made by statute for the case-made to be signed, settled, and certified by the judge trying the case, even though he is out of office.[11]

Kansas and Illinois have adopted the most efficient and liberal views in the matter of review on appeal by providing for an automatic transfer of the entire record. The Kansas court in interpreting its statute held that exceptions to rulings were abolished by the legislature by striking from the code all provisions relating to exceptions.[12] Illinois, prior to 1933, was strict in requiring the judge who signed the bill of exceptions to be the same judge who tried the cause.[13] But with the passage of the new Illinois Practice Act,[14] the entire record, similar to the record in equity, will be brought up for review, and the only authentication requirements are prescribed by the appellate courts, as they deem advisable.

The instant case seems to be a trend in the right direction. It is submitted, however, that Kansas and Illinois have adopted a more direct and desirable method of treating this problem.

I. B.

UNFAIR COMPETITION—RIGHT TO PRIVACY—PERFORMER'S INTEREST IN HIS RECORDED PERFORMANCE—INJUNCTION—[Pennsylvania].—Has a musician such a common law property interest in his recorded interpretations of a composition[1] as to afford him equitable relief from the unauthorized broadcasting of such recordings by a radio station as part of its sustaining program?[2] In a recent case[3] the Supreme Court of Pennsylvania held that the

11. Okl. Comp. Stats. (1921) sec. 787. This is a statutory modification of the common law, similar to the Missouri and Arkansas statutes, supra. The Oklahoma statute modified the rule laid down in Mitchell v. Bruce (1922) 80 Okl. 53, 204 Pac. 281, and affirmed in 1927 in Ark. Fertilizer Company v. Brattin, 127 Okl. 9,260 Pac. 43, that a case-made signed and settled by the successor of the judge who tried the cause, in the absence of a showing of inability of the trial judge to sign is a nulity. This view would be contra to the Missouri presumption of regularity in trial court proceedings.

12. Cobe v. Coughlin Hardware Co. (1910) 83 Kan. 522, 112 Pac. 115. To the same effect see Bowen v. Timmer (1912) 87 Kan. 162, 123 Pac. 742; Baker v. Readicker (1911) 84 Kan. 489, 115 Pac. 112; Readicker v. Denning (1912) 86 Kan. 79, 119 Pac. 533.

13. Independent Electric Company v. Donald (1899) 86 Ill. App. 166; but see Corbly v. Corbly 202 Ill. App. 469.

14. Illinois, McKaskill's Practice Act (1936 Supp.) sec. 74 (2).

1. Copyright Act (1909 as amended 1912) 35 Stat. 1076, 17 U. S. C. A. sec. 5. Subjects of copyright listed; right of performer in his performance not included.

2. Plaintiff made recordings for the Victor Talking Machine Co., agreeing at the time that the legend "not licensed for radio broadcasting" be put on the face of each record. Defendant secured license from the American Society of Composers, Authors, and Publishers, to whom both composer and publisher had assigned their rights, and played the record on one of its programs, announcing it as a Fred Waring recording. Plaintiff seeks an injunction.

3. Fred Waring v. WDAS Broadcasting Station, Inc. (Pa. 1937) 194 Atl. 631.

performer is entitled to such relief,[4] both on the ground of unfair competition[5] and on the ground of invasion of his right to privacy.[6] Although the case constitutes the first American inquiry and judgment on the rights of performers in their recorded performances,[7] the decision seems to be but a logical expansion of previous decisions,[8] both grounds being sustainable by respectable authority.[9] The decision is particularly significant in view of the present agitation against "canned" radio programs[10] and the serious

4. The court held that plaintiff's interpretation was creative enough to give him a property interest therein. In Musical Performers' Protection Ass'n, Ltd., v. British International Pictures, 46 T. L. R. 485, it was held that the English Musical Performers' Protection Act of 1925 did not give the performer any property rights in his performance but only provided for a fine on anyone playing his recorded performances without his consent.

5. "That Plaintiff's orchestra and defendant are in competition admits of but little doubt. Both furnish entertainment to the public over the radio," both being paid by advertisers. "Thus defendant can in effect 'sell' to its advertising customers and to the public, at practically no expense to itself, the identical musical renditions of plaintiff's orchestra. That such competition is extremely harmful to plaintiff is obvious." Fred Waring v. WDAS Broadcasting Station, Inc. (Pa. 1937) 194 Atl. 631, 641.

6. "The common-law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others." Warren and Brandeis, Right to Privacy (1890) 4 Harv. L. Rev. 193, 198, cited in the concurring opinion by Maxey, J. Supra, note 5, at p. 643.

7. Previous cases all involved the rights of composers or copyright owners under the copyright laws: 17 U. S. C. A. sec. 25, notes 22-69 (various acts held to infringe or not to infringe copyrights).

8. Wood v. Boosey (1867) L. R. 2 Q. B. 340 (separate property in an arrangement of an opera for pianoforte); Fleron v. Lackaye (1891) 14 N. Y. S. 292 (property in translation of novel); Edmonds v. Stern (1918) 248 Fed. 897 (property in orchestral score of copyrighted music); Arnstein v. E. B. Marks Music Corp. (1935) 11 F. Supp. 535 (property in new arrangement of old song).

9. *As to unfair competition:* Nat. Tel. News Co. v. Western Union Tel. Co. (1902) 119 Fed. 294; Board of Trade v. Christe Grain Co. (1905) 198 U. S. 236, 25 S. Ct. 637, 49 L. ed. 1031; Associated Press v. International News Service (1918) 248 U. S. 215, 39 S. Ct. 68, 63 L. ed. 211 (fraud and deception not essential elements to make one's act constitute unfair competition); Vogue Co. v. Thompson Hudson Co. (1924) 300 Fed. 509, 512; Uproar Co. v. NBC (1934) 8 F. Supp. 358. In Associated Press v. KVOS (1935) 80 F. (2d) 575, plaintiff gathered and published news in conjunction with newspaper advertising. Defendant pirated plaintiff's news and published it over radio in conjunction with its own advertising. Injunction granted.

As to invasion of right to privacy: Warren and Brandeis, Right to Privacy, (1890) 4 Harv. L. Rev. 193; Pollard v. Photographic Co. (1888) Ch. Div. L. R. 40 Ch. Div. 345; Edison v. Edison Polyform Co. (1907) 73 N. J. Eq. 136, 67 Atl. 392; Binns v. Vitagraph Co. (1913) 210 N. Y. 51, 103 N. E. 1108, L. R. A. 1915C 839, Ann. Cas. 1915B 1024 (based on N. Y. statute); Uproar Co. v. NBC (1934) 8 F. Supp. 358 (based on N. Y. statute).

10. Shafter, *Musical Copyright* (1932) 266-272. Testimony in case at bar revealed that from 350 to 450 radio stations in the United States use records almost exclusively.

discussion of the precarious position of the performing artist.[11] Coming as it does in these circumstances it fills a serious gap in the copyright laws.[12] If the decision is followed it would seem that the performer could entirely prohibit the broadcasting of his recordings by radio stations or demand prohibitive payments from them for the privilege. In any case the decision will have serious economic consequences on the small radio stations. It would seem that a fair solution to the problem would be an extension of the copyright laws to recognize the rights of artists in their performances and the fixing of a royalty to be paid them for each broadcast of their recordings.[13]

B. S.

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11. Id. at 272-280. See also Homberg, *Exclusive Rights of Actors and Performing Artists over their Performances* (1930).

12. Plaintiff here had applied for a copyright on the "personal interpretation of Fred Waring" of "Lullaby of Broadway." This was refused, the Register saying: " 'There is not and never has been any provision in the act for the protection of artist's personal interpretation or rendition of a musical work not expressible by musical notation in the form of 'legible' copies although the subject has been extensively discussed both here and abroad'." Fred Waring v. WDAS Broadcasting Station, Inc. (Pa. 1937) 194 Atl. 631, 633 (fn. 2).

13. Prior to the present copyright law the composer was in the same position in regard to the mechanical reproduction of his work as the performer is today. But the present law gives him a two cent royalty on all records made of his composition. 35 Stat. 1075, 17 U. S. C. A. sec. 1 (e).