

belonging to the pupil. In the same year Major Scott applied to the Court for an allowance out of the interest of the pupil's estate, for his maintenance, support, and upbringing. The Court allowed him a sum of £250 per annum. Of this date (11th November 1870), Major Scott applied to the Court to enlarge the foresaid provision to £400 per annum, his son the pupil being now nine years of age. It was stated that in consequence of the arrangements connected with the disentail of the estate of Malleny, and the different interests which had to be provided for, Major Scott received little or no present advantage from the possession of the estate.

The petition came up on the report of Lord Mackenzie.

At advising—

LORD PRESIDENT—I do not think that Major Scott has made out any case for the present application. A boy living in family with his father, who is quartered with his regiment at a station in this country, certainly cannot cost the father anything like the amount which he already has as an allowance for him. It is not said that there is any present purpose of sending the boy to a public school, nor is it even said that the time when he should be so sent has yet arrived. When that time does come, the Court will be quite ready to re-consider this application, but they will then require to have precise and distinct information as to the expenses which are proposed to be incurred on the boy's behalf, both at school and during those times of vacation when he may be residing at home.

The other Judges concurred.

Application refused.

Agent for Petitioner—H. W. Cornillon, S.S.C.

Friday, December 23.

BLACKS v. MURRAY AND SON.

Copyright—Second Edition—Notes—Quotations—Extent of Alteration. The defenders, who were a publishing firm, issued a book which professed to be a reprint of the original edition of a work, the copyright of which original edition had expired. There was, however, a later edition of this work, with notes, alterations, and additions, still within the protection of copyright, and the copyright in which was the property of the pursuers. From this last edition the defenders borrowed certain notes, a few of which were original, and the rest consisted of quotations from various works, which were used by way of explanation and illustration. They also took from certain other works, exactly in the same position with the work last mentioned, (1) notes consisting of quotations, and (2) passages abridged from the text as altered in the copyright editions. Held (1) as regarded all the notes borrowed the defenders had infringed the pursuers' copyright; (2) (*diss.* Lord Kinloch) with respect to two of the passages quoted from the text there was no infringement, as what was taken did not exceed the limits of legitimate quotation; (3) (*diss.* Lord Deas) that as regarded the last passage complained of, there was also no infringement, the alteration in the copyright edition being too insignificant.

This was an action at the instance of Messrs Adam & Charles Black, publishers, Edinburgh, against Messrs Alexander Murray & Son, publishers, London, for alleged infringement of the copyright possessed by the former firm in certain works of Sir Walter Scott. The summons concluded for the sum of £2000 sterling in name of damages, and as reparation for the loss and injury sustained by the pursuers through the defenders' wrongous invasion of the pursuers' copyrights of the edition of the "Minstrelsy of the Scottish Border," in four volumes, forming a portion of the poetical works of Sir Walter Scott in twelve volumes, edited by J. G. Lockhart, with Sir Walter Scott's "Introductory remarks, notes, and music to various ballads;" of the edition of the poem "On the Massacre of Glencoe," forming a portion of the said poetical works in twelve volumes; of the following portions of the second edition, with the author's introductions, alterations and notes, of the Waverley Novels in forty-eight volumes, viz., selections from "Old Mortality" and the "Antiquary." The summons farther concluded for delivery of all the copies of the book published by the defenders entitled the "Minstrelsy of the Scottish Border" which might remain unsold, or at least of the portions of said book which were complained of; and also for interdict against the continued publishing of the said book.

The peculiarity in the case was that the original text of all the works, the copyright of which the defenders were accused of infringing, was out of copyright, and the pursuers only claim for copyright in second or subsequent editions of said works. There was no dispute as to the editions claimed being copyright, and no question of title. The piracy complained of was of the following nature:—*First*, the defenders were accused of having copied the advertisement, or parts thereof, prepared by Mr Lockhart, and printed at the beginning of the copyright edition of the "Minstrelsy of the Scottish Border," and of having printed the same, or parts thereof, as a preface to their volume. It was farther averred that they had taken from the said copyright edition of the "Minstrelsy" forty notes, eight of which consisted of original matter, and thirty-two of quotations. These forty notes were a portion of two hundred notes, of which fifteen were original matter, which had been introduced for the first time by Mr Lockhart in the copyright edition of the "Minstrelsy."

Second, it was averred that the defenders had copied from the copyright edition of "Old Mortality" a note by Mr Lockhart, consisting of a quotation from the Bannatyne Club Papers, with an introduction by Mr Lockhart, and also from the text of the said novel the description of the battle of Drumclog, and a similar description of the battle of Bothwell Bridge.

Third, it was further stated that an account of the Massacre of Glencoe, originally published in the Encyclopædia Britannica, and used by Mr Lockhart as an illustration in the eighth volume of Sir Walter Scott's poetical works, had been copied by the defenders, and printed by them for the same purpose.

Lastly, the poem entitled "Glenallan's Earl," which is part of the text of the novel "The Antiquary," was alleged to have been copied by the defenders from the copyright edition of that novel. In the cases of the notes, which consisted of quo-

tations, and of the portions of the texts of the works which were alleged to have been pirated, it was apparent that they had been taken from the copyright editions, on account of both the alterations and the mistakes present in these editions having been copied. The alterations and changes on the text of the novels were very slight, and in the case of the poem "Glenallan's Earl" consisted merely of one word.

The Lord Ordinary (JERVISWOODE) found that the several instances of piracy and invasion of copyright alleged by the pursuers were proved to have been made by the defenders from copyright works, and held that the defenders had accordingly infringed the copyright of the several works mentioned in the summons. He farther found the defenders liable in the sum of thirty pounds in name of damages, and granted interdict as concluded for.

The defenders reclaimed.

The SOLICITOR-GENERAL and WATSON, for them, argued—That, with regard to the alleged invasion of the copyright of the text of the Waverley Novels, (1) the alterations made upon the text had been of such a trifling nature as not to entitle the pursuers to a copyright in the passages borrowed; (2) even although there had been a copyright in these passages, that the use here made of them did not exceed the limits of legitimate quotation, especially when the descriptions alleged to have been copied had been abridged by the defenders, and the quotation acknowledged. There was no attempt here either to supersede the works borrowed from or to compete with them. What is covered by copyright is not each single emendation, but the combination of them taken together. With respect to the notes alleged to have been borrowed, those consisting of original matter had been taken to such a slight extent, and were of so trifling a nature, as not to constitute piracy; whereas, as regarded the other notes, which consisted of quotation, the complaint practically came to this, that because one man had used a certain passage as a quotation no one else was entitled to do so. The arrangement and shape of the defenders' book was wholly different from those of the pursuers', and there are many things in it not contained in the pursuers' four volume edition. The following authorities were relied on:—*Copinger on Copyright*, *Clementi v. Golding*, 28th Feb. 1809, 2 Campbell 25; *Cadell v. Anderson*, 17th July 1787, M. 8310; *Carry v. Longman & Rees*, 5th April 1801, 1 East. 358; *Johnston v. Fullarton*, 7 Rep. of Trials; *Scott v. Stanford*, 31st Jan. 1867, 3 L. R. (Eq.) 718; *Roworth v. Wilkes*, 7th Dec. 1801, 1 Campbell, 94; *Wilkins v. Aikin*, 4th Aug. 1810, 17 Vesey Ch. R. 422; *Mawman v. Tegg*, 4th Aug. 1826, 2 Russel, 385; *Campbell v. Scott*, 8th Feb. 1842, 11 Simon, 31.

The LORD ADVOCATE, MILLAR, Q.C., and MAIR, for the respondents, maintained—That the defenders here had infringed their copyright. It was true that there might be something so infinitely trifling taken that it would not be worth while complaining, but here it was very different. The notes and alterations were important and valuable, great literary skill had been expended on them, and no man was entitled to avail himself of that even though he merely took the suggestion from the copyright book and borrowed the quotations direct from their source. The man who chooses a passage and prints it as an illustration in a note has a right of property in that combination which

must not be invaded. The protection of copyright also extends over all the differences between the texts of the original and the improved editions. The quotations taken from the texts here were clearly from the copyright texts, and these quotations were not within the limits of legitimate quotation, no man being entitled to take a well known and valuable passage from a copyright book in order to make his own book sell. The subjoined cases were quoted:—*Hotten v. Arthur*, 9th July 1863, 32 L. J. (Chan.) 771; *Taylor v. Bayne*, 21st Dec. 1776, M. 8308; *Maclean and Others v. Moody*, 23d June 1858, 20 D. 1154; *Thomson v. Walker*, 4 Burrows, 2326; *Jarrold v. Houston*, 9th July 1857, 3 Kay & Johnson, 708; *Kelly v. Morris*, 8th March 1866, 1 L. R. (Eq.) 697; *Lewis v. Fullarton*, 16th July 1839, 2 Beav. 6; *Gordon on Copyright*, 350; *Bell's Com.*, 1, 122 (5th ed.).

At advising—

The LORD PRESIDENT—My Lords, this is an action at the instance of Messrs Adam and Charles Black, publishers in this city, against Messrs Alexander Murray & Co., publishers in London, for the infringement of this copyright, the infringement being alleged to be contained in a book published by the defenders in 1869, and which purports to be a new edition of the "Minstrelsy of the Scottish Border," and is represented on the title page as a "reprint of the original edition." The peculiarity of the case is that the original edition is out of copyright, and consequently, if this book is what it pretends to be, viz., merely a reprint of the original edition, the action would necessarily fail. But the pursuers maintain that this book is not what it purports to be—that while reprinting a large quantity of the original edition of the "Minstrelsy of the Scottish Border," the defenders have also borrowed from certain works of which the pursuers have the copyright. The copyright works so alleged to be infringed are—*first*, the edition of the "Minstrelsy of the Scottish Border," in four volumes, forming a portion of the poetical works of Sir Walter Scott, in 12 volumes, edited by J. G. Lockhart, with Sir Walter Scott's "introductory remarks, notes, and music to various ballads," and of the edition of the poem "On the Massacre of Glencoe," forming a portion of the said poetical works in 12 volumes, the said edition having been published between 1st May 1833 and 1st April 1834. *Second*, the second edition, with the author's introductions, alterations, and notes, forming a portion of the Waverley Novels in 48 volumes, of "Tales of my Landlord," containing "The Black Dwarf," and "Old Mortality," published in 1830; and *third*, the second edition, with the author's alterations and notes, in two volumes, forming a portion of the Waverley Novels in 48 volumes, of "The Antiquary," published in 1829. As regards all these books, the original editions are out of copyright, and accordingly copyright can only be claimed in the new edition, or for and in respect of additions and alterations which are said to exist in the new editions. Additions and alterations which it is contended are in law truly the subjects of copyright, and protected against infringement. It is admitted on the other hand that these new editions are within the period during which copyright is protected, but that the alterations and additions are of too insignificant a nature to entitle them to protection. Now very difficult questions might arise as to how far a second edition can be the subject of copyright. If a

second edition be merely a reprint of the first edition it cannot have a new course of protection by the law of copyright. On the other hand, it may be so largely added to and annotated as to become practically a new work, and in that case would undoubtedly become entitled to protection. Take for instance the case of a new edition of a scientific work published 20 or 30 years after the publication of the first edition, and altered and added to as the progress of science has rendered necessary, such a book is certainly worthy of a new period of protection, as being almost entirely a new book. There are many cases which lie between these two extremes, and the difficulty is to lay down any general rule as to what amount of addition or alteration or new matter would entitle a second or new edition to the privilege of copyright, or whether the copyright extends to a whole book as amended and improved, or is confined to the additions so made only. In the present case we are not much troubled with any such difficulty. I think the case is of such a nature that it requires to be dealt with in detail, and that each separate complaint must form the subject of separate consideration. I may say here, that the title of the pursuers is quite clearly established to the copyrights which they claim. The first complaint is, that the defenders have illegally copied and pirated from the copyright edition of the "Minstrelsy of the Scottish Border," the advertisement or parts thereof prepared by Mr J. G. Lockhart, and printed at the beginning of the first volume of the said copyright edition; and they have printed the same or parts thereof as a preface to their volume. The defenders are also accused of having illegally copied and pirated from the pursuers' copyright edition of the "Minstrelsy" certain notes, quotations, illustrations, and references which are fully enumerated in the 10th article of the condensation. The advertisement to the copyright edition of the "Minstrelsy" by Mr Lockhart is a great deal longer than the preface published by the defenders, but it may be for all that, the defenders have borrowed from that edition, and if they have done so, they have done so not without warning. For Mr Lockhart has informed us in his advertisement that as long as Sir Walter Scott's health permitted him to continue his literary pursuits, he kept by him an interleaved copy of the collection, into which he inserted various readings and annotations which occurred to him, and that these, along with such information as he had picked up in the course of his personal intercourse with Sir Walter, form the subject matter of the additional notes in the edition. This is a very distinct intimation of the novelties introduced by Mr Lockhart in the copyright edition, and anyone intending to print from the edition out of copyright was distinctly warned. In the preface of the 1869 edition, the defenders certainly borrow an idea contained in Mr Lockhart's advertisement, though not in the same words; and if we were deciding the question of piracy on these words alone, I should have much difficulty in convicting the pirate. We have, however, in another part of the preface, a quotation from Mr Motherwell's "Minstrelsy," which is also given by Mr Lockhart, whose spelling and alterations are followed by the defenders.

The pursuers also allege appropriation of a great many notes. That there may be copyright in notes, even when the text is out of copyright, is a fixed principle of law. The annotation of a great work

is a task worthy of the highest literary talent and reputation, and it should be remembered that Mr Lockhart stood in a peculiarly advantageous position as editor and annotator of any of the works of Sir Walter Scott, being his son-in-law and literary executor, and having opportunities during the life of Sir Walter of collecting materials, not only from the poet, but from others, for the performance of such a task as supplying notes to his works. It was stated during the debate by the defenders' counsel, and in a disparaging way, that the notes by Mr Lockhart consisted of only 200 in all, and if put together would not cover above 25 pages of the book. Now, the length of these notes is not a disadvantage at all. Short explanatory notes are most agreeable to the reader. Of these 200 notes, 15 only consist of original matter, and are the composition of Mr Lockhart himself, while the remaining 185 are quotations from other books and authors. Now this also was considered a disparagement, but I cannot say that I look upon it as such; nothing can be more valuable than these selections. The quotations are most apposite, and highly interesting to the reader, and certainly the selection of such quotations may be the result of great literary skill and taste. The defenders admit that they borrowed 40 of these notes, 32 being quotations, and 8 original. As regards the 32 they are from Wordsworth, Burns, Hogg, Jamieson, "Scot's Magazine," "Critical Review," "Encyclopædia Britannica," Motherwell, "Edinburgh Review," "Monthly Review," and several of Sir Walter Scott's works. When in these few alone we find all that variety of quotation, they certainly give us a sample of what the remaining notes are worth. We are able to detect the editor of 1869, as pirating these quotations from a copyright edition, owing to the slavish manner in which he has copied not only the alterations but even the mistakes of Mr Lockhart. I have already stated my reason for holding that a person can have a copyright in notes consisting only of quotation, and I think that this copyright has here been infringed. As regards the notes consisting of original matter we have the editor of 1869 taking facts stated by Mr Lockhart *verbatim* from the copyright edition. It is needless to quote instances of this; from what I have said there is enough to show not merely *animus furandi*, but actual piracy and appropriation. This part of their case the pursuers, in my opinion, have completely made out.

We now come to another part of the pursuers' case, that, namely, which is contained in the 11th article of the condensation, where the defenders are complained of as having pirated the copyright edition of the "Waverley Novels," and particularly from "Old Mortality," certain notes, and also part of the text. Now, it is necessary to distinguish here. The one complaint is that the editor of 1869 has borrowed notes from the copyright edition with the references, which notes stand very much in the same position as the notes to the "Minstrelsy," as being notes to a new edition. But there is also a complaint of borrowing from the text which stands in a different position. The complaint as regards the notes, I think, is confined entirely to Claverhouse's letter. Now, this letter was originally published in the Bannatyne Club papers, and so far was open to all, but the editor of the copyright edition of the "Waverley Novels" used it as a note, and introduced it by a few remarks of his own. A great part of this introduction is borrowed by the editor of 1869 along with the letter,

and he betrays the source from which he took it by following alterations in spelling made by the editor of the "Waverley Novels." Here, then, we have the same kind of piracy as in the case of the notes to the "Minstrelsy." But the other complaint is that part of the text of the copyright edition of the "Waverley Novels"—viz., the description of the "Battle of Drumclog"—has been borrowed by the defenders. The portion borrowed occupies just about 8 pages of the defenders' book, and confessedly the original text of the novel is not copyright; but even though it were copyright, it might be maintained that this quotation is within the limits of legitimate quotation. I confess I have doubts whether, even if the text of the novels had been all copyright, this goes beyond the limits of legitimate quotation. A novel can surely be quoted for criticism and purposes of illustration of other books. And when we look to the differences between the texts of the copyright and non-copyright editions there are but two slight verbal alterations, and the complaint against the editor of 1869 is that he took the passage with these alterations in it. I do not think that complaint is a good one. I hold that this is quite within the limits of legitimate quotation, and if it were not so the differences between the two editions are so slight as not to affect the question of copyright. In condescence 12 we have the next complaint, which is of a similar nature to the one I have just referred to. It is a complaint that the defenders have borrowed the account of the "Battle of Bothwell Bridge," from the copyright edition of "Old Mortality," and here, I think, that the same kind of observation applies. There is here again a good defence that this is within the limits of legitimate quotation. The ballad which it is used to illustrate is most apposite; and I do not think that the editor of 1869 was committing any literary theft in so taking it. It would not be so easy to defend the taking of this from the copyright text, because not only are there greater alterations in the text of the new edition than in the previous case, but there is an original note in the copyright edition which is not in the former one, and which the defenders have borrowed. This, therefore, may be defended as legitimate quotation, but were it not so, it could be objected to as having been taken from the copyright edition, and it is therefore in a different position from the "Battle of Drumclog," above referred to.

The next complaint contained in the 18th article of the condescence is, that the defenders have borrowed from the copyright edition of Sir Walter Scott's Poetical Works an account of the "Massacre of Glencoe," introduced by Mr Lockhart in the form of a note, but borrowed by him from the "Encyclopædia Britannica." The pursuers allege copyright in the "Encyclopædia Britannica" also, but of this there is no effective statement, and I think it must be disregarded. The editor of 1869 has taken this note of Mr Lockhart's, and reproduced it word for word in conjunction with the poem that it was connected with by Mr Lockhart—taking the quotation evidently from the copyright edition, and not from the "Encyclopædia Britannica," as he follows Mr Lockhart's alterations. This therefore appears to me to be again within the principle of that kind of piracy to which I alluded with regard to the notes to the "Minstrelsy."

The last complaint is a very peculiar one, being

that the defenders have copied from the text of the copyright edition of the "Antiquary" a poem entitled "Glenallan's Earl." Now this poem was in the first edition of the "Antiquary," which is now out of copyright, but it is said that this is taken from the copyright edition, and not from the first, on account of an alteration in the word "spear," which stood in the first edition, into "spur" in the copyright edition. This is no doubt perfectly true, but it is not possible to convict the editor of 1869 of such a slavish adherence to the copyright edition in this case as in some of the others, for here he takes it on himself to make an alteration of his own, so that his version of the poem is different from both the others. The original text of the poem is free to all, and I think it would be very hard to hold that because one slight emendation has been made copyright has been kept up in it. I think that would be a very narrow ground for sustaining an allegation of piracy.

On the whole case, I am of opinion that, with the exception of the complaints about the quotations from "Old Mortality," and this last poem of "Glenallan's Earl," the pursuers have fully made out their case. Some alteration must however be made upon the Lord Ordinary's interlocutor to render it more specific.

LORD DEAS concurred, with the exception of the alleged piracy of the poem "Glenallan's Earl" from the "Antiquary," which he held to be clearly a case of invasion of copyright. Even though the alteration was only in one word in the copyright edition of the poem, he held that that word was of great importance, and copyright existed in it accordingly.

LORD ARDMILLAN concurred with the Lord President *in toto*.

LORD KINLOCH—The leading point brought into controversy is, whether the defenders, Messrs Alexander Murray & Son have infringed the alleged copyright belonging to the pursuers Messrs Adam & Charles Black in the edition, in four volumes, of Sir Walter Scott's Minstrelsy of the Scottish Border, by their, Messrs Murray's, publication in a single volume, bearing the same title.

It is not matter of dispute that there is now no copyright in the original edition, with notes, of the Minstrelsy of the Scottish Border, the legal term of copyright having expired. But it is said that by virtue of the additions and annotations made on Messrs Black's edition by Mr John Gibson Lockhart, the editor, a copyright has been created, which the defenders Messrs Murray have infringed. It is necessary, therefore, to consider the law with reference to additions and annotations,—both in its principle and application.

I think it clear that it will not create copyright in a new edition of a work, of which the copyright has expired, merely to make a few emendations of the text, or to add a few unimportant notes. To create a copyright by alterations of the text, these must be extensive and substantial, practically making a new book. With regard to notes, in like manner they must exhibit an addition to the work which is not superficial or colourable, but imparts to the book a true and real value, over and above that belonging to the text. This value may perhaps be rightly expressed by saying that the book will procure purchasers in the

market on special account of these notes. When notes to this extent and of this value are added, I cannot doubt that they attach to the edition the privilege of copyright. The principle of the law of copyright directly applies. There is involved in such an notation, and often in a very eminent degree, an exercise of intellect, and an application of learning, which places the annotator in the position and character of author in the most proper sense of the word. The skill and labour of such an annotator have often been procured at a price which cries shame on the miserable dole which formed to the author of the text his only remuneration. In every view, the addition of such notes as I have figured puts the stamp of copyright on the edition to which they are attached. It will still of course remain open to publish the text, which *ex hypothesi* is the same as in the original edition. But to take and publish the notes will be a clear infringement of copyright.

Applying these principles to the case before the Court, I have no doubt that Messrs Black's annotated edition of the Border Minstrelsy possesses the privilege of copyright. It was edited under the care of Mr John Gibson Lockhart, a man of great literary eminence, and peculiarly fitted, by his close connection with the author, to furnish interesting and valuable annotations. The additional notes supplied by Mr Lockhart are appropriate, valuable, and numerous, running, as I understood, to about two hundred. Clearly this was not a colourable republication. It was, in the strictest sense, a new edition, with so large an accession of matter as in all fairness and reason conferred the privilege of copyright, and made it piracy to publish these additional notes, in whole or in part.

I am of opinion that of this piracy the defenders have been guilty. They have taken a very considerable number of Mr Lockhart's notes, not less in number than about forty, and estimated, in extent of page, at a still larger proportion of the whole—certainly more than enough to prevent the transference from being held accidental or unimportant, or anything else than a scheme to benefit illegally by the labour and expenditure of others. In some instances the notes are simple transcripts. In others they are so slightly varied as to render them substantially the same. To a considerable extent the notes borrowed (to use a euphemism) from Messrs Black's edition, consist of quotations from various authors employed by Mr Lockhart to illustrate ballads in the Minstrelsy. It was perhaps thought that to repeat quotations from well-known authors was not piracy. If so, I think a great mistake was committed. In the adaptation of the quotation to the ballad, which it illustrates,—the literary research which discovered it—the critical skill which applied it—there was, I think, an act of authorship performed, of which no one was entitled to take the benefit for his own publication, and thereby to save the labour, the learning, and the expenditure necessary even for this part of the annotation. The aggregate of these piracies, estimated at forty-one in number, has been given us in the print laid before us; and composed, as I think, a clear infringement of the copyright.

I consider the whole forty-one instances to be, with a trivial exception, infringements of copyright. The preface to Messrs Murray's Minstrelsy is in substance taken from the advertisement to

Messrs Black's. The notes for the most part speak for themselves. It may seem a slight addition to such a quotation as "Our armies swore terribly in Flanders, but nothing to this," to inform the reader, as Mr Lockhart did, that this was from Tristram Shandy. But I suspect that Tristram Shandy has gone too much out of sight amid the sensational literature of the age to render the information altogether immaterial; and this itself—and the like of this—was an advantage in Messrs Black's edition which Messrs Murray were not entitled to make theirs. It appears at first sight as if the lines from the old ballad of Otterbourne, marked No. 4, were a mere transcript from the original edition of the Minstrelsy. But it turns out, on investigation, that these had been dropped from the text in after editions (as from the text of Messrs Murray they are now), and were thrown into a note by Mr Lockhart in explanation of an allusion in a preliminary exposition with which the ballad is prefaced. Their selection and presentation for this purpose formed eminently a piece of critical action. In so illustrating the ballad Messrs Murray implicitly follow Mr Lockhart; and thus what at first sight may appear no piracy is about the worst piracy of all. I think the only exceptions from the category of piracy occurring in these forty-one instances are Nos. 11 and 12; and I should also say No. 24—in which three numbers the transcript from the original edition is so identical as not to compose an infringement.

The next point of importance which has occurred for our consideration regards the quotations from "Old Mortality," marked Nos. 43 and 44 of the print. These are acknowledged quotations; being passages avowedly quoted from the novel descriptive of the battles of Drumclog and Bothwell Bridge, thrown into notes by way of illustration to the two ballads written on these battles. I am of opinion that these are not piracies. Acknowledged quotations, even from copyright works, if they are quotations fairly made, either for the purposes of criticism or of illustration, are not infringements of copyright. To hold anything else would be to sentence to death all our reviews and the greater part of our works in philosophy. If, indeed, the quotation is colourable, and made for the mere purpose of inserting a large portion of the copyright work, the result would be different. In the present case I see nothing in the quotations colourable or improper. Though they are of some length, they are a very small portion of the entire work. They are fairly and legitimately applied to the illustration of the ballads to which they are appended. They may have fittingly applied to them the test which is often referred to in questions of copyright—namely, whether they are likely to injure the sale of the alleged copyright work. I am of opinion that they are likely to do the very reverse of this. I think no one can read these quotations and rest content till he has acquired and read the whole of that exquisite novel, at whatever cost within his means.

In connection with this topic may be fitly considered the alleged piracy marked No. 46; consisting of the transference to Messrs Murray's volume of the ballad of Glenallan's Earl, originally published in the "Antiquary." The original edition, with this ballad contained in it, is now admittedly out of copyright; and to publish the ballad as it stood in the original edition would admittedly be legal. But it is said that Sir Walter Scott, in preparing a new edition of the "Antiquary,"

altered one of the lines from "The spear should be in my horse's side" into "The spur should be in my horse's side;" and it is said that to copy the ballad with this alteration, as Messrs Murray have done, is an infringement of copyright.

I cannot accede to this view. I cannot hold that the alteration of a single word, even though more important than this, would suffice to give copyright to a new edition. It is said that about the merits of the alteration opinions may differ. For my own part, I consider it so manifest an improvement that I doubt whether the original word was not a mere printer's error, and this nothing else than a simple correction of the press. But in any view I consider the alteration not to give copyright. Copyright in a single word is to me a legal novelty. If it ever can exist at all, it must be in something very different from this.

There remain for consideration the two alleged infringements marked Nos. 42 and 45; the first of which is a transference to Messrs Murray's book, at that part of it containing a ballad on the battle of Loudoun Hill, of a note from the copyright edition of the Waverley Novels, embodying a letter from Claverhouse, with an account of the battle taken from a publication by the Bannatyne Club. On the principle already referred to as governing the transference of notes, I am of opinion that this is a piracy. The note is substantially the same in Messrs Murray's book as in the other; and the discovery and application of Claverhouse's letter seem to me to form an act of authorship proper to be protected. The case is all the stronger that, in taking the letter from the Bannatyne Club book, the spelling has, in Messrs Black's publication, been largely modernised; and in this respect Messrs Murray do not copy from the Bannatyne Club book, but from the copy in Messrs Black's book subjected to this process, and, I have no doubt, subjected to it with considerable care and labour.

The other case referred to is the transference to Messrs Murray's book, at that part of it containing a ballad on the Massacre of Glencoe, of a note on the same ballad in the copyright edition of Scott's works, composed of an extract from an article in the Encyclopædia Britannica. This is just the kind of proceeding to which I have already alluded, in touching generally on notes. There is here a use made of the labour and skill expended in finding and applying a suitable quotation, which is justly held an infringement of copyright. The infringement here again is the more remarkable that the quotation is given in Messrs Black's book with very considerable alterations, justifiable on the ground that the Encyclopædia Britannica was itself their own publication. These alterations are all *verbatim* copied by Messrs Murray; and this makes the piracy unquestionable.

Lord Ordinary's interlocutor substantially adhered to.

Agent for Pursuers—James Finlay, S.S.C.

Agents for Defenders—J. A. Campbell & Lamond, C.S.

Friday, December 23.

THE DUKE OF HAMILTON'S TRUSTEES v.

JAMES FLEMING.

Lease—Landlord and Tenant—Compensation—Loss—Damnum Fatale—Insurance. A lease of certain mills and other subjects was entered into between A and B. A, the landlord, bound

himself to expend a sum of £380 upon the buildings at the commencement of the lease, and B, the tenant, undertook thereafter to maintain the buildings in good order, and so deliver them at the conclusion of his lease. On the other hand, B, the tenant, undertook to expend at the outset at least £800 upon replacing and repairing the old machinery of the mills, and thereafter to maintain the machinery, and deliver it over in good order and repair at the close of the lease, whereupon A, the landlord, was to repay him £400 of his original outlay. Farther, B was bound to insure the subjects for at least £1200, recovering half the premium from A, the landlord. In point of fact A effected the insurance, whereof £620 was allocated on the buildings of the mills, £200 on the machinery, and the rest upon the other subjects, and the tenant merely paid the half of the premium. The mills were destroyed by fire, without any fault of the tenant, about two years from the close of the lease, and the landlord recovered the sums insured, and also received, at the end of the lease, the remnants of the machinery, worth about £200. He declined to rebuild, but allowed a deduction from the rent, as effecting to the subjects which had been destroyed. In an action for the balance of rent due, the tenant pleaded his counter claims (1) to the £400 agreed to be paid under the lease; (2) to share in the policy of insurance. *Held*, on the first point (*diss.* the Lord President)—The maxim *res suo perit domino* applied only to the interests of the different parties, and that that of the landlord was in the property, while that of the tenant was in his profits as miller, which were lost to him (as the property was to the landlord), but which did not contain his claim to the £400 due *ex-contractu*; and that he, having fulfilled all his obligations until the *damnum fatale* supervened, was entitled to recover that sum—*Held*, farther, that the obligation to maintain in good order and repair throughout the lease was not a condition precedent which must be fulfilled to the letter before a claim could be made to the £400, but that it was cancelled by the *damnum fatale*.

Held, on the second point, that the policy was purely for the benefit of the landlord, and secured only his right of property, and that the tenant had no title to participate in it, his paying half the premium being merely an additional item of rent.

The pursuers in this case were the trustees appointed under a trust disposition and conveyance of his estates by the present Duke of Hamilton in their favour. They brought the present action to recover the rent due by one of the Duke's tenants for the last year of his lease. They were met by a counter claim on the part of the tenant, and it was on this counter claim that the real question between the parties arose.

It appeared from the statements of parties that "By articles of agreement of lease entered into (Aug. 22, 1848) between his Grace the late Alexander Duke of Hamilton and Brandon, father of the present Duke, and the also now deceased Alexander Fleming, the defender's father, the said Duke let to the said Alexander Fleming and his heirs, whether of line or destination, the lands and farm of Rouseland, the mills of Kinneil, with the mill lands thereof, and the south part of Falcon House