment of her draft on Brockhäus, agrees formally to make no use of Mr. Lawrence's notes in a new edition without his written consent. And Mrs. Wheaton will give to Mr. Lawrence the right to make any use he wishes to of his own notes.

"M. B. WHEATON.

"JUNE 14, 1863."

Simultaneously with the date of this written memorandum, Mr. Lawrence, pursuant to the terms of the arrangement, wrote to Mr. Brockhäus, a letter of which the following is a copy :

"OCHRE POINT, NEWPORT, }
June 14th, 1863. }

"Dear Sir, — I have made satisfactory arrangements with Mrs. Wheaton by which I relinquish to her all claims against the 6,000 francs in your hands, she defraying the expenses of translation, if any, which you may not defray. I am very unwilling to have the translation made otherwise than under my own direction, and the alterations render my supervision necessary. The new matter which I shall insert, and the condensation of the old, would I trust, amply compensate you for the difference between the expense of translation in Europe, and here. I know not what it would cost there, but I think it might be effected here for 2,000 francs. At all events, if that is allowed, the difference, if any, will be made up on this side. There will be more pages than I supposed, but I propose to cover actual cost only.

"I sincerely desire that Mrs. Wheaton may be enabled to obtain the whole of the 6,000 francs for which she is authorized to draw on that account. I will go to work immediately. Indeed I am already employed in correcting the notes, but I fear that I cannot promise you any part of the translation before six months. I go to Washington in a few days to examine the documents which I cannot obtain elsewhere, and

neither for that, nor for any other expenses, do I make any charge. I ought to repeat that you omit to notice that I shall expect twenty-five copies, including corresponding copies of the Elements, and if two editions are made, the same for each. Should any books appear which you deem important for me to use in connection with the work, it would be for your interest to forward them.

"Should Mrs. Wheaton hear nothing from you to the contrary before the tenth of August, she proposes to draw on that day.

"Yours truly,

"W. B. LAWRENCE.

"Mr. F. A. BROCKHAUS."

This letter was delivered to Professor Parsons at the time he conducted the arrangement on behalf of Mrs. Wheaton and her daughter with Mr. Lawrence. And he sent it to Miss Martha B. Wheaton when he transmitted to her the memorandum of the arrangement he had made to be signed by her. These were accompanied by the following note from him:

"Dear Miss Wheaton: Mr. Lawrence and I have come to a perfectly amicable result, which is expressed generally in this memorandum. I will give my reasons, if they do not occur to you, when we meet. If this result be satisfactory, please make a copy for yourself of the memorandum.

"Very sincerely yours,

"THEOPHILUS PARSONS."

"If convenient take a copy also of Mr. Lawrence's letter to Mr. Brockhaus, which seems to me entirely satisfactory."

Upon the receipt of the memorandum and letter, by Miss Wheaton, she signed the former, and caused it to be delivered to Mr. Lawrence. The letter was transmitted to Mr. Brockhaus at Leipsic. And Miss Wheaton was thereby enabled to obtain for her mother, by means of the draft upon him, the proceeds of the 6,000 francs, equal in value here to about \$1,800 in the paper currency of the United States in August 1863.

Mrs. Wheaton afterwards died, and Miss Martha B. Wheaton, the un-

married daughter, became her personal representative. Since the death of the mother, Miss Martha B. Wheaton, in conjunction with R. H. Dana, junior, and her brother-in-law Little, and his co-partners, composing the firm of Little, Brown & Co., have edited and published what is called the eighth edition of *Elements of International Law*, by Henry Wheaton, LL. D. &c., edited, with notes, by Richard Henry Dana, Jr., LL. D. Published at Boston, 1866, by Little, Brown & Co. And the copyright for the same is entered in the Office of the Clerk of the District Court of the United States, for the District of Massachusetts, in the name of Martha B. Wheaton.

In this edition, parts of many of the notes of Mr. Lawrence, embraced in, and published with, one or both of his annotated editions of *Wheaton's Elements of International Law*, are embraced and published, with more or less alterations of the language. And some of Mr. Lawrence's notes are published entire, in that eighth edition; with no alteration of the language of the original notes as used by him. In many cases the authorities collected, and cited or referred to by him; and the public and private documents and letters and documentary evidence collected and referred to by him, are referred to or published in the same connection with the text, in this eighth edition. All this is contrary to the spirit and intent of the arrangement made with Mr. Lawrence, in June 1863. And my opinion is now desired by Mr. Lawrence upon these two questions in relation to this subject.

First. Under the arrangement of the 14th of June, 1863, is Mr. Lawrence equitably entitled, as against Miss Wheaton, as representative of her mother, or otherwise, and as against the editor and the publishers of this edition, to an injunction to restrain her and them from thus using his copyrighted notes without his consent?

Second. Was such use of his notes and of the citations and authorities which he had collected and had permitted to be so published by Mrs. Wheaton, a violation of his equitable copyright, under the arrangement of the 14th of June, 1863?

OPINION.

1. It may be assumed, in the examination of the first question, that Mr. Lawrence, by allowing Wheaton's Elements of International Law, with the editor's own annotations, to be published by Mrs. Wheaton, and copyrighted in her name, made her the proprietor of the whole work, including the editor's notes. Such appears to have been the tacit understanding or agreement of the parties; although there was no written assignment of the right or interest in Mr. Lawrence's notes to Mrs. Wheaton.

I understand, from the published letter of Mr. Lawrence to Professor Parsons, of the 6th of January 1866, that the editor of the first and second annotated editions of the Elements of International Law, had from the beginning intended to bestow gratuitously, all his labor of preparing those two editions for the press, including his own elaborate and very valuable notes, for the benefit, pecuniarily, of the widow of his friend, the deceased author of the text of the work.

Under the English Copyright Acts it appears to be settled, whether rightfully or not it is unnecessary for me to express an opinion, that to entitle an assignee of an author to acquire the legal title to a copyright, the assignment to him must be in writing, (*Power vs. Walker*, 3 *Maule and Sel. Rep.* 7. *Clements vs. Walker*, 2 *Barn. and Cress. Rep.* 861.) The decisions on this subject in England appear to be based on the peculiar provisions of their Statutes.

I have not been able to find anything in the existing Statutes of the United States, relative to copyright, requiring the transfer from the author of a literary production to be in writing, to enable his assignee to copyright the work in his own name as proprietor. The first section of the Act of the 3d of February, 1831, entitled an act to amend the several acts respecting copyrights (*Dunlop's Dig. of Laws of the U. S.* 794), simply declares that any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of any book or books, etc., and the executors, administrators, or legal assigns of such person or persons shall have the sole right and liberty of printing, reprinting, publishing and vending, such book or books, etc., in whole or in part, for the term of twenty-eight years from the time of recording the title thereof in the manner in that act directed.

The fourth section then provides that no person shall be entitled to the benefit of that Act, unless he shall, before publication, deposit a printed copy of the title of such book or books, etc., in the Clerk's Office of the District Court of the District, wherein the author or *proprietor* shall reside. And the clerk, in recording the same, is to state the name of the author or *proprietor*, so depositing such title-page, and the date of such deposit, stating that the person so depositing the title claims to be *the author* or to be *the proprietor* of the book, etc., as the case may be. No evidence of authorship or proprietorship is required to be exhibited to the clerk with the title-page of the book, etc., by the person by whom, or in whose behalf it is deposited. All that he is required to do is to inform the clerk whether the person claiming the copyright desires it as the *author* of the book or as the *proprietor* thereof merely.

It is true the supplementary Act of the 30th of June 1834, authorizes deeds or instruments in writing, for the transfer or assignment of copyrights to be acknowledged, proved, and to be recorded in the office where the *original copyright* is deposited and recorded. And if not so recorded within sixty days after their execution, they are void as against subsequent *bond-fide* purchasers or mortgagees of the copyright for valuable consideration and without notice. (*Dunl. Dig. of Laws of U. S. p. 847.*)

But this statute only applies to an assignment after the book or other work has been properly copyrighted. Not to an assignment or transfer by the author, either verbally, or in writing, or impliedly, upon which assignment or transfer the assignee has the privilege of copyrighting the work, being the *proprietor* thereof. (*See also Webb v. Powers; Woodbury & Minot's Reports, 497.*)

I conclude, therefore, that at the time of the arrangement of the 14th of June, 1863, Mr. Lawrence's notes had been legally copyrighted in the name of Mrs. Catherine Wheaton, as the rightful *proprietor* thereof, by the spontaneous bounty of their author and compiler. And that the right of protecting these notes from piracy had not been lost by the author's consent to their publication by her as the rightful proprietor of his bounty.

That being the case, I think the arrangement of the fourteenth of June, 1833, restored to Mr. Lawrence, in equity, the proprietorship of

the copyrighted notes, and gave to him equitably all the rights contemplated by that arrangement. And as Miss Martha B. Wheaton assumed to act for her mother in making that arrangement, and has received for herself and for her mother, the full pecuniary benefit thereof, she and those claiming under her are in equity estopped from alleging that she was not authorized to make such arrangement for her mother.

And if the publication of this eighth edition of *The Elements of International Law*, which is copyrighted and published in her name, as the proprietor thereof, is in fact a violation of the arrangement made with her by Mr. Lawrence, he has in equity the right to restrain the publication and sale of the eighth edition, and to an account of the profits received from the sales already made.

An equitable assignment or the assignment of the legal interest of assignor in a copyrighted work, though not recorded according to the act of June, 1834, is valid as between the parties, and as against all but *bona-fide* purchasers, and mortgagees for valuable consideration, and without notice. (*Webb vs. Powers*, 2 *Woodbury & Minot's Rep.* 497.) And in the case under consideration, Dana the editor, and at least one of the firm of Little, Brown & Co., at the time they published this eighth edition, had actual notice, or at least sufficient to put them on inquiry, as to the equitable right of Mr. Lawrence to his copyrighted notes, under the arrangements of June 1863. And if any parts of those notes have been pirated by Mr. Dana in preparing and editing this eighth edition of the *Elements of International Law*, it is the right and duty of the proper court to restrain the further publication and sale of such pirated parts. Mr. Lawrence, as against Miss Wheaton as the representative of her mother, is also entitled to a specific performance of the arrangement of June 1863, by the execution of a formal assignment in conformity with that arrangement so that he may have such formal assignment recorded according to the provisions of the act of June 1834, to enable him to protect his rights as against subsequent *bona-fide* purchasers and mortgagees of the copyrights to his notes. (*See 11 Simons, Rep.* 572, and 7 *English Law and Equity, Rep.* 331.)

2. What use is allowed to be made of a copyrighted publication, without subjecting the parties using it to a charge of literary piracy is

frequently a question of much difficulty. And where the alleged pirate pretends that he has not used the copyrighted work in preparing his book, an ordinary and familiar mode of contradicting such pretensions is to show that he has stolen even the errors of the copyrighted work. (*See Murray vs. Bogue*, 17 *Eng. Law and Equity, Rep.* 172.) In the present case, it will be found that Mr. Dana, in preparing this eighth edition, has copied into, or transferred to it, several errors which had crept into Mr. Lawrence's notes.

Throughout this edition it will also be found that many of Mr. Lawrence's notes have been used, in substance, by the editor, though he has attempted, in most of those cases, to cover the piracy by carefully changing the language of Mr. Lawrence's notes. In several cases, however, he has servilely copied the very language of the note. And in other cases he has used the citations of authorities which the industry and research of Mr. Lawrence had collected and referred to in the notes. Probably he has examined some of the books referred to by Mr. Lawrence. But he has copied some of Mr. Lawrence's references to letters and documents, which letters and documents had never been published, nor been referred to except in Mr. Lawrence's copyrighted notes.

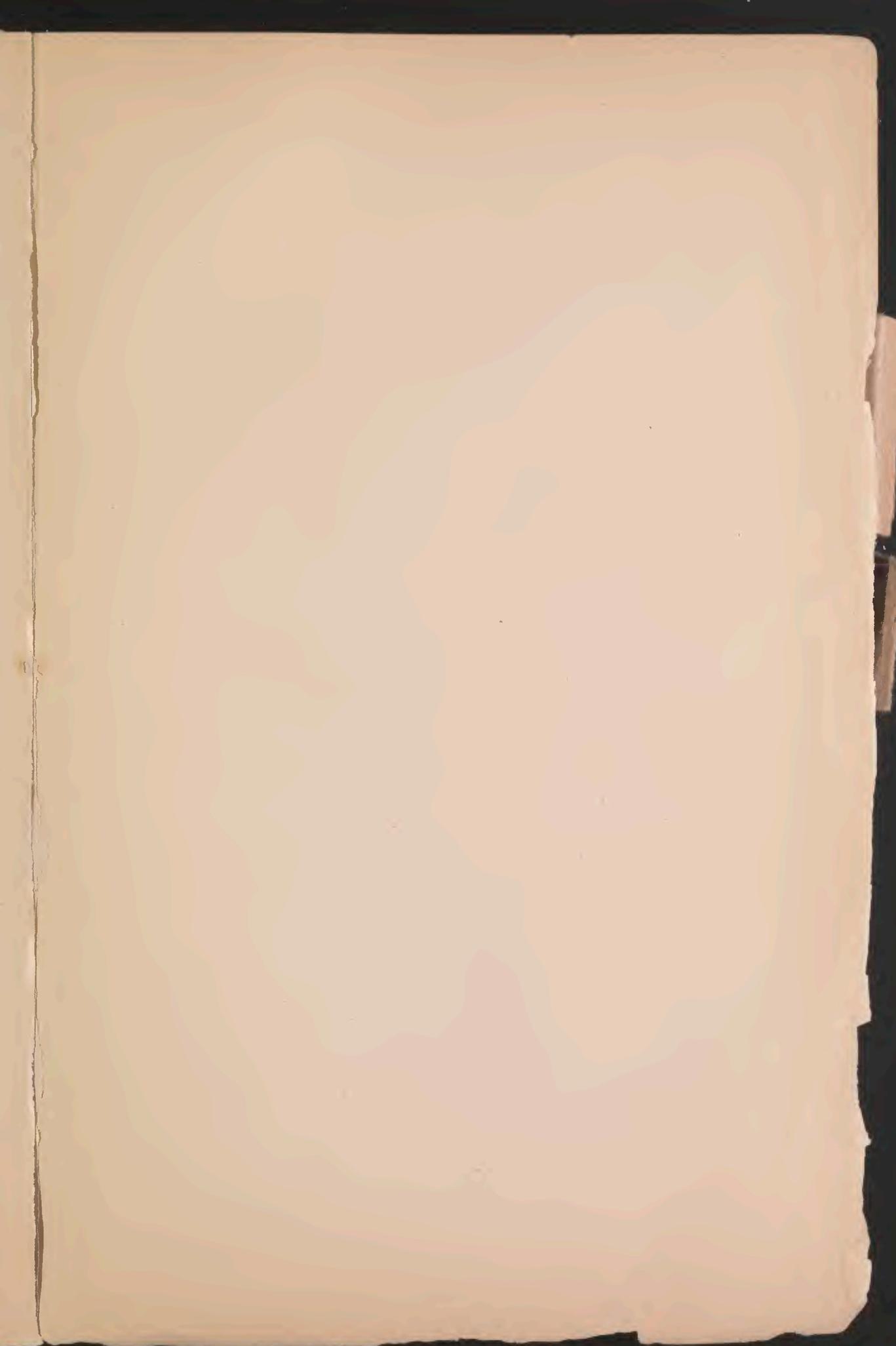
Again he has for the most part in his notes pirated the plan, order or arrangement, in which Mr. Lawrence has connected the subject-matters of those notes, respectively, with the text of Wheaton's *Elements of International Law*. Judge Story in the case of *Emerson vs. Davies* (3 *Story's Rep.* 768) says, "Every author of a book has a copyright in the plan, arrangement and combination of his materials, and in his mode of illustrating the subject, if it be new and original in its substance." And as the copyright of the *Elements of International Law* had run out when this Eighth Edition thereof was published, much of the value of Mr. Lawrence's notes as a copyrighted work was in their connection with the text of the *Elements* and the right he then had and now has to use his notes, and the several subject-matters thereof, in connection with the text of the *Elements*, and according to his plan or arrangements in his two annotated editions.

For these and other reasons which I have not leisure to state at length, my opinion is that the publication of this eighth edition of

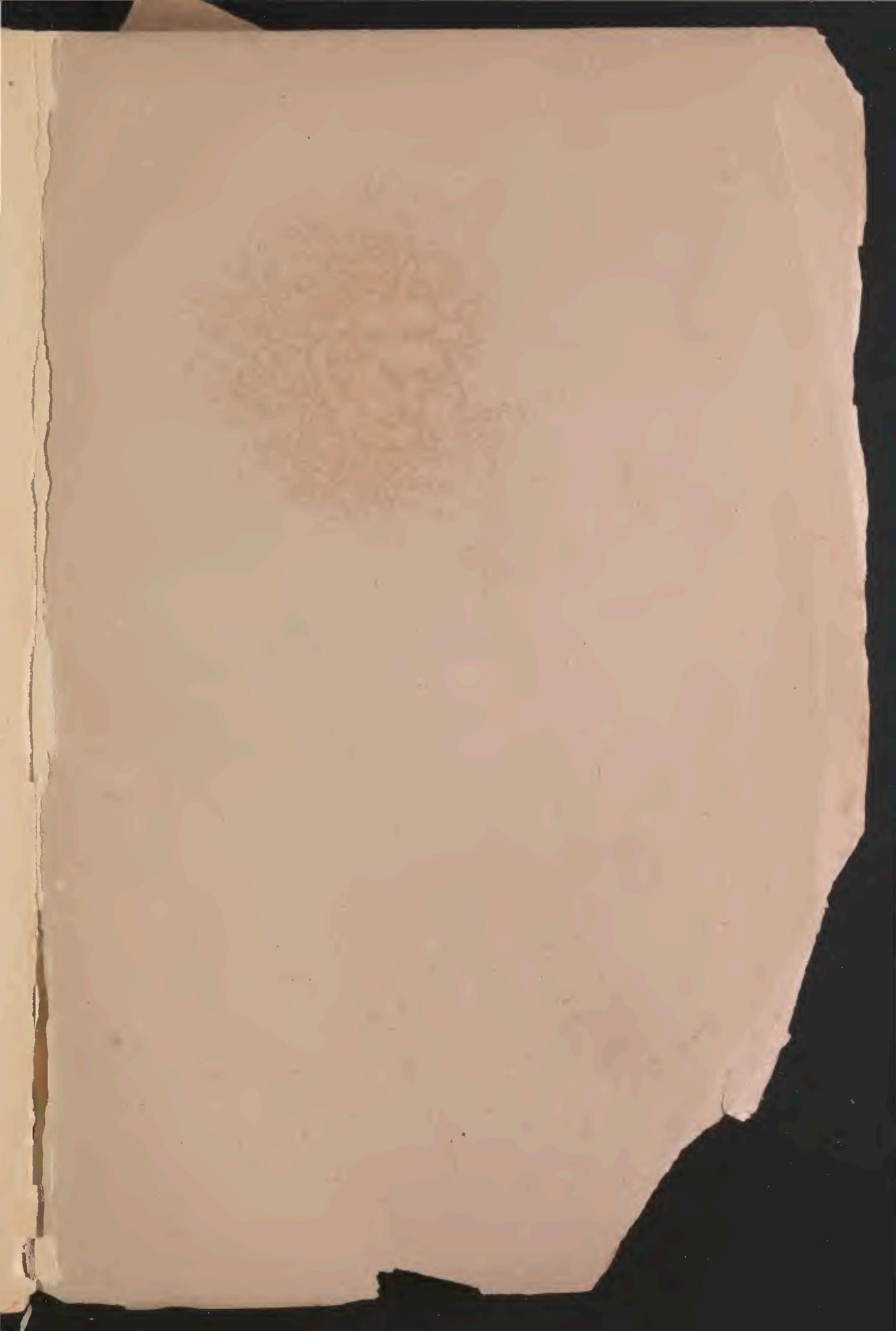
Wheaton's Elements of International Law, in connection with the notes, and the several subject-matters of those notes, was an unjustifiable violation of Mr. Lawrence's equitable rights under the arrangement of the 14th of June, 1863.

REUBEN H. WALWORTH.

FINE GROVE, SARATOGA SPRINGS,
August 29th, 1866.







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