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McCLURE'S MAGAZINE,  
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November eleventh 1909.

Messrs. Doubleday, Page & Co.,  
133 East 16th Street,  
New York, N.Y.

Gentlemen:-

Referring to the purchase from you by or on behalf  
of Miss Ida M. Tarbell of certain rights, plates, etc., of her  
"Life of Lincoln":

We have noted the various letters of Mr. Selden  
Bacon, attorney for Miss Tarbell, to yourselves or to your Mr.  
Lanier, dated respectively September 27th, October 11th, Octo-  
ber 15th, October 27th and November 3rd, 1909, and copies of  
your replies to some of Mr. Bacon's letters. Reserving for  
further consideration and action certain comments upon our-  
selves made by Mr. Bacon in his letters of October 27th and  
November 3rd, we express ourselves as follows in the matter  
of the subscription book rights in the "Life of Lincoln":  
The agreement with McClure, Phillips & Co. made by Miss  
Tarbell "years ago" is dated and was executed February 6, 1907.  
There seems to us to be nothing in Mr. Bacon's suggestion that  
the provision relating to a new subscription edition is in-  
volved in the present inquiry; such new subscription edition is  
defined as one "to contain added new material by the said  
author", and we have received no such added new material, not  
has any suggestion respecting same ever come to us. The sub-  
scription edition is identical in all respects with one intended  
to be published, and

actually published and sold, under the terms of the agreement of February 6, 1907. We are advised also that there is nothing in the nature of a question as to Mr. Bacon's query "whether more than the original subscription edition could be put out under this contract by the publisher without royalty to Miss Tarbell"; that is to say, Miss Tarbell's agreement that the "subscription (four-volume) edition of this work is to be exempt from royalty" referred to a species of binding and make-up, and not to any particular number of copies, or to the number of copies printed and bound at any particular date.

Passing, then, to the main point of Mr. Bacon's objection, which is, as we understand it, that the contract between Miss Tarbell and McClure, Phillips & Co. was terminated by our assignment thereof to yourselves, and that therefore we cannot claim that one term of such contract survives in our favor "when all the rest of the contract is abrogated";-while it is of course only a matter between yourselves and ourselves, we wish first to recall the circumstances that, when we began to discuss the transfer to you of our book business or of the management thereof, we called your attention to the fact that some of our contracts with authors were by their terms not assignable. When we finally came to terms, it was agreed only that we should try to procure the consent of authors to assignments in cases where such consent was

necessary. In the final arrangement also, the subscription book business was expressly reserved by us both generally and also as to the "Life of Lincoln". We also assigned to you our rights other than subscription book rights. Miss Tarbell's express consent was, we believe, never obtained. Her implied and equally binding assent has, however, been fully evidenced by the receipt from you of royalties upon the sale of the book, computed in the manner provided by her contract with McClure, Phillips & Co.; and, still more definitively, by her consummated negotiations with you for the purchase of certain plates, rights, etc. of and in the "Life of Lincoln".

On the way by, let us point out that we are not oblivious of the fact that Miss Tarbell's negotiations with you did not concern us nor our subscription rights, and also that you was not concerned in our arrangements with Miss Tarbell respecting those subscription rights. We are glad to contribute to the discussion, however, in the interest of getting the matter set forth fully and fairly by all persons having any relation to the circumstances. We state the following as our view of the matter and, but for his retainer as attorney for Miss Tarbell, we should be perfectly willing to let Mr. Bacon state whether or not our position is legally and technically correct.



Mr. Bacon's letter of September 27, 1909 and his earlier negotiations, as far as we have been informed of the same, concerned the purchase by Miss Tarbell from Doubleday, Page & Co. of certain plates and rights. If Miss Tarbell's contract with McClure, Phillips & Co. was not assignable, ought she not to have dealt with McClure, Phillips & Co. respecting these plates and rights? Be this as it may, she has not done so, but has dealt direct with Doubleday, Page & Co., overlooking McClure, Phillips & Co. except as to what is "practically a quit-claim deed"; nay, further, she has even agreed to pay to Doubleday, Page & Co. (not to McClure, Phillips & Co) a price that her attorney, with considerate self-repression, denominates "exorbitant". We yield nothing to Mr. Bacon in courtesy, and yet - we trust we are wrong in thinking this - and yet it seems to us that, in recognizing a valid title in Doubleday, Page & Co., Miss Tarbell must also concede that the contract is assignable, or at least must be deemed to have ratified the assignment of it. In either case, it seems to us Doubleday, Page & Co. got what they purported to get, and S. S. McClure Co. retained what it purported to retain. Can Miss Tarbell ratify or confirm or dondone (call it what you will) the assignment for the purpose of buying back one piece of property that she sold to McClure, Phillips & Co., and disavow the assignment and impugn the



assignability as to the other peice of property? We don't see how. It seems to us that she is doing that repugnant deed of which we were accused, and that the situation is by her "regarded as leaving that one term surviving in favor of (Miss Tarbell) when all the rest of the contract is abrogated".

In other words, Miss Tarbell, whether as a matter of business or as a matter of law, cannot use the non-assignability of the contract both as a sword and as a shield. If she has, by her conduct, confirmed the assignment to yourselves of a part of the contract, she cannot contrariwise set up the breach of the covenant not to assign as a reason why we should meekly permit her to carry away, without consideration paid, the balance of the contract definitely retained by us. As Mr. Bacon says, the covenant not to assign is merely one term of the contract, to which we should add that it is more of a collateral agreement than a part of the agreement itself, in that, if the assignability feature be expressly or impliedly waived, the contract itself remains in full force and binding upon Miss Tarbell, upon yourselves as to the portion of the contract that you have taken over with Miss Tarbell's assent, and upon ourselves as to the balance thereof. Miss Tarbell has elected to regard the book rights (other than the subscription book rights) and the royalty feature of the contract as definitely

assigned to yourselves, and she cannot therefore claim that the remainder of the contract has in some fashion expired or been abrogated.

You are at liberty to show this letter to Mr. Bacon or Miss Tarbell, if you so desire, and, of course with your consent, we shall be glad to let them look at the various understandings and correspondence between you and us upon this subject. If Mr. Bacon or Miss Tarbell desires a conference on this subject, we shall be glad to arrange to attend or be represented.

Truly yours,

Carver Mackenzie