

THE LAW OF COPYRIGHT.

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THE
LAW OF COPYRIGHT,

IN WORKS OF LITERATURE AND ART:

INCLUDING THAT OF THE

DRAMA, MUSIC, ENGRAVING, SCULPTURE, PAINTING, PHOTOGRAPHY
AND ORNAMENTAL AND USEFUL DESIGNS;

TOGETHER WITH

INTERNATIONAL AND FOREIGN COPYRIGHT,

WITH THE STATUTES RELATING THERETO,

AND

REFERENCES TO THE ENGLISH AND AMERICAN DECISIONS.

BY

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"Non equidem hoc studeo, bullatis ut mihi nugis
Pagina turgescat, dare pondus idonea fumo."—PERS.

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PREFACE.

THE decisions of our Courts of Law and Equity on the subject of Copyright during the last few years have been numerous; and so severely has been experienced the want of a work embodying these decisions, and presenting an exposition of the principles on which they have been determined, that little apology will be deemed necessary for introducing to the profession a digest of the Copyright Laws.

If I have, by the classification adopted, in any way facilitated the lawyer in his search for the principles of law as applicable to particular circumstances, and have proved of assistance to the literary man or the artist in the acquirement of that peculiar knowledge of the law which, for the due protection of his production is so requisite, I shall have attained an object at once gratifying to myself, and sufficiently compensative for my labour.

WALTER COPINGER.

Middle Temple.
Oct. 1870.

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THE LAW OF COPYRIGHT.

CHAPTER I.

HISTORICAL VIEW OF THE COPYRIGHT LAWS.

COPYRIGHT may be defined as the sole and exclusive liberty of multiplying copies of an original work or composition (a). Definition and nature of copyright.

The right of an author to the productions of his mental exertions may be classed among the species of property acquired by occupancy; being founded on labour and invention (b).

A literary composition, so long as it lies dormant in the author's mind, is absolutely in his own possession. Ideas drawn from external objects may be communicated by external signs, but words demonstrate the genuine operations of the intellect. The former are so identical with himself, that when by the author resolved into the latter, they lose not their original characteristic; and whether or not they be regarded as of pecuniary value in the

(a) 14 M. & W. 316. The term "copyright" may be understood in two different senses. The author of a literary composition, which he commits to paper belonging to himself, has an undoubted right at common law to the piece of paper on which his composition is written, and to the copies which he chooses to make of it for himself, or for others. If he lends a copy to another his right is not gone; if he sends it to another under an implied undertaking that he is not to part with it, or publish it, he has a right to enforce that undertaking. The other sense of that word is, the exclusive right of multiplying copies; the right of preventing all others from copying, by printing or otherwise, a literary work which the author has published. This must be carefully distinguished from the other sense of the word. (*Per Baron Parke, in Jefferys v. Boosey, 4 H. L. C. 920.*)

(b) Hoffman's 'Legal Outlines,' sect. iii.; Locke on Gov. pt. 2, c. 5.

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way of recital or sale, he ought to be the sole arbiter to authorize or to prohibit their publication, and have full control over them, before they are actually submitted to public inspection. In ancient times orations, plays, poems, and even philosophical discourses, were usually orally communicated, and all ages have allotted to the composers the profits which arose from this mode of publication. They were rewarded by the contributions of the audience or by the patronage of those illustrious persons in whose houses they recited their works. A recompense of some sort was regarded as a natural right, and anyone contravening it, was esteemed little better than a robber. Terence sold his 'Eunuchus' to the ædiles, and was afterwards charged with stealing his fable from Nævius and Plautus. "*Exclamat furem, non poetam, fabulam dedisse*" (a). He sold his 'Hecyra' to Roscius, the player. Statius would have starved had he not sold his tragedy of 'Agave' to Paris, another player :

"*Esurit, intactam Paridi nisi vendat Agaven*" (b).

These sales were founded upon natural justice. No man could possibly have a right to make a profit by the publication of the works of another, without the author's consent. It would be converting to one's own emolument the fruits of another's labour.

In later times the method of publication was usually by writing, or describing in characters those words in which an author had clothed his ideas. Characters are but the signs of words, and words are the vehicle of sentiments. Here the value which distinguishes the writing arises merely from the matter it conveys. The sentiment is, therefore, the thing of value from which the profit must

(a) *Prologus ad 'Eunuchum'* :

"*Exclamat, furem, non poetam, fabulam
Dedisse, et nihil dedisse verborum tamen ;
Colacem esse Nævi, et Plauti veterem fabulam,
Parasiti personam inde ablatam et militis.*"

(b) *Juvenal, Sat. vii. 87.*

arise. No man has a right to give an author's thoughts to the world, or to propagate their publication beyond the point to which he has given consent. His reputation is concerned and he has a right to defend it. This is natural justice, and dictated by reason; consequently, as *Lex est ratio summa. quæ jubet quæ sunt utilia et necessaria, et contraria prohibet* (a), we may obviously assume that though copyright, as a species of property, was in a strictly accurate sense unknown to, or at least was not by precedent established at common law, yet "the novelty of the question did not bar it of the common law remedy and protection" (b).

Distinct properties were not adjusted at the same time and by one single Act, but by successive degrees, according as either the condition of things or the number and genius of men seemed to require. When once established, the same law which pointed out and settled the line of demarcation commands the observance of everything that may be conducive to the end for which these various boundaries were erected. "*Nequaquam autem omnes res,*" says Puffendorf (c), "*statim ab initio humani generis, aut ubique locorum ex definito aliquo præcepto juris naturalis debuerunt proprietatem subire; sed hæc est introducta, prout pax mortalium id requirere visa fuit.*"

The necessary consequence of being a distinguishable property was its having a determinate owner. As property must precede the violation of property, so the rights must be instituted before the remedies for their violation; and the seeking for the law of the right of property in the law of procedure relating to the remedies is a mistake similar to supposing that the mark on the ear of an animal is the cause, instead of the consequence, of property therein. If the essential principle for one source of property be production, the mode of production is unimportant; the

(a) Co. Lit. 319, b. Jenk. Cent. 117.

(b) 4 Burr. 2345. *Nihil quod est contra rationem est licitum*: Co. Lit. 97, b. *Sou le ley donc chose, la ceo donc remedie a venir a ceo*: 2 Roll. R. 17. *In novo casu, novum remedium opponendum est*: 2 Inst. 3.

(c) *De Jure, Nat. et gen.* lib. iv. c. iv. s. 14. *Vide ibid.* s. 6.

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essential principle is applicable alike to the steam and gas appropriated in the nineteenth century, and the printing introduced in the fifteenth, and the farmers' produce of the earlier ages. The importance of the interest dependent on words advances with the advance of civilisation. If the growth of the law be traced with respect to the words that make and unmake a simple contract, and with respect to the words that are actionable or justifiable as defamation, and with respect to the words that are indictable as seditious or blasphemous, it will be thought reasonable that there should be the same growth of the law in respect of the interest connected with the investment of capital in words. In the other matters the law has been adapted to the progress of society according to justice and convenience, and by analogy it should be the same for literary works, and they would become property with all its incidents, on the most elementary principles of securing to industry its fruits and to capital its profits (a).

In the vast complications of human affairs, requiring new applications of old principles continually to be made; in the measureless range of human thought, bringing new doctrines out of the mass of new and old events; in the immense fields of human exploration, luminous with the light of every species of science, over which the race of man is always travelling; in the unlimited expansibility of human society, developing new aspects, new relations, new wants; in the fact that, although the reported decisions of the courts are numerically great, they embrace but comparatively few even of the questions which have arisen heretofore; in the known fact, also, that evermore the surges of time are driving the shores of human capability further towards the infinite,—we read the truth, pervading every system of jurisprudence, that whenever a matter comes before the courts, it is really a call for a new enunciation of legal doctrines, and that from the past we only gather a few rules to guide us in the future. We learn that both the olden and the new light point to the

(a) *Per Mr. Justice Erle in Jefferys v. Boosey*, 4 H. L. C. 870.

way of principle for the settlement of all new cases, when particular precedents fail (a).

What property could be more emphatically a man's own than his literary works? Is the property in any article or substance accruing to him by reason of his own mechanical labour denied him? Is the labour of his mind less arduous, less worthy of the protection of the law? When the right could not be combatted on the ground of common sense or simple reason, the lawyers were forced to fly to what Lord Coke styles "*summa ratio*," or the legal reason, and they contended that from the very nature of literary productions no property in them could exist. For, said they, to claim a property in anything it is necessary that it should have certain qualities; it should be of a *corporeal substance*, be capable of occupancy or possession, it should have distinguishable proprietary marks, and be a subject of sole and exclusive enjoyment. Now, none of these indispensable characteristics were possessed by a literary production.

To this it was replied, that such definition of property was too narrow and confined; (for the rules attending property must ever keep pace with its increase and expansibility, and must be adapted to every particular condition;) that a distinguishable existence in the thing claimed as property, and an actual value in such thing to the true owner, are its essentials; and that the best rule of reason and justice seemed to be, to assign to everything capable of possession a legal and determinate owner.

Ideas, being neither capable of a visible possession nor of sustaining any one of the qualities or incidents of property, inasmuch as they have no bounds whatever, cannot be the subject of property. Their whole existence is in the mind alone; incapable of any other mode of acquisition or enjoyment than by mental possession or apprehension, safe and invulnerable from their own immateriality, no trespass can reach, no tort affect, no fraud or

No copyright
in mere ideas.

(a) Bishop's 'Criminal Law.'

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violence diminish or damage them (a). They are of a nature too unsubstantial, too evanescent, to be the subject of proprietary rights.

Copyright however in the material that has embodied the ideas.

When, however, any material has embodied those ideas, then the ideas, through that corporeity, can be recognised as a species of property by the common law. The claim is not to ideas, but to the order of words, and this order has a marked identity and a permanent endurance. The order of each man's words is as singular as his countenance, and although, if two authors composed originally with the same order of words, each would have a property therein, still the probability of such an occurrence is less than that there should be two countenances that could not be discriminated. The permanent endurance of words is obvious by comparing the words of ancient authors with other works of their day; the vigour of the words is unabated, though other works have mostly perished. It is true that property in the order of words is a mental abstraction, but so also are many other kinds of property; for instance, the property in a stream of water, which is not in any of the atoms of the water, but only in the flow of the stream. The right to the stream is not the less a right of property, either because it generally belongs to the riparian proprietor, or because the remedy for a violation of the right is by action on the case, instead of detinue or trover (b)

Author's right to the first publication of his own manuscript.

"Ideas" says Mr. Justice Yates, "are free. But while the author confines them to his study, they are like birds in a cage, which none but he can have a right to let fly; for, till he thinks proper to emancipate them, they are under his own dominion. It is certain every man has a right to keep his own sentiments, if he pleases; he has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends. In that state, the manuscript is, in every sense, his peculiar pro-

(a) Yates, in *Millar v. Taylor*, 4 Burr. 2362; *Abernethy v. Hutchinson*, 1 Hall & Tw. 28; S. C. in 3 L. J. (Ch.) 209, 213, 219; and see Sir G. Turner, V.C., in *Morison v. Moat*, 9 Hare, 257.

(b) Mr. Justice Erle, in *Jefferys v. Boosey*, 4 H. L. C. 869.

perty; and no man can take it from him or make any use of it which he has not authorized, without being guilty of a violation of his property. And as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication; and whoever deprives him of that priority is guilty of a manifest wrong, and the court have a right to stop it" (a).

Thus we see that every man has the right at common law to the first publication of his own manuscript (b). Suppose, therefore, that a man, with or without leave to peruse a manuscript work, transcribes and publishes it, it would not be within the Copyright Acts; it would not be larceny, nor trespass, nor a crime indictable (the physical property of the author, the original manuscript, remains), but it would be a gross violation of a valuable right. Again, suppose the original or a transcript be given or lent to a man to read, and he were to publish it, such publication would be a violation of the author's common law right to the copy.

In the case of the *Duke of Queensberry v. Shebbeare*, before Lord Hardwicke, an injunction was granted against printing the second part of Lord Clarendon's 'History.' Lord Clarendon lent to a person of the name of Gwynne a copy of his 'History;' his son and representatives insisted that he had a right to print and publish this 'History,' but the court were of opinion that Gwynne might make every use of it except the profit of multiplying in print. The presumption was that Lord Clarendon never intended that when he gave him the copy. The injunction was acquiesced

(a) Yates, J., in *Millar v. Taylor*, 4 Burr. 2378; 1 Mac. & Gor. 36; *Forrester v. Walker*, cited 2 Bro. P. C. 138; *Webb v. Rose*, 4 Burr. 2330; *Southey v. Sherwood*, 2 Mer. 435; *Wheaton v. Peters*, 8 Peters, S. C. R. (Amer.) 591; Eden on Injunc. 285; 2 Story, Eq. Jur. s. 943; Curtis on Copy. 84, 150, 159; *Woolsey v. Judd*, 4 Duer (Amer.) 385.

(b) See *Little v. Hall*, 18 How. (Amer.) 170; *Bartlette v. Crittenden*, 4 McLean (Amer.) 300; S. C. 5 *ibid.* 32; *Webb v. Rose*, 4 Burr. 2330; 2 Bro. P. C. 138; *Pope v. Curl*, 2 Atk. 312; *Manley v. Owen*, cited 4 Burr. 2329; *Macklin v. Richardson*, Amb. 694; *Donaldson v. Becket*, 4 Burr. 2408; *Wheaton v. Peters*, 8 Peters, S. C. R. (Amer.) 591. See *Dudley v. Mayhew*, 3 Coms. (Amer.) 12; *Clayton v. Stone*, 2 Paine, (Amer.) 383; and *Jones v. Thorne*, 1 N. Y. Leg. Obs. 409.

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under (a); and Dr. Shebbeare recovered, before Lord Mansfield, a large sum against Gwynne for representing "that he had a right to print."

In the cases of Webb and Forrester (b), the Court of Chancery again interposed by injunction. It appears that the plaintiff in the former case had his 'Precedents of Conveyancing' stolen out of his chambers and printed; and in the latter he had his notes copied by a clerk to a gentleman to whom he had lent them, and printed. In *Macklin v. Richardson* (c) the defendant had employed a short-hand writer to take down the farce of 'Love à la Mode,' upon its performance at the theatre, and inserted one act in a magazine, giving notice that the second act would be published in a magazine of the following month. Upon an application to Lord Camden for an injunction, he directed the case to stand over until that of *Millar v. Taylor*, which was then pending, should be determined; and after the decision had been given in that case the injunction was granted by the Lords Commissioners Smythe and Bathurst. The former, referring to the play, saying, "it has been argued to be a publication by being acted, and therefore the printing is no injury to the plaintiff; but that is a mistake; for, besides the advantage of the performance, the author has another source of profit from the printing and publishing, and there is as much reason that he should be protected in that right as any other." Bathurst adding, "The printing it before the author is doing him a great injury."

This was the opinion also of Lord Cottenham in Prince Albert's case (d). "The property," said he, "in an author or composer of any work, whether of literature, art, or science, such work being unpublished and kept for his private use or pleasure, cannot be disputed after the many

(a) 2 Eden, 329; *Knaplock v. Curle*, 4 Vin. Abr. 278.

(b) Cited Ambl. 695.

(c) *Ibid.*

(d) *Prince Albert v. Strange*, 18 L. J. (N. S.) Ch. 120; 1 Hall & Tw. 1; 1 Mac. & Gor. 25; *Turner v. Robinson*, 10 Ir. Ch. Rep. 121, 510; *Southey v. Sherwood*, 2 Mer. 435; *Gee v. Pritchard*, 2 Swans. 402.

decisions upon which that proposition has been affirmed or assumed. I say 'assumed,' because in most cases which have been decided, the question was not as to the original right of the author, but whether what had taken place did not amount to a waiver of such right; as, in the case of letters how far the sending of the letter, in the case of dramatic composition how far the permitting performance, and in the case of Mr. Abernethy's lectures how far the oral delivery of the lecture, had deprived the author of any part of his original right and property;—a question which could not have arisen if there had not been such original right or property."

What amounts to publication sufficient to defeat the common law right is a question of some nicety. The publication of a work for private purposes and private circulation is not such a publication (a). Accordingly, it has been determined that a copyright in a piece of music is not lost, although it had been published in manuscript a year before being printed. The words "printed and published," used in the statutes, have reference only to the time at which the author's exercise of the right is to be dated; and therefore, the circumstance of an author having previously published in manuscript any composition which is afterwards printed, only varies the period of time from which the term of protection is to be calculated. The delivery of a lecture to an audience of persons admitted on payment of a fee, is not deemed a publication (b); neither is the exhibition of a picture at a public exhibition or gallery, where copying is expressly or impliedly forbidden, nor the exhibition of a picture for the purpose of obtaining subscribers to an engraving (c).

What amounts to publication at common law.

At one time it was contended that by publication the author or proprietor lost any right he might have had at

The effect of publication.

(a) *White v. Geroch*, 2 B. & Ald 298; *Prince Albert v. Strange*, 2 De G. & Sm. 686; 1 Mac. & Gor. 42; 1 Hall & Tw. 1; *Jefferys v. Boosey*, 4 H. L. C. 816.

(b) *Abernethy v. Hutchinson*, 3 L. J. (Ch.) 209.

(c) *Turner v. Robinson*, 10 Ir. Ch. 510. But see *Dalglish v. Jarvie*, 2 Mac. & Gor. 231, cited Kerr on Injunc. 184, and 25 & 26 Vict. c. 68.

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common law to the property in the work published. But it would have been hard indeed if publication, the only and necessary act to make the work useful and profitable, were construed to be destructive at once of the author's confessed original property against his expressed will. For the right of the author to the property while in manuscript, is freely admitted. But he is ready to admit his contemporaries and posterity into a participation in the result of his labours. Without publication the work would be useless to the author, because without profit; and property, without the power of use and disposal, is an empty sound. Publication, therefore, is the necessary act and only method of rendering this avowed property serviceable to mankind and profitable to the owner; in this they are jointly concerned.

On publication, no more passes to the public than an unlimited use of every advantage that the purchaser can reap from the doctrine and sentiments which the work contains. The property in the composition does not pass; for those things which only peculiarly and appropriately are his, must remain his till he agrees or consents to part with them by compact or donation; "because no man can deprive him of them without his approbation; but the depriver must use them as his when they are not his, in contradiction to truth." For "to have the property" of any thing, and "to have the sole right of using and disposing of it," is the same thing. They are equipollent expressions (a).

Primary recognition of copyright.

It was only since the introduction of printing that any question of the extent and duration of copyright could be expected to occur in a court of justice. For the period of about a century from the time of this discovery we have no evidence of the recognition in any public form of the copyright of authors, or of the remedies by which its infraction might be redressed (b). The earliest evidence which occurs is to be found in the charter of the Stationers' Company and the decrees of the Star Chamber.

(a) Author of 'The Religion of Nature Delineated,' p. 136.

(b) Maugham, Lit. Prop.

The original charter of the Stationers' Company was CAP. I. granted by Philip and Mary. It was the declared object of the Crown at that time to prevent the propagation of the reformed religion, and it seems to have been thought that this could most effectually be brought about by imposing the severest restrictions on the press. About this period there are several decrees and ordinances of the Star Chamber regulating the manner of printing, the number of presses throughout the kingdom, and prohibiting all printing against the force and meaning of any of the statutes or laws of the realm. Until the year 1640 the Crown, through the instrumentality of the Star Chamber, exercised this restrictive jurisdiction without limit, enforcing by the summary powers of search, confiscation, and imprisonment, its decrees, without the least obstruction from Westminster Hall or the Parliament in any instance.

The original charter of the Stationers' Company.

In 1640, however, the Star Chamber was abolished; the king's authority was set at naught; all the regulations of the press, and restraints previously imposed against unlicensed printers by proclamations, decrees of the Star Chamber, and charter powers given to the Stationers' Company, were deemed and certainly were illegal. The licentiousness of libels induced the Parliament to make an ordinance which prohibited printing unless the book was first licensed. The ordinance prohibited printing without the consent of the owner, or importing (if printed abroad), upon pain of forfeiting the same to the owner or owners of the copies of the said books, &c. This provision necessarily presupposed the property to exist; it would have been nugatory if there had been no admitted owner. An owner could not at that time have existed otherwise than by common law. In 1649 the Long Parliament made another ordinance; and in 1662 was passed the Licensing Act (13 & 14 Car. 2, c. 33), which interdicted the printing of any book unless first licensed and entered in the registry of the Stationers' Company. This Act further prohibited the printing of any work without the consent of the owner, upon pain of forfeiture, &c. The

On abolition of Star Chamber all restraints on printing deemed illegal.

The Licensing Act of Car. 2.

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sole property of the owner is here acknowledged in express terms as a common law right; and the legislature which passed that Act could never have entertained the most distant idea "that the productions of the brain were not a subject-matter of property." To support an action on this statute ownership had to be proved or the plaintiff could not have recovered, because the action was to be brought by the owner, who was to have a moiety of the penalty. The various provisions of this Act effectually prevented piracies, without actions at law or bills in equity. But cases arose of disputed property. Some of them were between different patentees of the Crown; some, whether the property "belonged to the author, from his invention and labour, or the king, from the subject-matter."

The Licensing Act of Car. 2 was continued by several Acts of Parliament, but expired May, 1679; soon after which there is a case in Lilly's 'Entries of Hilary Term,' 31 Car. 2, B. R. (a). In this case an action was brought for printing 4000 copies of the 'Pilgrim's Progress,' of which the plaintiff was the true proprietor, whereby he lost the profit and benefit of his copy. There is no account, however, of the case having been proceeded with.

Ordinance of
the Stationers'
Company in
1681.

In 1681, all legislative protection having ceased, the Stationers' Company adopted an ordinance or bylaw, which recited that several members of the company had *great part of their estates in copies*, that by ancient usage of the company, when any book or copy was duly entered in their register to any member, such person had always been reputed and taken to be the proprietor of such book or copy, and ought to have the sole printing thereof. The ordinance further recited that this privilege and interest had of late been often violated and abused; and it then provides a penalty against such violation by any member or members of the company, where the copy had been duly entered in their register. The true view of this ordinance would seem to be, that the members of the

(a) *Ponder v. Bradyl*, Lilly's 'Entries,' 67; see Carter, 89; 4 Burr. 2317; Skinner, 234; 1 Mod. 257.

Stationers' Company, finding their estates in copies, which belonged to them by the common law, no longer under the protection of the Licensing Act (the repeal of which had incidentally withdrawn the protection that had always been inserted in it, though it had necessarily no connection with the system of licensing), undertook to provide for the failure of legislation, as far as they could, by an ordinance applicable of course to their own members only. The ordinance is not to be cited as any other proof of what the common law right was than that it shows, in connection with other historical proof, what it was then supposed to be. It was much the same as if an association of persons were to agree that any one of their number should pay a penalty for violating the acknowledged rights of property of any other person in the association, provided such rights were duly entered in their common records. It would not be an attempt to create the right, but it would justly be regarded as an acknowledgment of the existence of such a right (a).

In another bylaw, passed in 1694 (b), it was stated that copies were constantly bargained and sold amongst the members of the company as their property, and devised to their children and others for legacies and to their widows for maintenance; and it was ordained, that if any member should, without the consent of the member by whom the entry was made, print or sell the same, he should forfeit for every copy twelve-pence.

A bylaw of the Stationers' Company in 1694.

For many years successively attempts were made to obtain a new Licensing Act. Such a bill once passed the upper house, but the attempt miscarried upon constitutional objections to a licence. Proprietors of copyright had so long been protected by summary measures, that they regarded an action at law as an inadequate remedy. A bill in equity was never even thought of; no hope of its success appears at that time to have been entertained.

(a) Curtis on Copy. p. 38.

(b) In this year expired finally the Licensing Act of 13 & 14 Car. 2 which had been revived by 1 Jac. c. 7, and continued by 4 W. & M. c. 24.

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A petition presented to Parliament in 1709 for protection of copyright.

In one of the petitions presented to the House in support of applications to Parliament in 1709, for a bill to protect copyright, the last clause or paragraph was as follows: "The liberty now set on foot of breaking through this ancient and reasonable usage is no way to be effectually restrained but by an Act of Parliament. For by common law, a bookseller can recover no more costs than he can prove damage; but it is impossible for him to prove the tenth, nay, perhaps, the hundredth part of the damage he suffers; because a thousand counterfeit copies may be dispersed into as many hands all over the kingdom, and he not be able to prove the sale of them. Besides, the defendant is always a pauper, and so the plaintiff must lose his costs of suit. (No man of substance has been known to offend in this particular, nor will any ever appear in it.) Therefore, the only remedy by the common law is to confine a beggar to the rules of the King's Bench or Fleet, and there he will continue the evil practice with impunity. We therefore pray that confiscation of counterfeit copies be one of the penalties to be inflicted on offenders" (a).

The first Copyright Act, 8 Anne, c. 19.

In response to these applications the Act 8 Anne, c. 19, was passed. It recites that printers, booksellers, and other persons had of late frequently taken the liberty of printing, reprinting, and publishing books and other writings without the consent of the authors or proprietors, to their very great detriment, and too often to the ruin of them and their families. For preventing, therefore, such practices for the future, and for the encouragement of learned men to compose and write useful books, it was enacted, that the authors of books already printed who had not transferred their rights, and the booksellers or other persons who had purchased or acquired the copy of any books in order to print or reprint the same, should have the sole right and liberty of printing them for a term of twenty-one years from the 10th of April, 1710, and no longer; and that authors of books not then printed, should have the sole right of printing for fourteen years, and no longer. It

(a) 4 Burr. 2318.

also provided that copies of books should be entered before publication in the register book of the Stationers' Company, which book should be free for inspection at any time without fee; and that nine copies of each book should be delivered to the warehouse-keeper of the said company for the use of university libraries, inflicting a penalty in default of such delivery, besides the value of the said printed copies, of the sum of £5 for every copy not so delivered (a). And lastly it provided, that after the expiration of the said term of fourteen years the sole right of printing or disposing of copies should return to the authors thereof, if they were then living, for another term of fourteen years.

The general question upon the common law right to old copies of works could not arise until the expiration of the full term conferred by the Act of Anne, that is, until twenty-one years from the 10th of April, 1710. Shortly after the expiration of this period, in 1735, in the case of *Eyre v. Walker* (b), Sir Joseph Jekyll granted an injunction to restrain the defendant from printing the 'Whole Duty of Man,' the first assignment of which had been made in December, 1657; and this was acquiesced under.

The common law right to old copies.

Injunctions issued in support of this right.

In the same year, in the case of *Motte v. Falkner* (c), an injunction was granted for printing Pope's and Swift's 'Miscellanies.' Many of the pieces had been published in 1701, 1702, and 1703, and the counsel strongly pressed the objection as to these pieces. Lord Talbot, however, continued the injunction as to the whole, and it was acquiesced under.

In the following year, in the case of *Walthoe v. Walker*, an injunction was granted for printing Nelson's 'Festivals and Feasts,' though the bill set forth that the original work was printed in the lifetime of Robert Nelson, the author, and that he died in 1714. This also was acquiesced under.

In 1739 Lord Hardwicke granted a fourth injunction to

(a) The number was extended to eleven copies by 41 Geo. 3, c. 107, s. 6; amended by 54 Geo. 3, c. 156, s. 2, and the number was limited to five by the 6 & 7 Will. 4, c. 110.

(b) Cited 4 Burr. 2325; 3 Swans. 673; 1 W. Bl. 331; see 2 Eden, 328.

(c) Cited in *Millar v. Taylor*, 4 Burr. 2325; *Tonson v. Walker*, 3 Swans. 672.

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restrain the defendant from printing Milton's 'Paradise Lost.' The plaintiffs derived their title under an assignment of the copy from the author in 1667. This injunction was also acquiesced under (a). In 1751 Milton's poem again came before Lord Hardwicke, in the form of an application for an injunction to restrain the defendants printing the same with the notes of Dr. Newton and other commentators, all of which belonged to the plaintiff. The bill, as in the former application, derived a title to the poem from the author's assignment in 1667, and a title to the life by Fenton, published in 1727, to Bentley's notes, published in 1732, and to Dr. Newton's notes, published in 1749. The defendants put in an answer, and set up notes of their own, of which it appeared there were twenty-eight, while the notes of the other commentators, belonging to the plaintiffs, and included in the defendants' edition, numbered 1500. Lord Hardwicke gave judgment in 1752, and held that the plaintiffs' notes were within the protection of the statute; and as to the poem, although he said that the general question had never been determined, and there was a doubt, yet he granted the injunction until the hearing (a).

Principle on which the injunctions were issued.

All these injunctions were issued and acquiesced in under the presumption that the perpetual common law right, unaffected by the statute of Anne, was in the respective plaintiffs; had there been a reasonable doubt in the minds of the judges the injunctions would have been improper (b), for no reparation could be afforded to the defendants for the damage sustained thereby, in the case of their being innocent of the piracies attributed to them.

The celebrated cases of *Millar v. Taylor* and

The common law right was at length disputed and fully discussed in the celebrated case of *Millar v. Taylor* (c),

(a) *Tonson v. Walker*, 3 Swans. 672; 4 Burr. 2325, 2327, 2379, 2380; 1 W. Bl. 345; 2 Eden, 328; 1 Cox. 285.

(b) *Hill v. The University of Oxford*, 1 Vern. 275; *Grierson v. Jackson*, Ir. Term R. 304; *Univ. of Oxf. and Cam. v. Richardson*, 6 Ves. 689; *Bruce v. Bruce*, cited 13 Ves. 505; *Harmer v. Plane*, 14 Ves. 130; *Hogg v. Kirby*, 8 Ves. 224. And see Lord Erskine in *Gurney v. Longman*, 13 Ves. 505; *The Assignees of Robinson v. Wilkins*, cited 8 Ves. 224.

(c) 4 Burr. 2303.

when judgment was given for the plaintiff on the ground that the common law right to copyright was unaffected by the statute of Anne. However, in a case (a) determined on the authority of the last mentioned, the defendant appealed to the House of Lords, on which occasion the following questions were propounded to the judges :

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Donaldson v.
Becket.

1st. Whether, at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent ?

2nd. If the author had such right originally, did the law take it away upon his printing and publishing such book or literary composition ? And might any person afterwards reprint and sell, for his own benefit, such book or literary composition, against the will of the author ?

3rd. If such action would have lain at common law, is it taken away by the statute, 8 Anne ? And is an author, by the said statute, precluded from every remedy except on the foundation of the said statute and on the terms and conditions prescribed thereby ?

Eleven judges delivered their opinions *seriatim*; eight to three for the affirmative on the first question, four to seven on the second, and six to five on the third; so that it was declared that, although an author had by common law an exclusive right to print his works, and does not lose it by the mere act of publication, yet the statute of Anne had completely deprived him of the right. It was notorious that Lord Mansfield concurred with the eight

(a) *Donaldson v. Becket*, 4 Burr. 2408; 2 Bro. Parl. Cas. 129. Lord Kenyon expressed a decided opinion that no such right existed: *Beckford v. Hood*, 7 T. R. 620. Lord Ellenborough inclined to the same view: *Cambridge Univ. v. Beyer*, 16 East, 317; and a majority of the judges in *Wheaton v. Peters*, 8 Peters (Amer.) 591, arrived at the same conclusion. See *Jefferys v. Boosey*, 1 H. L. C. 815.

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upon the first question, with the seven upon the second, and with the five upon the third; but it being very unusual (from reasons of delicacy) for a peer to support his own judgment upon an appeal to the House of Lords, he did not speak (*a*).

The universities obtain an Act for the protection of their copyrights.

The universities, alarmed at the consequence of this decision, applied for and obtained an Act of Parliament (15 Geo. 3, c. 53) establishing in perpetuity their right to all the copies given or bequeathed them theretofore, or which might thereafter be given to or acquired by them (*b*).

The period for which copyright was capable of existing was somewhat varied by the 54 Geo. 3, c. 156, s. 4, which enacted that instead of enduring for fourteen years, and contingently for fourteen more, authors should have the sole liberty of printing and reprinting their works for the term of twenty-eight years, to commence from the day of the first publication of the same; and further, if the author should be living at the expiration of that period, for the residue of his natural life (*c*).

The present Literary Copyright Act, 1842.

All these Acts have been repealed by an Act of Parliament of the present reign—the 5 & 6 Vict. c. 45, on which the law of literary copyright now depends. To Mr. Serjeant Talfourd is due the honour of obtaining this piece of legislative justice. From 1837 to 1842 he used his best endeavours and expended his most eloquent strains to accomplish its passing. In contending for an extension of the period during which protection was

(*a*) In Scotland this question had been tried as early as 1748, and decided against the author's right: *Midwinter v. Hamilton*, June 7, 1748; Mor. Diet. of Dec. 19, 20, §305. On appeal the case went off upon informality in the original summons: Feb. 11, 1751; 1 Cr. & St. 488. The same decision was pronounced in *Hinton v. Donaldson*, July 28, 1773, Mor. Diet. of Dec. 19, 20, §307; 5 Brown's Sup. 508; and in *Cadell & Davies v. Robertson*, Dec. 18, 1804, Mor. Diet. of Dec., App., Lit. Prop. 5, as delivered in the House of Lords, July 16, 1811 (5 Paton, 493), the author's right was held to depend entirely on the Act of Queen Anne: Bell's Com. See *Payne v. Anderson*, Mor. Diet. of Dec. vols. 19, 20, p. 8316.

(*b*) *Vide post*, p. 144.

(*c*) An author whose works had been published more than twenty-eight years before the passing of this statute was held not to be entitled to the copyright for life: *Brooke v. Clarke*, 1 B. & Ald. 396.

afforded to literary works, he bursts forth:—"There is something peculiarly unjust in bounding the term of an author's property by his natural life, if he should survive so short a period as twenty-eight years. It denies to age and experience the probable reward it permits to youth—to youth, sufficiently full of hope and joys to slight its promises. It gives a bounty to haste, and informs the laborious student, who would wear away his strength to complete some work which 'the world will not willingly let die,' that the more of his life he devotes to its perfection, the more limited shall be his interest in its fruits. It stops the progress of remuneration at the moment it is most needed; and when the benignity of nature would extract from her last calamity a means of support and comfort to the survivors—at the moment when his name is invested with the solemn interest of the grave—when his eccentricities or frailties excite a smile or a shrug no longer—when the last seal is set upon his earthly course, and his works assume their place among the classics of his country—your law declares that his works shall become your property, and you requite him by seizing the patrimony of his children."

CHAPTER .II.

WHAT MAY BE THE SUBJECT OF COPYRIGHT.

The subject of
copyright.

IN order to acquire a copyright in a work it is necessary that it should be original. If any part of the composition is copied or adopted by the writer from a prior-existing work of course the title fails *quoad hoc*, as the writer cannot have been the author of what he has borrowed from another (a). "It is difficult," says Mr. Curtis (b), "to lay down any legal definition of originality in a literary composition that may be resorted to as a universal test. Many intellectual productions present no more difficulty upon the question of their originality than some inventions, or discoveries. The poems of the great masters in every language, and a vast body of other writings, however freely their authors may have used the thoughts of others, are at once seen to be just as original in a legal as they are in a critical sense. But in every species of composition, in all literatures, there is of necessity a constant reproduction of what is old, mixed with more or less that is new, peculiar, and original. There are also large classes of works the materials of which are common to all writers, existing in nature, art, science, philosophy, history, statistics, &c., where there must be considerable resemblances, however independently of each other the different authors may have written. Over this vast field it is impossible to erect an unvarying general rule, which can be fitted to all cases and capable of determining whether a particular work exhibits the degree of originality necessary

(a) 'Copyright,' chap. 5.

(b) *Ibid.*

to a valid copyright. The laws which protect literary property are designed for every species of composition, from the great productions of genius that are to delight and instruct mankind for ages, to the humble compilation that is to teach children the art of numbers for a few years and then to disappear for ever.

“Hence these laws must be so administered that every literary labourer shall find in them an adequate protection to whatever he can show to be the product of his own labour. Something he must show to have been produced by himself; whether it be a purely original thought or principle unpublished before, or a new combination of old thoughts, and ideas, and sentiments, or a new application or use of known and common materials, or a collection, the result of his industry and skill. In whatever way he claims the exclusive privilege accorded by these laws, he must shew something which the law can fix upon as the product of his, and not another’s, labour. But in order that the law should do this ample justice, in the great variety of claimants, it is necessary that its rules should be capable of adaptation to the objects of their labours. They must include in their range everything that can be justly claimed as the peculiar product of individual efforts; otherwise they would exclude from the benefit of literary property objects which are as clearly the product of individual labour as the most original thoughts ever written, namely, new and important combinations and arrangements, or collections of materials known and common to all mankind.”

The law does not require that the subject of a book should be new, but that the method of treating should have some degree of originality about it. Copyright may exist in a novel arrangement, as well as in recent corrections and additions to an old work not the property of the compiler (a).

(a) *Cary v. Longman*, 1 East, 358; *Sayre v. Moore*, *ibid.* 361; *Tonson v. Walker*, 3 Swans. 672; *Tonson v. Collins*, 1 W. Bl. 321; *Cary v. Faden*, 5 Ves. 24; *Motte v. Falkner*, cited 1 W. Bl. 331; *King v. Reed*, 8 Ves. 223, n.; *Hogg v. Kirby*, 8 Ves. 215; *Longman v. Winchester*, 16 Ves. 269;

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Thus, in the case of 'Gray's Poems,' which had been for many years published and were afterwards collected by a Mr. Mason, and reprinted with the addition of several new poems, the Lord Chancellor granted an injunction against a defendant who had copied the whole, though the plaintiff had but a copyright in the additions (a).

So, if a person collects an account of natural curiosities, or of works of art, or of mere matters of statistical or geographical information, and employs the labour of his mind in giving a description of them, his own description may be the subject of copyright. It is equally competent to any person to compile and publish a similar work; but it must be made substantially new and original, like the first work, by resort to the original sources, and must not copy or adopt from the other, upon the notion that the subject is common (b).

If a man makes an actual survey of certain roads and depicts such roads on a map, though his map might, and probably would, correspond with many which had previously been published, it would be hard to say that it was not a new work. In such a case it is not a question of the mind, like the 'Essay on the Human Understanding;' it lies *in medio*; every man with eyes can trace it, and the whole merit depends upon the accuracy of the observation; every description will therefore be in a great measure original (c). If this be so, every edition will be a new work; if it differs as much from the last edition as it does from the last precedent work, either

Lewis v. Fullarton, 2 Beav. 6; *Leuder v. Purday*, 7 C. B. 4; *Barfield v. Nicholson*, 2 Sim. & Stu. 1; *Jarrold v. Houlston*, 3 K. & J. 708; *Emerson v. Davies*, 3 Story (Amer.) 768; *Atwill v. Ferrett*, 2 Blatch. (Amer.) 46; *Burtlett v. Crittenden*, 5 McLean (Amer.) 32. As to musical compositions see *Reed v. Carusi*, 8 Law Rep. O.S. (Amer.) 411.

(a) *Mason v. Murray*, cited 1 East, 360.

(b) *Hogg v. Kirby*, 8 Ves. 215; and in a Scotch case it was held that the directors of the Customs Annuity and Benevolent Fund have a copyright or right of property in the publication 'The Clyde Bill of Entry and Shipping List,' entitling them to protection against piracy: *Walford v. Johnston*, 3rd June, 1846; 20 Sess. Cas. 1160. See *Maclean v. Moody*, 23 June, 1858, 20 Sess. Cas. 1154.

(c) See Lord Jeffery's observations in *Alexander v. Mackenzie*, 9 Sess. Cas. (N.S.) 758; *Blunt v. Patten*, 2 Paine (Amer.) 393.

all are original works or none of them. It is an extremely difficult thing to establish identity in a map or a mere list of distances; but there may be originality in casting an index, or pointing out a ready method of finding a place in a map (a).

The composing receipts or arranging them in a book will give a copyright to the compiler; but the mere collecting them and handing them over to a publisher will not (b); nor will the mere copying that which is public property. However, if there be some new arrangement or classification of the subject, or the copy be at all varied, then a copyright may exist in it (c), provided the variation be not merely colourable (d).

Thus, where the defendant had used four charts published by the plaintiff in making one large map, but there were very important differences between them, much in favour of the defendant's, and the evidence showed the plaintiff's charts to be founded upon a wrong principle, Lord Mansfield left it to the jury to say whether the alteration was colourable or not. "There must be such a similitude," said he, "as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript. So in the case of different prints; no doubt different men may take engravings from the same picture. The same principle holds with regard to charts; whoever has it in his intention to publish a chart may take advantage of all prior publications." "You are told, that there are various and very material alterations—the chart of the plaintiff is upon a wrong principle, inapplicable to navigation—the defendant, therefore, has been correcting errors, and not servilely copying. If you think so, you will find for the defendant; if you think it

(a) *Carnan v. Bowles*, 2 Bro. C. C. 80; *Taylor v. Bayne*, Mor. Diet. of Dec. in Ct. Sess. vols. 19, 20, 8308; *ibid.* App. pt. 1, 7; *Alexander v. Mackenzie*, 9 Sess. Cas. (N.S.) 758.

(b) *Rundell v. Murray*, Jac. 314, per Lord Eldon; *Matthewson v. Stockdale*, 12 Ves. 270.

(c) *Newton v. Cowrie*, 4 Bing. 234.

(d) *Matthewson v. Stockdale*, *supra*; *Barfield v. Nicholson*, 2 Sim. & Sta. 1.

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is a mere servile imitation, and pirated from the other, you will find for the plaintiff (a).” And in *Matthewson v. Stockdale* (b) Lord Eldon said, “I admit that no man can monopolize such subjects as the English Channel, the Island of St. Domingo, or the events of the world; and every man may take what is useful from the original work, improve, add, and give to the public the whole, comprising the original work, with the additions and improvements.”

On the same principle a person may have copyright in mathematical tables *actually calculated by himself*, although on a fresh calculation the same tables would result from the same *data* and the same principles, and although they may have previously been published before his appeared (c).

Copyright in
private letters.

The copyright of private letters forming literary compositions is in the composer, and not in the receiver, who has only a special property in them; “possibly the property of the paper may belong to him, but this does not give a licence to any person whatever to publish them to the world, for at most the receiver has but a joint property with the writer” (d). If a letter, therefore, by any means gets back into the hands of the sender the receiver is entitled to recover it from him by action. In *Oliver v. Oliver* the facts were as follows. The plaintiff and defendant were brothers. The letters for the recovery of which the action was brought, related to family affairs. They were written and sent by the defendant to the plaintiff, —had been given back by the plaintiff to the defendant, and proof was given of a demand and refusal to restore them. There was contradictory evidence as to whether

(a) *Sayre v. Moore*, 1 East, 361, n.

(b) 12 Ves. 275; *Wilkins v. Atkins*, 17 Ves. 422.

(c) *Bailey v. Taylor*, 3 L. J. 66.

(d) Per Lord Hardwicke, *Pope v. Curl*, 2 Atk. 312; *Perceval v. Phipps*, 2 V. & B. 19; *Forrester v. Walker*, 4 Burr. 2331; *Webb v. Rose*, *ibid.* 2330; *Macklin v. Richardson*, Amb. 691; *Duke of Queensberry v. Shebbeare*, 2 Eden, 329; *Millar v. Taylor*, 4 Burr. 2303; *Donaldson v. Becket*, 2 Bro. P. C. 129; *Oliver v. Oliver*, 11 C. B. (N.S.) 139; *Cadell v. Stewart*, Mor. Diet. of Dec. vols. 19, 20, App., Lit. Prop. 13; *Palin v. Gathercole*, 1 Coll. 565; *Folsom v. Marsh*, 2 Story (Amer.) 100; *Boosey v. Jefferys*, 6 Exch. 583, per Lord Campbell.

the letters had been given by the plaintiff to the defendant to be kept by him as his own property, or whether they had been merely handed to the defendant as custodian, to be re-delivered to the plaintiff on request. The learned judge told the jury that the receiver of a letter had such a property in the paper as to entitle him to maintain an action against the sender if, by any means, it got back into his hands; and that it was for them to say whether the letters in question had been given to the defendant that he might retain them as his own property, in which case the defendant would be entitled to their verdict, or whether they were merely deposited with him to take care of them for the plaintiff, in which case the latter would be entitled to the verdict. Erle, C.J., in refusing a rule for a new trial, upheld this direction, and said: "In the case of letters, the paper at least becomes the property of the persons receiving them. Of course it is necessary to distinguish between the property in the paper and the copyright. The former is in the receiver, the latter is in the writer" (a).

The letters of Pope (b), Swift, and others, and the letters of Lord Chesterfield (c), were prevented from a surreptitious and unauthorized publication by injunction, on the ground of copyright in their authors. Lord Hardwicke, in *Pope's Case*, thought it would be extremely mischievous to draw a distinction between a book of letters, which came out into the world either by the permission of the writer or the receiver of them, and any other learned work. The same objection would, he thought, hold good against sermons which the author may never have intended to be published, but have been obtained from loose papers and brought out after his death.

In the case of the *Earl of Granard v. Dunkin* (d) the executors of Lady Tyrawley obtained an injunction in the first instance against the defendant publishing letters to Lady Tyrawley from different correspondents, and which

(a) See *Howard v. Gurn*, 32 Beav. 462; 2 N. R. 256. (b) 2 Atk. 312.
 (c) *Thompson v. Stanhope*, Amb. 737. (d) 1 Ball & Beatie, 207.

A distinction drawn between letters of a literary nature, and those of a commercial description.

CAP. II.

he had got possession of by being permitted to reside in her house, and continuing to do so after her death. In 1804 the Court of Sessions in Scotland interdicted, at the instance of the children, the publication of the manuscript letters of the poet Burns (a).

In the case of *Perceval v. Phipps*, though the Vice-Chancellor, Sir Thomas Plumer, held that private letters having the character of literary compositions were within the spirit of the Act protecting literary property, and that by sending a letter the writer did not give the receiver the right to publish it, yet the court would not interfere to restrain the publication of *commercial* or *friendly letters*, except under circumstances (b); "for," said he, "though the form of familiar letters might not prevent their approaching the character of literary works, every private letter, upon any subject, to any person, is not to be described as a literary work, to be protected upon the principle of copyright. The ordinary use of correspondence by letters is to carry on the intercourse of life between persons at a distance from each other in the prosecution of commercial or other business, which it would be very extraordinary to describe as a literary work in which the writers have a copyright."

No such distinction at the present time admitted.

Non nostrum est tantas componere lites; yet this distinction appears to us to have but little foundation, and seems to have existed merely in the imagination of Sir Thomas Plumer. It is true that a court of equity cannot interfere to prevent the publication of private letters simply on the ground that such a publication, without the consent of the writer, as a breach of confidence, and social duty, is injurious to the interests of society; but solely on the ground that the writer has an exclusive property which remains in him, even where the letters have been transmitted to the person to whom they were addressed. A

(a) *Cadell & Davis v. Stewart*, cited 1 Bell's Com. 116, n., cited 2 Kent's Com. 381.

(b) 2 V. & B. 19: see *Wetmore v. Scoville*, 3 Edw. Ch. (Amer.) 515; *Hoyt v. Mackenzie*, 3 Barb. Ch. (Amer.) 320; but see *Woolsey v. Judd*, 4 Duer (N. York) 379; and *Eyre v. Higbie*, 35 Barb (N. York) 502.

court of equity is not the general guardian of the morals of society. It has not an unlimited authority to enforce the performance or prevent the violation of every moral duty. It would be extravagant to say that it may restrain by an injunction the perpetration of every act which it may judge to be corrupt in its motives or demoralising or dangerous in its tendency. An injunction can never be granted unless it is apparent to the court that the personal legal rights of the party who seeks its aid are in danger of violation, and, as a general rule, that the injury to result to him from such violation, if not prevented, will be irreparable.

The sole foundation is the right which every man has to the exclusive possession and control of the product of his own labour. Why should a writing of inferior composition be precluded from being a subject of property (a)? To establish a rule that the quality of a composition must be weighed previous to investing it with the title of property, would be forming a very dangerous precedent. What reason can be assigned why the illiterate and badly spelt letters of an uneducated person should not be as much the subject of property as the elegant and learned epistle of a well known author? The essence of the existence of the property is the labour used in the concoction of the composition, and the reduction of ideas into a tangible and substantial form; and can it be contended that the labour is less in the former than the latter case? Every letter is, in the general and proper acceptation of the term, a literary composition. It is that, and nothing else; and it is so, however defective it may be in sense, grammar, or orthography. Every writing in which words are so arranged as to convey the thoughts of the writer to the mind of the reader is a literary composition; and the definition applies just as certainly to a trival letter as to

Motives why no distinction should be drawn.

(a) School books for teaching children are entitled to protection. See *Lennie v. Pillans*, 5 Sess. Cas. 2nd series, 416; *Constable & Co. v. Brewster*, 3 S. 215 (N. E. 152). So are abstracts and indices of title to land, so long as the compiler retains the ownership of the unpublished manuscript; *Banker v. Caldwell*, 3 Min. (Amer.) 94.

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an elaborate treatise or a finished poem. Literary compositions differ widely in their merits and value, but not at all in the facts from which they derive their common sense (a).

Printing and publishing cannot make a book "literary" which was not so in manuscript; and consequently, the author of a book (for the same doctrine would apply to a book as to a private letter) which may be of a private nature, and not considered as "a literary composition," ought to be excluded from the benefit of the Acts conferring copyright. But surely it is not contended that the copyright of an author should be liable to impeachment and frustration by reason of an inquiry into the merits or value of his work as published.

The exclusive right which alone a court of equity is bound to protect, and which, from its nature, can only be protected by an injunction, is the author's right of property in the words, thoughts, and sentiments which, in their connection, form the written composition—which his manuscript embodies and preserves. This composition—whether, as such, it has any value or not, is immaterial—is his work, the product of his own labour, of his hand, and his mind; and it is this fact which gives him the right to say that, without his consent, it shall not be published, and makes it the duty of a court of equity to protect him in the assertion of that right by a permanent injunction. Of this it is a conclusive proof that the right to control the publication of a manuscript remains in the author and his representatives, even when the material property has, with his own consent, been vested in another. The gift of the manuscript, it is settled, unless by an express agreement, carries with it no licence to publish (b).

Lord Eldon intimates in *Gee v. Pritchard* (c) that he

(a) 2 Story's Rep., cited *Woolsey v. Judd*, 4 Duer (N. York) 379.

(b) *Duke of Queensberry v. Shebbeare*, 2 Eden, 329; *Thompson v. Stanhope*, Amb. 737.

(c) 2 Swans. 418, 426, 427. See *Brandreth v. Lance*, 8 Paige's R. (Amer.) 24, 26.

The author's right of property alone, protected by the Court of Chancery.

does not understand the Vice-Chancellor, in the case of CAP. II.
Perceval v. Phipps, as denying the property of the writer Lord Eldon's
 in the letters, but that he appears to have inferred, from opinion of the
 the particular circumstances of that case, that the plaintiff case of
 had authorized, and for that reason could not complain of, *Perceval v.*
 the publication. "I will not say," he adds, "that there *Phipps.*
 may not be a case of exception, but if there is, the
 exception must be established on examination of the
 letters; and I think that it will be extremely difficult
 to say where that distinction is to be found between
 private letters of one nature and private letters of another
 nature."

Mr. Justice Story strongly asserts the propriety of the Mr. Story's
 jurisdiction by injunction for the purpose of restraining opinion.
 the publication of private letters. He thinks the doctrine
 but sound and just that a court of equity ought to inter-
 fere where a letter, from its very nature, as in the case of
 matters of business, or friendship, or advice, or family or
 private confidence, imports the implied or necessary inten-
 tion and duty of privacy and secrecy; or where the publi-
 cation would be a violation of *trust* or *confidence* founded
 in contract, or implied from circumstances (a). Cicero
 has with great force thus spoken of the grossness of such
 offences against common decency: "*Quis enim unquam,*
qui paulum modo bonorum consuetudinem nosset, literas, ad
se ab amico missas, offensione aliquâ interposita, in medium
protulit, palamque recitavit? Quid est aliud, tollere e vitâ
vitæ societatem quam tollere amicorum colloquia absentium?
Quam multa joca solent esse in epistolis, quæ, prolati si sint,
inepta videantur! Quam multa seria, neque tamen ullo
modo divulganda!" (b)

With these natural feelings on the breach of epistolary Principles on
 confidence the determinations of the Court of Session which the
 in Scotland have accorded (c); but it must be borne determinations of the

(a) Story's Com. on Eq. Jur. ss. 917-949.

(b) Cic. Orat. Phillip. ii. c. 4. See Sir S. Romily, 2 Swans. 419.

(c) So it was held in *Dodsley v. M'Farguhar*, Feb. 27, 1775, relative to
 the publication of Lord Chesterfield's Letters: Mor. Diet. of Dec., Lit.

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Court of
Session have
proceeded.

Ground on
which a court
of equity will
frequently
interfere.

in mind that that court is held to have jurisdiction by interdict to protect, not property only, but reputation, from injury, and private feelings from outrage and invasion (a).

Courts of equity will, notwithstanding what we have already intimated, sometimes interfere to stay the publication of letters, on the ground that the publication is a *breach of contract or confidence*; and *à fortiori*, when they are intended to be made a source of *profit*; for then it is not a mere breach of confidence or contract, but it is a violation of the exclusive copyright of the writer.

Thus, upon the principle of *breach of contract*, an injunction was granted to prevent the publication of letters written by an old lady to a young man, to whom she had been foolishly attached, there being an agreement not to publish the letters, but to deliver them up for a valuable consideration (b).

Were the Court of Chancery to interfere on any other principle than that already stated, individuals would be deprived of their defence in proving agency, orders for goods, the truth of an assertion, or some other fact, merely because the testimony establishing the true and genuine circumstances was contained in letters in which a pretended copyright was claimed (c).

Instances in
which the
publication of
private letters
has been
permitted.

Accordingly an injunction obtained on account of agency and confidence was dissolved by the court when the answer denied confidence, and avowed that the defendant's ob-

Prop., App. 1, 5; Br. Sup. 509; and again more solemnly in *Cadell and Davies v. Stewart*, June, 1, 1804, Mor. Dict. of Dec., Lit. Prop., App. 4. *Ibid.* But see, 5 Pat. 493. Here letters written by Burns to a lady whom he distinguished by the name of *Clarinda*, had been by her given to Stewart, a bookseller, who published them. The family of Burns, as interested in his literary reputation, were found entitled to an interdict: Bell's Com.

(a) Bell's Com. b. 2, pt. 2, c. 4.

(b) *Anon v. Eaton*, cited 2 V. & B. 27; *Perceval v. Phipps*, 2 V. & B. 27; *Earl of Granard v. Dunkin*, 1 Ball. & B. 247; Story's Eq. Jur. vol. 2, ss. 944-950; *Denis v. Laclere*, 1 Martin (Amer.), 297; *Woolsey v. Judd*, 4 Duer. (N. York) 379; *Eyre v. Higbie*, 35 Barb. (N. York) 502.

(c) See Godson on Copy. p. 330.

ject in publishing them in a newspaper, of which he was the proprietor, was not to obtain profit, but to *vindicate his own character* from the imputation of having published false intelligence publicly cast on him by the plaintiff; for defective and injurious indeed would be the effect of a law permitting not the publication or production of business letters when necessary for one's own defence (a).

The receiver of a letter, however, will not be permitted to publish it for the purpose of representing to the public as true that which he has, in legal proceedings upon that very question, admitted to be false. The case of *Palin v. Gathercole* (b) elucidated this point. The circumstances of that case were these: Palin, the plaintiff, had written to Gathercole, the defendant, who was the editor of a newspaper, certain letters containing information respecting one Noakes, and Gathercole from these letters drew up an article which he published in his newspaper. Noakes brought an action against him for libel, and he compromised the action, paying Noakes' costs, and apologizing. Gathercole then claimed of Palin half the costs that he, Gathercole, had so incurred, and Palin refusing to pay them, Gathercole published in his newspaper a statement that the libel upon Noakes was communicated to him, Gathercole, by Palin. Palin thereupon brought an action against Gathercole; and Gathercole pleaded that the matter, however libellous as between Noakes and Gathercole, was matter of which, as between Palin and Gathercole, Palin was the author; but before trial Gathercole submitted to what was, in effect, a general verdict, establishing in substance, as Vice-Chancellor Knight Bruce expressed it in his judgment, that the libel published by Gathercole on Noakes was not a libel which Palin had communicated to Gathercole. Gathercole then proceeded to shew Palin's letters to third persons, upon which Palin filed his bill for an injunction to restrain Gathercole from

Not permissible for the purpose of representing that to be true which has been admitted to be false.

(a) *Folsom v. Marsh*, 2 Story (Amer.) 100; see *Howard v. Gunn*, 32 Benv. 462.

(b) 1 Coll. 565.

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publishing or showing the letters, and obtained an *ex parte* injunction. The use which Gathereole desired to make of the letters was, it will be observed, to establish the fact that Palin was the author of the libel upon Noakes, the very fact which he had, by submitting to the general verdict in Palin's action, admitted not to exist. Under those circumstances, the court refused to dissolve the injunction, permitting, however, the defendant to exhibit the letters to his solicitors and counsel in the cause.

Communica-
tions sent to
editors of
periodicals.

Communications received from correspondents by editors or proprietors of periodical publications (if sent impliedly or expressly for the purpose of publication) become the property of the person to whom they are directed, and cannot be published by any other person obtaining possession of them (a). The editor or proprietor, however, of any such periodical may not publish them if, previous to publication, the writer expresses his desire to withdraw them (b); but though the editor may not publish them he may destroy them (c).

Power of
government
to publish or
withhold
letters.

The government has, moreover, a right to publish or to withhold all letters addressed to the public offices (d). This exception in favour of the government is not supposed to make such communications common property, to be published by any person who may see fit, without the sanction of the government, nor to take away the property of the writers or their representatives. "In respect to official letters addressed to government," observed Mr. Justice Story in *Folsom v. Marsh* (e), "or any of its departments, by public officers, so far as the right of the government extends from principles of public policy to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful whether any public officer is at liberty to publish

(a) 8 Ves. 215.

(b) *Davis v. Miller*, July 28, 1855; 17 Dec. of Ct. of Sess. 2nd series, 1166. See 1 Jur. (N.S.) pt. 2, 523.

(c) Kerr on Injunc. p. 188.

(d) Curtis on Copy. 98.

(e) *Folsom v. Marsh*, 2 Story (Amer.) 100.

them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers. But this is an exception in favour of the government, and stands upon principles allied to, or nearly similar to, the right of private individuals, to whom letters are addressed by their agents, to use them, and publish them, upon fit and justifiable occasions. But assuming the right of the government to publish such official letters and papers, under its own sanction, and for public purposes, I am not prepared to admit that any private persons have a right to publish the same letters and papers without the sanction of the government for their own private profit and advantage. Recently the Duke of Wellington's despatches have, I believe, been published by an able editor, with the consent of the noble duke and under the sanction of the government. It would be a strange thing to say, that a compilation involving so much expense and so much labour to the editor in collecting and arranging the materials, might be pirated and republished by another bookseller, perhaps to the ruin of the original publisher and editor. Before my mind arrives at such a conclusion, I must have clear and positive lights to guide my judgment, or to bind me in point of authority."

Copyright may be had in lectures. If a lecture has been reduced wholly or partially into writing, the author has a right of property in it; but when a court of equity is called upon to restrain the publication of such a lecture, the writing must be produced, that the court may compare the original composition with the piracy.

The admission of persons to hear such a lecture affords no presumption that the speaker intends to give them a right to publish the information they may acquire. When the lecture is orally delivered it is difficult to say that an

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injunction can be granted upon the same principle as that upon which an injunction is issued in the case of a literary composition; because the court must be satisfied that the publication complained of is an invasion of the written work, and this can only be done by comparing the composition with the piracy. It does not, however, follow that because the information communicated by the lecturer is not committed to writing, but orally delivered, it is therefore within the power of the person who hears it to publish it (a). On the contrary, Lord Eldon, in *Abernethy v. Hutchinson*, observed that he was clearly of opinion that, whatever else might be done with it, the lecture could not be published for profit. When persons are admitted as pupils or otherwise to listen to lectures orally delivered, although they may go to the extent, if desirous and capable, of putting down the whole by means of shorthand, yet they can do that only for the purpose of their own information; they may not publish.

The Lecture
Copyright
Act, 5 & 6
Will. 4, c. 65.

The right of property in lectures, whether written or oral, has now been confirmed by statute. The Lecture Copyright Act is the 5 & 6 Will. 4, c. 65. It provides that, from and after the 1st of September, 1835, the author of any lecture, or the person to whom he has sold or otherwise conveyed the copy in order to deliver the same to any school, seminary, institution, or other place, or for any other purpose, shall have the sole right and liberty of printing and publishing such lecture. And it declares that no person, allowed for a certain fee and reward or otherwise to attend and be present at any lecture delivered at any place, shall be deemed and taken to be licensed, or to have leave to print, copy, and publish such lecture on account merely of having permission to attend the delivery.

Lectures not
within the
meaning of
the Act.

Lectures published by authority, since the publication of which the period of copyright therein given by 8 Anne, c. 19, and 54 Geo. 3, c. 156, has expired, and lectures printed and published before September 1835, are ex-

(a) *Per* Lord Eldon, in *Abernethy v. Hutchinson*, 3 L. J. (Ch.) 209.

cluded from the protection afforded by the above Act; likewise lectures of the delivery of which notice in writing shall not have been given two days previously to two justices living within five miles of the place of delivery; and those delivered in any university, or public school, or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment, or foundation.

In consequence of these exceptions, few lectures are protected by this Act, for seldom is the requisite notice given. And, under this latter clause, it would appear that sermons delivered by clergymen of the Established Church, in endowed places of public worship, are deemed public property.

Copyright may likewise exist in a genuine and just abridgment, for it is said that an abridgment may with great propriety be called a new book (a). Copyright in abridgments.

To constitute a true and equitable abridgment the entire work must be preserved in its precise import and exact meaning, and then the act of abridgment is an exertion of the understanding, employed in moulding and transfusing a large work into a small compass, thus rendering it less expensive, and more convenient both to the time and use of the reader. In the case known as *Newbery's* (b), Lord Chancellor Apsley, having spent some hours in consultation with Mr. Justice Blackstone, decided that an abridgment, where the understanding is employed in retrenching unnecessary and uninteresting circumstances which rather deaden the narration, is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work. It requires both invention and judgment, and displays frequently a deal of learning. Lord Hardwicke thus states the rule (c):—"Where books are What constitutes an abridgment.

(a) *Bell v. Walker*, 1 Bro. C. C. 451. An abstract also was held no piracy: *Dodsley v. Kinnersley*, Amb. 403; 4 Esp. 168; 1 Camp. 94.

(b) Lofft, 775; *Dodsley v. Kinnersley*, supra; *Butterworth v. Robinson*, 5 Ves. 709.

(c) *Gyles v. Wilcox*, 2 Atk. 141. See also the case of *Read v. Hodges*, referred to in *Tonson v. Walker*, 3 Swans. 672, per Lord Eldon; *Bell v. Walker*, 1 Bro. C. C. 451; *Tinsley v. Lacy*, 11 W. R. 877.

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colourably shortened only, they are undoubtedly within the meaning of the Act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgment. But this must not be carried so far as to restrain persons from making a real and fair abridgment; for abridgments may, with great propriety, be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shewn in them, and in many cases are extremely useful, though in some instances, prejudicial, by mistaking and curtailing the sense of an author."

On these considerations the Master of the Rolls refused an injunction to restrain the publication of an abridgment of Dr. Johnson's 'Rasselas,' it appearing that not one-tenth part of the first volume had been abstracted, and that the injury alleged to be sustained by the author arose from the abridgment containing the narrative of the tale, and not the moral reflections (a).

Considerations in discriminating a *bonâ fide* abridgment from a piracy.

The question in such a case must be compounded of various ingredients: whether it be a *bonâ fide* abridgment, or only an evasion by the omission of some important parts, whether it will in its present form prejudice or supersede the original work, whether it will be adapted to the same class of readers, and many other considerations of the same sort, which may enter as elements, in ascertaining whether there has been a piracy or not. Although the doctrine is often laid down in the books, that an abridgment is not piracy of the original copyright, yet this proposition must be received with many qualifications.

Impropriety of the rule respecting abridgments.

The rule appears very unreasonable, and has been the subject of much criticism by late writers. Why should an abridgment, tending to injure the reputation, and to lessen the profits of the author, not be considered an invasion of his property? (b) In many cases the question may naturally turn upon the point, not so much of the quantity

(a) Amb. 403.

(b) Lord Campbell's 'Lives of the Chancellors,' vol. 5, chap. 131.

as of the value of the selected materials. As was significantly said on another occasion: *Non numerantur; ponderantur*. The quintessence of a work may be practically extracted so as to leave a mere *caput mortuum*, by a selection of all the important passages in a comparatively moderate space.

In the case of *Bramwell v. Halcomb* (a) it was held that the question whether one author has made a piratical use of another's work does not necessarily depend upon the quantity of that work which he has quoted, or introduced into his own book. On that occasion Lord Cottenham said, "When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value, which is looked at. It is useless to look to any particular case about quantity." Quantum but little criterion of piracy.

The general principle is, that the proper object of the copyright is the *peculiar expression of the author's ideas*, meaning by this, the structure of the work, the sequence of his remarks, and, above all, his language; and that this peculiarity is always distinguishable, as, by a law of nature, every human production is stamped with the idiosyncrasy of the author's mind. If these views be correct, it follows that any abridgment of the work, in the original author's language, is an infringement of his right; and indeed any quotation will be, *pro tanto*, a violation, unless excused on the ground of its inconsiderable extent, or on the presumed assent of the author, which, in works of criticism, might be justly implied (b).

Copyright may also be had in a digest. The digest of a report, usually included in and known as the head note, is a species of property which will receive protection. Copyright in digests. "The head note, or the side or marginal note of a report,"

(a) 3 My. & Cr. 737; *Bell v. Whitehead*, 3 Jur. 68; *Sweet v. Shaw*, 3 Jur. 217; *Saunders v. Smith*, 3 My. & Cr. 711, 728; *Wheaton v. Peters*, 8 Peters. (Amer.) 591; *Gray v. Russell*, 1 Story (Amer.) 11; *Mawman v. Tegg*, 2 Russ. 385; *Butterworth v. Robinson*, 5 Ves. 709.

(b) 2 Kent's Com. 382, note; Curtis on Copy. 252.

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said Mr. Justice Crowder, in *Sweet v. Berning* (a), "is a thing upon which much skill and exercise of thought is required, to express in clear and concise language the principles of law to be deduced from the decision to which it is prefixed, or the facts and circumstances which bring the case in hand within the same principle or rule of law or of practice." It may indeed be considered, perhaps, as in itself a species of brief and condensed report, the reporter furnishing in each case two reports, in one of which he gives the facts, the arguments, and the judgment at length; and in the other, an abstract of the decision, conveying the principle upon which it is founded and the pith and substance of the case. But whether thus regarded, or viewed in the manner adopted by Mr. Justice Maule, in the above cited case, namely, in the nature of an independent deduction from the report, and a succinct statement of the legal principles involved, or of the doctrine of law established by the decision, there is a sufficient exertion of mental power in the formation to render it substantially a subject of copyright.

The right of selecting passages from books of reports (including entire judgments) in treatises upon particular subjects is not disputed. Had it been otherwise decided, the greater part of our law libraries would be much thinned and attenuated, and we should be deprived of many valuable works; for a considerable portion consists of mere transcripts from books of report (b).

What would become of the elaborate commentaries of modern scholars upon the classics, which, for the most part, consist of selections from the works and criticisms of various former authors, arranged in a new form, and combined together by new illustrations? What would become of the modern treatises upon astronomy, mathematics, natural philosophy and chemistry? What would

(a) 16 C. B. 491; 1 Jur. (N.S.) 543. *Vide D'Almaine v. Boosey*, 1 Y. & C. 301; but there Lord Lyndhurst referred to digests such as Vin. Abr. and Comyn's 'Digest.'

(b) See *Butterworth v. Robinson*, 5 Ves. 709; Evans' 'Statutes,' 2nd. ed. vol. ii. p. 25.

become of the treatises in our own profession, the materials of which, if the work be of any real value, must essentially depend upon faithful abstracts from the reports, and from juridical treatises, with illustrations of their bearing. 'Blackstone's Commentaries' is but a compilation of the Laws of England drawn from authentic sources, open to the whole profession; and yet it was never deemed that it was not a work which, in the highest sense, might be considered an original work, since never before were the same materials so admirably combined and exquisitely wrought out, with a judgment, skill and taste absolutely unrivalled (a).

The question has been raised whether there can be copyright in a work not claiming an originality in the doctrines contained therein (b). And this argument was put forth in the case of *Jarroll v Houlston* (c) respecting Dr. Brewer's 'Guide to Science,' in which work the author does not profess to have made any discovery in science, or to do more than to provide for the young and other persons who have not been in the habit of making observations for themselves, information by which some of the ordinary phenomena of common life may be explained to them on scientific principles, and that they may themselves be led to observe and to reflect upon those wonderful laws of nature, by which the most ordinary phenomena are governed. And it was determined that, if anyone by pains and labour collects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions, and explanations of those phenomena, whether such explanations and answers are furnished by his own recollection of his former general reading, or out of works consulted by him for the express purpose, the reduction of the questions so collected,

As to whether copyright may exist in a work not claiming an originality in the doctrine contained therein.

(a) Story, J., in *Gray v. Russell*, 1 Story (Amer.) 17.

(b) As to the amount of originality required in a musical composition in America, see *Jollie v. Jaques*, 1 Blatch. (Amer.) 626.

(c) 3 K. & J. 708; 3 Jur. (N.S.) 1051.

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with such answers, under certain heads and in a scientific form, is amply sufficient to constitute an original work of which the copyright will be protected.

No copyright in that which has no present existence.

Copyright can only exist in respect of some already published or some composed and not yet published literary production. Therefore there can be no copyright in the prospective series of a newspaper. Copyright may attach upon each successive publication; but that which has no present existence as a publication cannot be the subject of this species of property (a).

The mere declaration of the intention to publish any articles bearing a particular name or mark, even though made public by registration at Stationers' Hall, cannot create a right to the exclusive use of such name or mark. So in the late cases of *Maxwell v. Hogg*, and *Hogg v. Maxwell*. Messrs. Hogg, in 1863, registered an intended new magazine to be called 'Belgravia.' In 1866, such magazine not having appeared, Mr. Maxwell, in ignorance of what Messrs. Hogg had done, projected a magazine with the same name, and incurred considerable expense in preparing it, and extensively advertising it in August and September as about to appear in October. Messrs. Hogg knowing of this, made hasty preparations for bringing out their own magazine before that of Mr. Maxwell could appear, and in the meantime accepted an order from Mr. Maxwell for advertising his (Mr. Maxwell's) magazine on the covers of their own publications, and the first day on which they informed Mr. Maxwell that they objected to his publishing a magazine under that name was the 25th of September, on which day the first number of Messrs. Hogg's magazine appeared. Mr. Maxwell's magazine appeared in October. Under these circumstances, on a bill filed by Mr. Maxwell, it was held, that Mr. Maxwell's advertisements and expenditure did not give him any exclusive right to the use of the name 'Belgravia,' and that he could not restrain Messrs. Hogg from publishing a magazine under the same name, the first number of which appeared before Mr. Max-

(a) *Platt v. Walter*, 17 L. T. (N.S.) 157.

well had published his; and on a bill filed by Messrs. Hogg, that the registration by them of the title of an intended publication could not confer upon them a copyright in that name, and that, in the circumstances of the case, they had not acquired any right to restrain Mr. Maxwell from using the name as being Messrs. Hogg's trade mark (*a*).

The title of a periodical or newspaper was held under the former statutes to be a proper subject of copyright, as characterising the particular publication (*b*); that it cannot therefore be assumed by another without injury, although a similar title distinguishable may be assumed (*c*). On this point nothing is said in the Copyright Act, 1842, unless the words 'sheet of letterpress' be held to include a title; but there is, at least, nothing to sanction any alteration of the grounds upon which the former judgments stood (*d*).

With regard to encyclopædias, periodicals, and works published in series, reviews, or magazines, it is provided by the Copyright Act, 1842, that the copyright in every article shall belong to the *proprietor* of the work for the same term as is given by the Act to authors of books, whenever any such article shall have been or shall be composed on the terms that the copyright therein shall belong to such proprietor and be paid for by him; but payment must be actually made by the proprietor before the copyright can vest in him (*e*). After the term of twenty-eight years from the first publication of any such article the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by the Act; and during such term of twenty-eight

(*a*) *Maxwell v. Hogg*; *Hogg v. Maxwell*, 15 L. T. 204; 15 W. R. 84, 464; 36 L. J. (Ch.) 433; Law Rep. 2 Ch. Ap. 307.

(*b*) *Hogg v. Kirby*, 8 Ves. 215; *Keene v. Harris*, cited 17 Ves. 338; *Constable & Co. v. Brewster*, 3 Sess. Cas. 215 (N. E. 152).

(*c*) 8 Ves. 222. Where assumed for the purpose of deceiving the public, see *Bell v. Locke*, 8 Paige R. (Amer.) 75; and see *Crutwell v. Lye*, 17 Ves. 335.

(*d*) Bell's Com. 6th ed. 549.

(*e*) A contract for payment is not sufficient: *Richardson v. Gilbert*, 1 Sim. (N.S.) 336; 20 L. J. (Ch.) 553; 15 Jur. 389. See *Brown v. Cooke*, 11 Jur. 77; 16 L. J. (Ch.) 110.

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Reservation
by author of
right to
separate
publication.

years the proprietor shall not publish any such article separately, without the previous consent of the author or his assigns, unless the article was written on the express terms that the copyright therein should belong to the proprietor, for all purposes (a). But any author may reserve to himself the right to publish any such composition in a separate form, and he will then be entitled to the copyright in such composition, when published separately, without prejudice to the right of the proprietor of the encyclopædia, review, or other periodical, in which it may have first appeared (b).

In order to give the proprietor of a periodical a copyright in articles composed for him by others, it is not necessary that there should be an express contract that he should have the property in the copyright. The fact of the author being paid by the proprietor for articles supplied expressly for the periodical, raises the presumption that the copyright is intended to be the property of the proprietor. Otherwise, the articles might be published by the writers thereof simultaneously, or shortly afterwards; possibly to the detriment and injury of the purchasers of the articles for particular periodicals.

Right of
separate
publication.

In the case of *Smith v. Johnson*, where the plaintiff had composed certain tales, under the common title of 'The Chronicles of Stanfield Hall,' for the defendant to publish in the 'London Journal,' of which he was the proprietor, it was held that the subsequent publication of such tales in a weekly supplementary number, for sale with or without the current number, was "a publication separately," within the meaning of the 18th section of the Copyright Act. And Vice-Chancellor Stuart then adopted the same view as did the Vice-Chancellor of England, in the *Bishop of Hereford v. Griffin*, and also that subsequently taken by

(a) *Hereford (Bishop) v. Griffin*, 16 Sim. 190; 17 L. J. (Ch.) 210. See 1 J. & H. 112; 3 L. T. (N.S.) 466. As to the course to be adopted on dissolution of partnership, and the withdrawal of one partner from the periodical publication by the firm, see *Bradbury v. Dickens*, 27 Beav. 53; 28 L. J. (Ch.) 667, cited Phillips on Copy. 181, note.

(b) 5 & 6 Vict. c. 45, s. 18.

Vice-Chancellor Wood, who considered that the meaning of the proviso in the 18th section, taken with the whole clause, was, not to vest a copyright in the proprietors or publishers of a periodical work, but simply to give them a licence to use the matter for a particular purpose. "Keeping in view," says the Vice-Chancellor, "this principle of construction—that the Act of Parliament was intended to give a licence only to the proprietors of periodical works purchasing and paying for a literary composition to be published as a part or portion of a periodical work—the construction of the words in the proviso which prohibit them from publishing these parts or portions which 'alone' are the property of the author—from publishing these portions 'separately and singly,' seems reasonably plain. 'Publishing separately' must mean publishing separately from something. What is that 'publishing,' which the Act of Parliament says shall not be separately made? It must be the publishing of the part or portion separately from that which has been before published. That is the view which has been previously taken, and the language in the case of *Mayhew v. Maxwell* was to the effect that the defendant should be prohibited from publishing the literary work then in question, otherwise than as part of the Christmas number of the 'Welcome Guest.' Now, that Christmas number was a thing called 'a part' in the Act of Parliament, which describes these periodical works as being published in a series of parts and numbers. The Christmas number is part or portion of the other composition. The order of this court peremptorily prohibited the defendant Maxwell from publishing it separately from the other part or number. What has the defendant in this case done? He has acquired, under the first clause of the Act of Parliament, an actual property in this literary composition, which is called 'The Stanfield Hall Tales,' published in portions or parts of a certain periodical work. The Act of Parliament says the publishers shall not publish these portions separately from those parts for the publication of which they have obtained a licence already. What

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they have done is to print the portions already published of these antecedent parts in what is called a supplementary number, and which may be purchased with or without the number in which the 'portions' were originally published. That is a separate publication; separate from the 'parts' in which it was originally published. To reprint in numbers, which may be had with or without the concurrent number of the work, is an act not permitted by the legislature" (a).

Copyright in work written for another, in the employer.

It is a well-known rule, that if a person be employed to produce anything for another, whether by writing or not, it is to be inferred (in the absence of any circumstances shewing the contrary) that the writing or thing produced by the person so employed is produced upon the terms that it shall be the property of the employer (b).

Transactions of this kind between publishers and authors resemble contracts for so much work and labour towards a general undertaking—so many bricks towards the erection of an edifice—and are different from the sale of a copyright. When delivered by the author, his contribution appears to be the property of the owner of the general work, more especially as the several articles are wrought into their appropriate form by the literary agent of the proprietor. In this manner contributions seem after leaving the hands of their authors to lose their separate identity (c).

Not so, however, if employer merely suggest the subject.

In *Shepherd v. Conquest* (d) the Court of Common Pleas questioned whether *under any circumstances* the copyright in a literary work, or the right of representation of a dramatic one, could become vested *ab initio* in an employer other than the person who has actually composed or adapted the work; and they decided that no such effect

(a) Vice-Chancellor Stuart, *Smith v. Johnson*, 4 Giff. 637; 33 L. J. (Ch.) 137; 9 Jur. (N.S.) 1223; 12 W. R. 122; 9 L. T. (N.S.) 437. See *Wallenstein v. Herbert*, 15 W. R. 838; 16 L. T. (N.S.) 453.

(b) *Sweet v. Benning*, 24 L. J. (C.P.) 175; 16 C. B. 459; *Cox v. Cox*, 11 Hare, 148; see *Hutton v. Kean*, 29 L. J. (C.P.) 20, *post*, and 2 Hill. 'Torts.'

(c) Maugham on 'Copyright,' 171.

(d) 17 C. B. 427, see 25 L. J. (N.S.) C.P. 127; 2 Jur. (N.S.) 236. See *Pierpont v. Fowle*, 2 Wood & Min. (Amer.) 23; *Atwill v. Ferrett*, 2 Blatch. *ibid.* 36; *De Witt v. Brooks*, M.S. Nelson, J., N. Y. 1861; *Binns v. Woodruff*, 4 Wash. (Amer.) 53.

could be produced where the employers merely suggest the subject and have no share or design in the execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed; for it would be an abuse of terms to say that in such a case the employers were the authors of a work to which their minds had not contributed an idea.

Where, however, the employers do more than suggest the subject, and have a share in or solely design the execution of the work, the case is different. Thus in *Barfield v. Nicholson* (a) Sir John Leach said, "I am of opinion that, under the statute (8 Anne, c. 19), the person who forms the plans, and who embarks in the speculation of a work, and who employs various persons to compose different parts of it, adapted to their own peculiar acquirements, that he, the person who so forms the plan and scheme of the work, and pays different artists of his own selection, who, upon certain conditions contribute to it, is the author and proprietor of the work, if not within the liberal expression, at least within the equitable meaning of the statute of Anne, which, being a remedial law, is to be construed liberally."

On this principle was determined the case of *Hatton v. Kean* (b), where the defendant, with the aid of scenery, dresses, and music, adapted one of Shakespeare's plays to the stage, and found the general design of the representation. He employed the plaintiff, a well-known musician named Hatton, for reward, to compose, and he did compose, as part of the representation, and as accessory to the dramatic piece, a musical composition, which formed part of the dramatic piece, on the terms that the defendant should have the liberty of representing and permitting to be represented the said musical composition with the dramatic piece as part thereof. And it was held that the defendant had the sole right of representing the entire

(a) 2 Sim. & Stu. 1; S. C. 2 L. J. (Ch.) 90; *Heine v. Appleton*, 4 Blatch. (Amer.) 125; *Siebert's Case*, 7 Opin. 656—Cushing Attorn.-Gen. (Amer.) 1856.

(b) 8 W. R. 7.

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dramatic piece, including the plaintiff's musical composition, and that he violated no right of the plaintiff within the 3 & 4 Will. 4, c. 15 (a), and the 5 & 6 Vict. c. 45, by representing, without the plaintiff's consent in writing, the entire dramatic piece, including the plaintiff's musical composition. The reason assigned was that, though the plaintiff was the author of the musical composition, it appeared that the defendant was the author and designer of the entire dramatic work, and with respect to a part, accessory to that whole (that whole consisting of something produced by the skill of the defendant in its entirety), he employed the plaintiff. The production by the plaintiff would be a part of the whole, and the defendant would have the sole right of performing and representing the entire piece in conjunction with the music.

Copyright in translations.

Copyright may exist in a translation, whether it be the result of personal application and expense, or donation (b). In the case of *Wyatt v. Barnard* (c), Lord Eldon states this to be the law: 'The plaintiff was the proprietor of a periodical called 'The Repository of Arts, Manufacture, and Agriculture.' He claimed the sole copyright of the work, containing, amongst other articles, translations from the foreign languages. The defendants were publishers of another periodical which contained various articles, being translations from foreign languages, copied or taken from the plaintiff's work without his consent. The defendants, by their affidavit, stated the usual practice among publishers of magazines, &c., to take from each other articles translated from foreign languages, or become public property by reason of their having appeared in other works. They relied on the custom of the trade, and contended that neither of the works was original, both being mere compilations; that it had never been decided that a trans-

(a) *Vide post*, p. 148, app. xv.

(b) *Wyatt v. Barnard*, 3 V. & B. 77. If a foreigner translates an English work, and then an Englishman re-translates the foreign work into English, that is an infringement of the original copyright: *Murray v. Boque*, 17 Jur. 219; 1 Drew. 353; 22 L. J. (Ch.) 457.

(c) 3 V. & B. 78. *Vide Stone v. Thomas*, 2 Amer. L. Reg. 231.

lator might have a copyright in a translation, supposing, what was not proved, that these translations were made by the plaintiff himself. The Lord Chancellor said that the custom among booksellers could not control the law; and upon an affidavit stating that all the articles were translated by a person employed and paid by the plaintiff, and were translated from foreign books imported by the plaintiff at considerable expense, his Lordship granted an injunction.

The work from which the translation was taken in the present case was, of course, unprotected by the copyright law in existence here, and the cases which have treated translations from foreign works, having no copyright in this country, as original, would not necessarily form a precedent in the case of a translation of an English copyright work. But in the case above cited, Lord Eldon draws a conclusion that every translation is an original work, and if this be the case, the translation of an English copyright work cannot be a piracy. For a considerable time this position was doubted. "Does the mere act of giving to a literary composition the new dress of another language," it was asked, "add to the case an element which ought to take it out of the rule by which reproductions in other forms are prohibited?" "The new language in which his composition is clothed by translation," observes Mr. Curtis, "affords only a different medium of communicating that in which he has an exclusive property; and to attribute to such a new medium the effect of entire originality is to declare that a change of dress alone annihilates the most important subject of his right of property. It reduces his right to the narrow limits of an exclusive privilege of publishing in that idiom alone in which he first publishes." Nevertheless, the law may now be taken as decided in favour of copyright in a translation. Mr. Justice Yates, in *Millar v. Taylor* (a), and Lord Macclesfield, in *Burnett v. Chetwood* (b), inclined to this opinion; and the late Lord Justice Knight Bruce, when Vice-Chancellor, remarked in

Every fair translation an original work.

(a) 4 Burr. 2348.

(b) 2 Mer. 441.

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the well-known case of *Prince Albert v. Strange* (a), that a work lawfully published, in the popular sense of the term, stood in this respect differently from a work which has never been in that situation. The former was liable to be translated, abridged, analyzed, exhibited in morsels, complimented, and otherwise treated in a manner that the latter was not.

The Queen may now direct that the authors of books published after a specified day in any foreign country, their executors, administrators, or assigns, shall have the power (subject to the provisions of the 15 & 16 Vict. c. 12) to prevent the publication in the British dominions of any translations of such books as are not authorized by them, for a period (to be specified by her Majesty) not exceeding five years from the first publication of an authorized translation; and in the case of books published in parts, for a period not exceeding, as to each part, five years from the first publication of an authorized translation of that part (b).

No copyright
in a libellous,
immoral, or
obscene work.

Copyright cannot exist in a work of libellous, immoral, obscene, or irreligious tendency (c); because in order to establish such a claim the author must, in the first place, show a right to sell; and this he cannot possibly do, he himself not being able to acquire a property therein. *Nemo plus juris ad alium transferre potest quam ipse haberet* (d).

Not to protect such works, it has been argued, is to increase the circulation by allowing the publication of pirated editions; but it is an open question whether the circulation is not more effectually restrained by holding that there can be no property in such a work, than by protecting it; for the inducement to the publisher will

(a) 2 De G. & Sm. 693.

(b) 15 & 16 Vict. c. 12, s. 2.

(c) *Stockdale v. Onychyn*, 5 B. & C. 173; 7 D. & R. 625; *Hime v. Dale*, 2 Camp. 28; *Walcot v. Walker*, 7 Ves. 1; *Poplett v. Stockdale*, 1 R. & M. 337; *Gee v. Pritchard*, 2 Swans. 413; *Southey v. Sherwood*, 2 Mer. 435; *Murray v. Benbow*, 1 Jac. 474; *Lawrence v. Smith*, *ibid.* 471; *Forbes v. Johnes*, 4 Esp. 97; *Gale v. Leekie*, 2 Stark. N. P. C. 107.

(d) Ulpian: *Nemo potest plus juris ad alium transferre quam ipse habet*: Co. Lit. 309; Wing. 56.

be less if other persons may copy and publish *ad infinitum*. CAP. II.

In answer to the remark, that by refusing to interfere in cases where the work is of an evil tendency, the court virtually promotes, in some instances, the multiplication of mischievous productions, it must be borne in mind, that a court of equity professes to decide only upon questions of property, concerning itself merely with the civil interests of the parties, and disclaiming interference to prevent or to punish injuries of a criminal nature; and it therefore leaves the offending person to be dealt with at law (a). And adopting such a course is not merely to act in conformity with its own general principles, but also with the constitution of the country; for, to assist a person who has exerted himself to the prejudice of national or of individual welfare, by deciding upon questions of a criminal character, the court would be assuming a power of adjudication in instances which, according to our notions of political freedom, ought not to be determined without the intervention of a jury. And it is also observable, that although interposition is refused in cases of this kind, except upon the plaintiff's right receiving the sanction of a court of law, the court of equity does not thereby bereave the party applying of any redress which he might otherwise obtain, or of the means of seeking it, but merely withholds that extraordinary relief which is adapted to other cases (b).

The first case establishing the doctrine that there could not be property in a work of the above description, is that known as Dr. Priestley's. The plaintiff brought an action against the hundred to recover damages for injury sustained by him in consequence of the riotous proceedings of a mob at Birmingham, and, among other property alleged to have been destroyed, claimed compensation for the loss of certain unpublished manuscripts, offering to produce booksellers as witnesses to prove that they would have given

(a) *Vide* 7 Ves. 2; 2 Mer. 438; 2 Swans. 413; 1 Jac. 473.

(b) Jer. Eq. Jur. Bk. 3 Ch. 2.

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considerable sums for them. On behalf of the hundred it was alleged that the plaintiff was in the habit of publishing works injurious to the government of the State; but no evidence was produced to that effect. Upon this the Lord Chief Justice Eyre remarked, that if any such evidence had been produced, he should have held it was fit to be received as against the claim made by the plaintiff. Several passages were read from the work itself in support of the charge as to its tendency.

No copyright
in a work of
an irreligious
tendency.

This dictum was followed in *Walcot (Peter Pindar) v. Walker (a)*, and in *Lawrence v. Smith (b)*. In the latter case it was carried very far. The plaintiff having published a work under the title of 'Lectures on Physiology, Zoology, and the Natural History of Man,' filed a bill to restrain the defendant from selling a pirated edition, and obtained an injunction upon motion made *ex parte*. The defendants then moved to dissolve the injunction, and argued that the nature and general tendency of the work in question was such that it could not be the subject of copyright, and in support of this argument, several passages in it were referred to, which, it was contended, were hostile to natural and revealed religion, and impugned the doctrines of the immateriality and immortality of the soul. Lord Eldon, in dissolving the injunction, said: "I take it for granted that when the motion for the injunction was made, it was opened as quite of course; nothing probably was said as to the general nature of the work, or of any part of it; for we must look not only to the general tenor, but at the different parts; and the question is to be decided, not merely by seeing what is said of materialism, of the immortality of the soul, and of the Scriptures, but, by looking at the different parts, and inquiring whether there be any which deny, or which appear to deny, the truth of Scripture; or which raise a fair question for a court of law to determine whether they do or do not deny. Looking at the general

(a) 7 Ves. 1. See *Stockdale v. Onihwyn*, 5 B. & C. 173; *Poplett v. Stockdale*, Ry. & Mood. 337.

(b) 1 Jac. 471.

tenor of the work, and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the Scripture, considering that the law does not give protection to those who contradict Scriptures, and entertaining a doubt, I think a rational doubt, whether this book does not violate the law, I cannot continue the injunction. 'The plaintiff' may bring an action, and when that is decided, he may apply again." From a note by the editor, we learn that in 1822, in *Murray v. Benbow*, Mr. Shadwell, on the part of the plaintiff, moved for an injunction to restrain the defendants from publishing a pirated edition of Lord Byron's poem of 'Cain.' The Lord Chancellor, after reading the work, refused the motion, on grounds similar to those stated in the above judgment. He said "that the Court of Chancery, like other courts of justice in this country, acknowledged Christianity as part of the law of the land; that the jurisdiction of the court in protecting literary property was founded on this: that, where an action would lie for pirating a work, then the court, attending to the imperfection of that remedy, granted its injunction, because there might be publication after publication, which one might never be able to hunt down by proceeding in other courts. But where such an action did not lie, he did not apprehend that it was according to the course of the court to grant an injunction to protect the copyright. That the publication, if it were one intended to vilify and bring into discredit that portion of Scripture history to which it related, was a publication with reference to which, if the principles on which that case at Warwick (Dr. Priestley's) was decided were just principles of law, the party could not recover damages in respect of a piracy of it. That the court had no criminal jurisdiction; it could not look on anything as an offence; but in those cases it only administered justice for the protection of the civil rights of those who possessed them, in consequence of being able to maintain an action. Milton's immortal work had been alluded to; it so happened that in the course of the previous long vacation, amongst the

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solicitæ jucunda oblivia vitæ, he had read that work from beginning to end; it was therefore quite fresh in his memory, and it appeared to him that the great object of its author was to promote the cause of Christianity; there were, undoubtedly, a great many passages in it of which, if that were not its object, it would be very improper by law to vindicate the publication; but, taking it altogether, it was clear that the object and effect were not to bring into disrepute, but to promote, the reverence of our religion. That the real question was, looking at the work before him, its preface, the poem, its manner of treating the subject, particularly with reference to the Fall and the Atonement, whether its intent was as innocent as that of the other with which it had been compared; or whether it was to traduce and bring into discredit that part of sacred history. This question he had no right to try, because it had been settled, after great difference of opinion among the learned, that it was for a jury to determine that point; and where, therefore, a reasonable doubt was entertained as to the character of the work (and it was impossible for him to say he had not a doubt, he hoped it was a reasonable one), another course should be taken for determining what was its true nature and character" (a).

In a case which came before the Vice-Chancellor in 1823, an injunction which had been obtained to restrain the publication of a pirated edition of a portion of the poem of 'Don Juan' was dissolved on a similar principle. His Honour ordered that the defendant should keep an account.

In the case of *Hime v. Dale*, referred to in *Clementi v. Goulding* (b), counsel called attention to the libellous nature of the publication, and contended that it was of such a description that it could not receive the protection of the law. It professed to be a panegyric upon money, but was in reality a gross and nefarious libel upon the solemn administration of British justice. The mischievous

(a) *Murray v. Benbow*, in Ch. 1822, MS., cited 6 Peters. Abr. 558.

(b) 2 Camp. 30.

tendency of the production would sufficiently appear from CAP. II.
the following stanza:—

“The world is inclined
To think *Justice* blind,—
Yet, what of all that?
She will blink like a bat
At the sight of friend Abraham Newland!
Oh! Abraham Newland! magical Abraham Newland!
'Tho' Justice, 'tis known,
Can see thro' a milestone,
She can't see through Abraham Newland.”

Lord Ellenborough, however, stated that though if the composition had appeared on the face of it to be a libel so gross as to affect the public morals, he should advise the jury to give no damages, as he knew the Court of Chancery on such an occasion would grant no injunction, yet he thought the above ought not to be considered one of that kind.

Neither can there be copyright in works intended to deceive purchasers, and therefore, in an action for pirating a work of a devotional character, falsely professing to be a translation from the German, of an author who had a high reputation for writings of this kind, the object being to deceive purchasers, and give the work a value which it would not otherwise have possessed, judgment was given for the defendants. Chief Justice Tindal, in the case referred to (a), drew a distinction between such a work and books of instruction or amusement which have been published as translations, whilst they have, in fact, been original works, or which have been published under an assumed instead of a true name. Such, for instance, as ‘The Castle of Otranto,’ professing to be translated from the Italian, and such the case of innumerable works published under assumed names—voyages, travels, biographies, works of fiction or romance, and even works of science and instruction; for, in all these instances the misrepresentation is innocent and harmless. But the facts stated in the pleas in the case under consideration imported a serious design on the part of the plaintiff to

No copyright
in works
intended to
deceive the
public.

(a) *Wright v. Tallis*, 1 C. B. 893; 14 L. J. (C.P.) 283; 9 Jur. 946.

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impose on the credulity of each purchaser, by fixing on the name of an author who had a real existence, and who possessed a large share of weight and estimation in the opinion of the public. The object of the plaintiff was, not merely to conceal the name of the genuine author, and to publish opinions to the world under an innocent disguise, but it was to practise upon some of the best feelings of the public, namely, their religious feelings; and thus to induce them to believe that the work was the original work of the author whom he named, when he knew it not to be so. The transaction, therefore, ranged itself under the head of *crimen falsi*. It was a species of obtaining money under false pretences; and as the very act of publishing the work, and the sale of the copies to each individual purchaser, were each liable to the objection above stated, the chief justice thought the plaintiff could not be considered as having a valid and subsisting copyright in the work, the sale of which produced such consequences, or that he was capable of maintaining an action in respect of its infringement. Cases in which a copyright has been held not to subsist, where the work is one which is subversive of good order, morality, or religion, did not bear, he thought, on the case before him, but they had so far analogy, that the rule which denied the existence of copyright in those cases, was the rule established for the benefit and protection of the public.

So decided on
the ground of
fraud.

This decision proceeded more on the ground of fraud than invasion of literary property, and to the principle of this decision may also be referred the case of *Seeley v. Fisher* (a), where an injunction was granted to restrain A. from putting forth his work under advertisements which the court below thought tended to produce the impression, contrary to the truth, that it contained matter which was in fact the property of B. But if there be no such fraudulent misrepresentation, but only statements which, whether true or false, tend merely to encourage a belief that the matter contained in A.'s work is the truly valuable matter,

(a) 11 Sim. 581.

and that contained in B.'s is spurious and of no value, an injunction will not be granted to restrain such representations; and on the ground that such was the true effect of the advertisements, in the last cited case, the Lord Chancellor dissolved the injunction.

There can be no copyright in a catalogue, consisting of a mere dry list of names, but where a bookseller's catalogue contained a description of the books offered for sale, with short anecdotes relating to them, protection was afforded (a). No copyright in a dry catalogue of names.

(a) *Hollen v. Arthur*, 1 Hem. & Mil. 603; 32 L. J. (Ch.) 771; 11 W. R. 231; 9 L. T. (N.S.) 199.

CHAPTER III.

TERM OF COPYRIGHT, AND IN WHOM VESTED.

Term of copy-
right.

MANY have agitated for the establishment of a perpetual copyright, together with a bestowal upon authors of the exclusive power of abridging, dramatizing, and metamorphosing their own works at will, turning prose into poetry, romances into plays, and *vice versâ*. The claim of authors resulting from the principles of natural right involves the perpetual duration of the property. But in order that such property should be of value, it is necessary that society should interfere actively for its protection. It may either interfere by the enactment of penalties, which, in order to be effectual, must be severe; or it may interfere by prohibition, which is a stern and summary exercise of power. Society will not ordinarily be willing to apply such remedies in favour of an exclusive right, further than it finds such a course beneficial to its own interests, in the broadest sense of the term. It is argued, however, that the concessionary allowance of a perpetuity in copyright would encourage publication, and tend greatly to the promotion and furtherance of science and literature. But, admitting that learning and science should be encouraged, that everything tending or conducive to the advancement of knowledge, and consequently to the happiness of the community, should be favoured and tenderly cherished by the legislature, and that the labour of every individual should be properly recompensed, it does not follow that the same or a similar end might not be obtained by different and less objectionable means.

If the individual is a gainer by the existence of perpetual copyright, society is a loser. The absurdity of the asser-

tion that authors are alone inclined to make known their works from the specific benefit arising from an absolute perpetual monopoly, is manifest. What a studied indignity to those who have devoted their lives to the advancement of every science that adorns the annals of literature! Ambition cannot be deemed a cipher; benevolence will ever exist in the heart of man, and they at least act as powerfully by way of conducing to the communication of knowledge between man and man, as avaricious or mercenary motives.

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Considerations
respecting a
perpetuity in
copyright.

A perpetuity in copyright would have the effect of impeding the progress of literature and science, and among other serious inconveniences we will mention one. The text of an author, after two or three generations, if the property be retained so long by his descendants, would belong to so many claimants, that endless disputes would arise as to the right to publish, which in all probability might prevent the publication altogether. The Emperor Napoleon is reported to have stated this objection in council with his characteristic practical wisdom as follows:—

The effect of
a perpetuity in
copyright.

“Napoléon dit que la perpétuité de la propriété dans les familles des auteurs aurait des inconvénients. Une propriété littéraire est une propriété incorporelle qui, se trouvant dans la suite des temps et par le cours des successions divisée entre une multitude d’individus, finirait, en quelque sorte, par ne plus exister pour personne; car, comment un grand nombre de propriétaires, souvent éloignés les uns des autres, et qui, après quelques générations, se connaissent à peine, pourraient-ils s’entendre et contribuer pour réimprimer l’ouvrage de leur auteur commun? Cependant, s’ils n’y parviennent pas, et qu’eux seuls aient le droit de la publier, les meilleurs livres disparaîtront insensiblement de la circulation.

The Emperor
Napoleon’s
opinion of a
perpetuity.

“Il y aurait un autre inconvénient non moins grave. Le progrès des lumières serait arrêté, puis qu’il ne serait plus permis ni de commenter, ni d’annoter les ouvrages; les gloses, les notes, les commentaires ne pourraient être séparés d’un texte qu’on n’aurait pas la liberté d’imprimer.

“D’ailleurs, un ouvrage a produit à l’auteur et à ses

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héritiers tout le bénéfice qu'ils peuvent naturellement en attendre, lorsque le premier a eu le droit exclusif de le vendre pendant tout sa vie, et les autres pendant les dix ans qui suivent sa mort. Cependant, si l'on veut favoriser davantage encore la veuve et les héritiers, qu'on porte leur propriété à vingt ans" (a).

Though we could not, therefore, uphold a perpetual copyright, believing that its existence would by no means tend to the spread or encouragement of literature, we would willingly offer our support to the extension of the period during which literary copyright is at present protected.

Present term
of copyright.

The third section of the 5 & 6 Vict. c. 45 enacts that the copyright in every book which shall after the passing of that Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns; provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns.

In whom
vested.

The only persons who can claim the copyright in a book published before the 1st of July, 1842, are the proprietor on that day of the copyright therein, or his assigns; and in the case of a book since published, the author or his assigns. And as the word "author" is used without limitation or restriction, it is therefore equally applicable to foreigners as to British subjects (b).

Meaning of
the word
"book."

The term "book" by virtue of the interpretation clause is to be construed to signify and include every volume,

(a) Loaré, *Législation civile de la France*, tit. ix. pp. 17-19; Renouard, *Droits d'Auteurs*, tom. i. p. 387.

(b) *Koutledge v. Low*, Law Rep. 3 H. L. 100; 37 L. J. (Ch.) 451; 18 L. T. (N.S.) 874; 16 W. R. 1081.

part or division of a volume (a), pamphlet, sheet of letter-press (b), sheet of music, map, chart, or plan separately published. But a separate article, advertised to form part of a periodical publication, is not a book within the meaning of this Act, and therefore does not require registration under the 24th section (c).

The copyright is, we have seen, to run from the date of the publication of the work, consequently it will be necessary to inquire what, in the eye of the law, may be regarded as equivalent to publication. In *Coleman v. Wathen* (d), it was said that the acting of a dramatic composition on the stage was not a publication within the statute. The plaintiff, it appears, had purchased from O'Keefe the copyright of an entertainment called the 'Agreeable Surprise,' and the defendant represented this piece upon the stage. The mere act of repeating such a performance from memory was held to be no publication. On the other hand, to take down from the mouths of the actors the words of a dramatic composition, which the author had occasionally suffered to be performed, but never printed or published, and to publish it from the notes so taken down, was deemed a breach of right; and the publication of the copy so taken down was restrained by injunction (e).

By the 20th section of the Copyright Act, 1842, it is declared, that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent to the first publication of any book (f).

The gratuitous circulation would seem to amount to a publication (g).

(a) See the *University of Cambridge v. Bryer*, 16 East, 317; *The British Museum v. Payne*, 2 Y. & J. 166; *Clayton v. Stone*, 2 Paine (Amer.) 383; *Scoville v. Toland*, 6 West, L. J. (Amer.) 84. But a label used in the sale of an article is not a book. *Coffeen v. Brunton*, 4 McLean (Amer.) 517.

(b) See *Clementi v. Goulding*, 2 Camp. 25; 11 East, 244; *Hime v. Dale*, 2 Camp. 27 a; *White v. Geroch*, 2 B. & Ald. 298.

(c) *Murray v. Maxwell*, 3 L. T. (N.S.) Ch. 466.

(d) 5 T. R. 245; see *Roberts v. Myers*, 13 Mo. Law Rep. (Amer.) 397; *Croze v. Aiken*, Amer. Law Rep. L. Jour. vol. 5, No. 226. 1870.

(e) *Macklin v. Richardson*, Amb. 694, cited 2 Kent's Com. 378.

(f) Post, p. 149; App. xxxi.

(g) Vide *Novello v. Ludlow*, 12 C. B. 177; 16 Jur. 689; 21 L. J. (C.P.) 169; *Dr. Paley's Case*, cited 2 V. & B. 23; *Alexander v. Mackenzie*, 9 Sess. Cas. 2nd series, 748.

What is a
publication.

Gratuitous
circulation a
publication.

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Work must be first published in this country, or simultaneously with that in another.

The previous publication of a work abroad disqualifies it for copyright in this country (a). If, however, the publication here and abroad be simultaneous, the publication abroad will not stand in the way of copyright in this country (b). The legislature contemplates publication *here and here only*, and it contemplates such publication only when made by the author, or under such consent and authority from him as the statute requires; and it contemplates publication of foreign books only when they are capable of advancing literature here, that is to say, before the work is published here by a person who has obtained it fairly and *bonâ fide* under a previous publication by the author in a foreign country (c).

An Englishman resident abroad may have a copyright.

A residence abroad by an English subject, or the fact of the work having been composed abroad, either by an Englishman or a foreigner, would not have the effect of preventing the author from acquiring a copyright in this country. The reason assigned for the copyright attaching to an English subject, though resident abroad, is that by such residence he does not throw off his natural allegiance; he cannot be relieved from it, and therefore carries with him the natural rights of a subject of England wherever he goes. That gives him, though resident abroad, the right of publishing and acquiring a copyright here, because he has always fulfilled the implied condition of being a subject of, and owing allegiance to, the crown of Great Britain. This of course could not be said of a foreigner, who was not actually resident here (d).

Copyright no existence in the law of nations.

Copyright has no existence in the law of nations; it acquires a power simply by the municipal law of each particular community. "As soon," observes Mr. Curtis (e), "as a copy of a book is landed in any foreign country, all

(a) See *Clementi v. Walker*, 2 B. & C. 861; *Guichard v. Mori*, 9 L. J. (Ch.) 227; *Hedderwich v. Griffin*, 3 Sess. Cas., 2nd series, 383.

(b) Phillips on Copy. 52, citing Erle, J., in *Cocks v. Purday*, 2 Car. & Kirw. 269.

(c) Per Bayley, J., *Clementi v. Walker*, *supra*; *Chappell v. Purday*, 4 Y. & C. 485; 14 M. & W. 303; *Guichard v. Mori*, *supra*.

(d) Per Lord St. Leonards in *Jefferys v. Boosey*, 1 H. L. C. 985.

(e) 'Copyright,' 22.

complaint of its republication is, in the absence of a treaty, fruitless, because no means of redress exist, except under the law of the author's own country. It becomes public property, not because the justice of the case is changed by the passage across the sea or a boundary, but because there are no means of enforcing the private right."

In *D'Almaine v. Boosey* (a) the two principal questions that arose were, whether the law would protect the assignee of foreign copyright at all, and whether any protection could exist where the work had been first published abroad. Alluding to *Delondre v. Shaw*, Lord Abinger said, "If the Vice-Chancellor had decided expressly that a foreigner, *quâ* foreigner, had no protection in England in regard to copyright, I confess I should have doubted the correctness of that decision; though, certainly, I should not have decided in opposition to him, but should have put this case to the course of further investigation, out of respect to his authority. But the case which has been cited upon the subject does not go that length; it is in principle not quite intelligible; but there was clear ground for an injunction independently of the question of copyright. Besides, that was a case where one of the parties resided abroad. Now, the Acts give no protection to foreigners resident abroad in respect of works published abroad; and all the Vice-Chancellor said was, that the publisher of a work at Paris could not protect himself in a court of justice in England, either by action or injunction."

Whether a foreigner resident abroad can obtain a copyright in a work first published in this country.

Again, in *Bentley v. Foster* (b), Vice-Chancellor Shadwell said, that if an alien friend wrote a book, whether abroad or in this country, and gave the British public the advantage of his industry and knowledge by first publishing the work here, he was entitled to the protection of the laws relating to copyright in this country.

The question was fully discussed in *Bach v. Longman* (c).

(a) 1 Y. & C. 288.

(b) 10 Sim. 329; see also *Page v. Townsend*, 5 Sim. 395; *Tonson v. Collins*, 1 W. Bl. 301; *Bach v. Longman*, 2 Cowp. 623; *contra*, *Chappell v. Purday*, 14 M. & W. 303.

(c) 2 Cowp. 623.

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Bach was a musical composer, who had come into this country from Germany. He sued Longman for pirating a sonata, which the latter had published in England, and he was successful in his suit. In accordance with these decisions, in the year 1845 Chief Baron Pollock, in delivering the judgment of the Barons of the Exchequer in *Chappell v. Purday*, stated the result of the cases at that time decided on the subject to be that if a foreign author, not having published abroad, first publishes in England, he may have the benefit of the statutes; and on the authority of these cases, and the general rule that an alien may acquire personal rights and maintain personal actions in respect of injuries to them (a), it was determined in *Cock v. Purday*, that an alien any resident abroad, the author of a work of which he is also the first publisher in *England*, and which he has not made *publici juris* by a previous publication elsewhere, has a copyright in that work, whether it be composed in this country or abroad. This determination was supported in *Boosey v. Davidson* (b), and subsequently considered by the Court of Exchequer in *Boosey v. Purday* (c), when that court held that a foreigner had no such capacity.

Case of
Jefferys v.
Boosey.

In this unsettled state of the law arose the case of *Jefferys v. Boosey*, which was ultimately carried on appeal to the House of Lords.

Bellini, a foreign musical composer, resident at that time in his own country, composed a certain work, in which, by the laws there in force, he had a copyright. He then assigned to Ricordi, another foreigner also resident there, according to the laws of their country, his right to the copyright in the composition of which he was the author, and which was then unpublished. The assignee brought the composition to this country, and, before publication, assigned it, according to the forms required by the laws of this country, to an Englishman. The first

(a) See *Pisani v. Lawson*, 8 Scott, 182; 6 Bing. (N.S.) 90; 8 Dowl. 57; *Tuerloote v. Morrison*, 1 Bulst. 134; Yelv. 198; Dyer. 2 b.

(b) 18 L. J. (Q.B.) 174; 13 Q. B. 257.

(c) 4 Ex. 145.

publication took place in this country. The work was subsequently pirated, and proceedings instituted which ultimately reached the Upper House. The judges were called upon for their opinions, which they delivered *seriatim*, and judgment was finally pronounced by the House in favour of the defendant. The grounds of the decision were that an Act of Parliament of this country, having within its view a municipal operation only, and being therefore limited to this kingdom, cannot be held to extend beyond our own subjects, except as both statutes and common law so provide for foreigners when they become resident here, and owe at least a temporary allegiance to the sovereign, and thereby acquire rights just as other persons do; not because they are foreigners, but because being here, they are here entitled, in so far as they do not break in upon certain rules, to the general benefit of the law for the protection of their property, in the same way as if they were natural-born subjects. "Where an exclusive privilege," said Lord Cranworth (a), "is given to a particular class at the expense of the rest of Her Majesty's subjects, the object of giving that privilege must be taken to have been a national object; and the privileged class to be confined to a portion of that community, for the general advantage of which the enactment is made. When I say that the Legislature must *primâ facie* be taken to legislate only for its own subjects, I must be taken to include under the word 'subjects,' all persons who are within the Queen's dominions, and who thus owe to her a temporary allegiance. I do not doubt but that a foreigner resident here, and composing and publishing a book here, is an author within the meaning of the statute; he is within its words and spirit. I go further; I think that if a foreigner having composed, but not having published a work abroad, were to come to this country, and the week or day after his arrival, were to print and publish

(a) *Jefferys v. Boosey*, 4 H. L. C. 815; 1 Jur. (N. S.) 615; *Low v. Routledge*, 10 Jur. (N. S.) 922; 10 L. T. (N. S.) 838; 11 Jur. (N. S.) 939; *Routledge v. Low*, Law Rep. 3 H. L. 100; 37 L. J. (Ch.) 454; 18 L. T. (N. S.) 874.

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it here, he would be within the protection of the statute. This would be so if he had composed the work after his arrival in this country, and I do not think any question can be raised as to when and where he composed it. So long as a literary work remains unpublished at all, it has no existence, except in the mind of its author, or in the papers in which he, for his own convenience, may have embodied it. Copyright, defined to mean the exclusive right of multiplying copies, commences at the instant of publication; and if the author is at that time in England, and while here he first prints and publishes his work, he is, I apprehend, an author within the meaning of the statute, even though he should have come here solely with a view to the publication. The law does not require or permit any investigation on a subject which would obviously, for the most part, baffle all inquiry, namely, how far the actual composition of the work itself had, in the mind of its author, taken place here or abroad. If he comes here with his ideas already reduced into form in his own mind, still, if he first publishes after his arrival in this country, he must be treated as an author in this country. If publication, which is (so to say) the overt act establishing authorship, takes place here, the author is then a British subject, wherever he may, in fact, have composed his work. But if at the time when copyright commences by publication, the foreign author is not in this country, he is not, in my opinion, a person whose interests the statute meant to protect."

Such portion of a work as is first published in this country will be protected.

If only a portion of a work be first published in this country, or within the scope of the British Copyright Act, it will be protected. A., a citizen of the United States, published a work of which he was the author, in monthly parts, between January and December, 1867, of a magazine published in the United States. In October, 1867, A. went to reside in Canada for the purpose of acquiring a British copyright, and during such residence, when the work wanted six chapters for completion in the magazine, an edition of the whole was published in London under an

agreement between A. and the plaintiff, an English publisher. A cheap reprint taken from the pages of the 'American Magazine,' having been subsequently published in this country by the defendant, it was held that the copyright was divisible and could be claimed for a portion of the book only; and, accordingly, the publication by the defendant of the last six chapters of the work was restrained by injunction (a).

In the late case of *Routledge v. Low* (b), two of the greatest law lords on the Bench—Lord Cairns and Lord Westbury—were of opinion that the Act of Parliament gives a copyright to every author who first publishes his book in England, no matter where he lives, or under what dynasty he serves. "Protection," said the former learned judge, "is given to every author who publishes in the United Kingdom, wheresoever that author may be resident, or of whatever state he may be the subject. The intention of the Act is to obtain a benefit for the people of this country by the publication to them of works of learning, of utility, of amusement. The benefit is obtained, in the opinion of the legislature, by offering a certain amount of protection to the author, thereby inducing him to publish his work here. This is, or may be, a benefit to the author, but it is a benefit given, not for the sake of the author of the work, but for the sake of those to whom the work is communicated. The aim of the legislature is to increase the common stock of the literature of the country; and if that stock can be increased by the publication for the first time here of a new and valuable work, composed by an alien, who never has been in the country, I see nothing in the wording of the Act which prevents, nothing in the policy of the Act which should prevent, and everything in the professed object of the Act, and in its wide and general provisions, which should entitle such a person to the pro-

Lord Cairns' and Lord Westbury's opinions on the interpretation of the Copyright Act.

(a) *Low v. Ward*, Law Rep. 6 Eq. 415; 37 L. J. (Ch.) 841; but see *Routledge v. Low*, 37 L. J. (Ch.) 454; 18 L. T. (N.S.) 874; Law Rep. 3 H. L. 100.

(b) Law Rep. 3 H. L. 100; 37 L. J. (Ch.) 454; 18 L. T. (N.S.) 874.

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tection of the Act, in return and compensation for the addition he has made to the literature of the country. I am glad to be able to entertain no doubt that a construction of the Act so consistent with a wise and liberal policy is the proper construction to be placed upon it." To this view, however, Lord Cranworth objected, and Lord Chelmsford doubted whether it was good in law.

In this same case it was unanimously held by Lords Cairns, Chelmsford, Cranworth, Westbury, and Colonsay, that to acquire a copyright under the 5 & 6 Vict. c. 45 the works must be first published in the *United Kingdom*. The law now, therefore, is, that if a literary or musical work be first published in the *United Kingdom*, it may be protected from infringement in any part of the *British dominions*; but if, on the other hand, any such work be first published in India, Canada, Jamaica, or any other British possession, not included in the *United Kingdom*, no copyright can be acquired in that work, excepting only such (if any) as the local laws of the colony, &c., where it is first published, may afford.

CHAPTER IV.

REGISTRATION OF COPYRIGHT.

A BOOK OF REGISTRY is kept by the Company of Stationers, and the object of the entries therein is clearly shewn by the 2nd section of the Statute of Anne. The entry is deemed equivalent to notice of the existence of the copyright in the particular book or article registered. Unless such entry had been provided, many, through ignorance, would have offended (a). By the Statute of Anne it was enacted that no person should be subjected to the forfeitures or penalties therein mentioned in cases of infringement of copyright, unless the title to the copy of such book should, before publication, be entered in the register book of the Stationers' Company (b).

The Book of Registry.

The Statute of Anne was, however, repealed and incorporated in that of the 5 & 6 Vict. c. 45, the 11th section of which provides that a book of registry, wherein may be registered the proprietorship in the copyright of books, and assignments thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such copyright, shall be kept at the hall of the Stationers' Company by the officer appointed by the said company for the purposes of the Act, which shall at all convenient times be open to inspection on payment of 1s. for every entry which shall be searched for or inspected in the same book; and that such officer shall, wherever reasonably required, give a copy of any entry, certified

(a) Sect. 2 of the 8 Anne, c. 19.

(b) *Ibid.*, and see Malins, V.C. in *Cox v. The Land and Water Co.*, 18 W. R. 206.

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under his hand, and impressed with the stamp of the said company, to any person requiring the same on payment to him of the sum of 5s.; and such copies shall be received in evidence in all courts, and in all summary proceedings, and shall be *primâ facie* proof of the proprietorship or assignment of copyright or licence as therein expressed, but subject to be rebutted by other evidence, and in the case of dramatic or musical pieces shall be *primâ facie* proof of the right of representation or performance, subject to be rebutted as aforesaid; and that making a false entry in the book of registry, or wilfully producing or causing to be tendered in evidence any paper falsely purporting to be a copy of any entry in the said book, shall be deemed an indictable misdemeanour, and punished accordingly. It provides, further, that it shall be lawful for the proprietor of the copyright in any book to make entry in the said registry book of the title of such book, the time of the first publication, the name and place of abode of the publisher, and the name and place of abode of the proprietor, in a form given in the schedule annexed to the Act, upon payment of 5s. to the officers of the said company; and that it shall be lawful for every such registered proprietor to assign his interest or any portion of his interest therein, by making entry in the said book of registry of such assignment, and of the name and place of abode of the assignees thereof, in the manner, and for the sum aforesaid. And such assignment shall have the same force and effect as if made by deed, without being subject to any stamp duty.

Entry must be correct to support action for penalties.

A proprietor of copyright in a book, registered his book by making an entry, purporting to be pursuant to this Act, but in such entry the exact date of first publication was not stated, the day of the month being omitted, and the month and year only inserted. He filed a bill to restrain a party from infringing the copyright in respect of which such entry had been made. But the court held, that the suit could not be maintained, as the entry was defective; there being no entry of the date of first publication as re-

quired by the statute, unless, in addition to the month and year, the day of the month is also stated.

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L. & Sons registered a cricketing scoring-sheet, dating it 1851, and, dissolving partnership, again registered it in L.'s own name, dating it 1863. P. having published the same thing, L. threatened an action. P. continued to publish, and, on L. becoming bankrupt, purchased it of the assignees for £20. W., who had bid £10, purchased the sheet of P. for some time, but ultimately printed and published the left-hand half, containing the totals of runs, but not an analysis of bowling, which was on the right-hand half. On a bill filed to restrain the alleged infringement of the copyright, it was determined that the second registration was fatal, not showing the real first date of publication (a).

First date of publication must be stated.

In *Lover v. Davidson* (b) the plaintiff, who was residing at New York at the time the entry was made, gave the address of his English publishers in the entry under the above provision, and Cresswell, J., was of opinion that Mr. Lover, the plaintiff, having at that time no other place of abode in England, had very properly described himself as of a place where he might be communicated with.

As to the place of residence.

The provision with reference to the place of abode of the assignee would seem not to apply to the case of an assignee to whom the proprietorship has been assigned, not according to the statutory mode, but by an independent method. As soon as the copyright is established in the original proprietor, there is nothing to prevent him from assigning by any other method, although the statute provides one more convenient and less expensive than the ordinary mode of assurance by deed. If the statute is resorted to, the terms of it must be complied with. Unfortunately, there is a discrepancy between the enactment in the 13th section, and the schedule No. 5, to which that section expressly refers. The section requires that there shall be an entry "of such assignment, and of the name

As to the abode of the assignee.

(a) *Page v. Wisden*, 20 L. T. (N.S.) 435.

(b) 1 C. B. (N.S.) 182.

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and place of abode of the assignee thereof, in the form given in that behalf in the said schedule," but when we turn to the schedule there is no reference to the place of abode of the assignee. In *Wood v. Boosey* (a) the question arose, whether section 24 (which enacts that no proprietor of copyright shall maintain an action for infringement of it, unless he shall have caused an entry to be made in the book of registry pursuant to the Act) applies to an assignee. Cockburn, C.J., without directly deciding the point, said: "I observe a distinction in the earlier sections between the term 'proprietor,' (as applied to the person by whom the work is originally published and in whom the property vested), and any person who takes by assignment from him; and there is no provision in the statute which gives the assignee a right to have his name inserted in the book of registry as the new proprietor. The only case in which the change of the name of the proprietor is to be made, is where the statutory form of assignment is resorted to, and even in that case it is only the assignor who can insist on the change being made in the book of registry. Taking all this into account, it seems to me that to hold that section 24 applies to an assignee, who has no power under the statute, either through this court or by any other means, to enforce registration of himself as 'proprietor,' would work considerable injustice."

Expunging or
varying entry.

By the 14th section it is provided, 'That if any person shall deem himself aggrieved by any entry made under colour of this Act in the said book of registry, it shall be lawful for such person to apply by motion to the courts of law in term time, or to apply by summons to any judge of such courts in vacation, for an order that such entry may be expunged or varied; and that, upon any such application by motion or summons, the court or judge, as the case may be, shall make such order for expunging, varying, or confirming such entry, either with or without costs, and the officer appointed by the Stationers' Company for the purposes of this Act shall, on the production to him of

(a) 7 B. & S. 869, 897.

any such order for expunging or varying any such entry, expunge or vary the same according to the requisitions of such order.

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It seems that the court will not exercise its power under the above section to expunge any entry of proprietorship of copyright in the register book; unless it be clearly and unequivocally shewn that it is false; or vary it, unless satisfied by affidavit that in so doing it would make a true entry (a). And in one case (b), the court would not expunge the entry, but ordered an issue to be tried to determine the question of copyright, on the trial of which the entry was not to be used, and stayed proceedings in the action in the mean time.

But the entry must be clearly shewn to be false.

No copyright is acquired under 5 & 6 Vict. c. 45, by the registration of a book before its actual publication (c); and registration under the 24th section is only necessary in order to secure the copyright in books under the 3rd section, and not that of periodicals under the 18th section (d).

No copyright acquired by registration before publication.

It is not necessary to register a newspaper. The Act which provided a special registry for them was repealed but lately by the 32 & 33 Vict. c. 24. It must not be inferred from this that there is no copyright in newspapers, for they are obviously covered by the phrase "periodical works" in the 18th section, and the proprietor would therefore have a copyright under that section in all compositions for which he had paid (e). He would also, by

A newspaper need not be registered.

(a) *Ex parte Davidson* (1856), 18 C. B. 297; S. C. 25 L. J. (C.P.) 237; 2 Jur. (N.S.) 1024.

(b) *Ex parte Davidson* (1853), 2 E. & B. 577. "Persons aggrieved" are those whose title conflicts with that of the person registered: *Chappell v. Purday*, 12 M. & W. 303. But a person convicted of infringing the copyright in certain paintings and photographs of the registered proprietor, and who sets up no title in himself or adduces no evidence to rebut the *prima facie* evidence of proprietorship afforded by the book of registry, is not a person "aggrieved" within the meaning of the above section: *Re Walker v. Graves*, 20 L. T. (N.S.) 877.

(c) *Correspondent Newspaper Co. v. Saunders*, 11 Jur. (N.S.) 540; 13 W. R. 804.

(d) *Cox v. The Land and Water Co.*, 18 W. R. 206; *Browne v. Cooke*, 11 Jur. 77; *Sweet v. Benning*, 3 W. R. 519; 16 C. B. 459; S. C. 24 L. J. (C.P.) 175; *Mayhew v. Maxwell*, 9 W. R. 118; 1 J. & H. 312.

(e) *Strahan v. Graham*, 15 W. R. 487; see *Prowell v. Mortimer*, 4 W. R. 519.

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Registration
a condition
precedent to
the title to sue
under 5 & 6
Vict. c. 45.

general law, have a right to prohibit others from appropriating the fruits of his own labour (a).

The law, as it existed previous to the 5 & 6 Vict., did not require registration as a condition precedent to the title to sue. The neglect to register did not affect the copyright (b), it merely prevented the recovery of the penalties inflicted by the Acts in existence, until such entry had been made.

Subsequent to the Act, however, although the author has copyright in his work still unregistered (c), yet he cannot sue, either at law or in equity, to protect himself against infringement, unless he has duly registered in accordance with the Act (d). For, by the 24th section, it is declared that no proprietor of copyright in any book which shall be first published after the passing of this Act shall maintain any action or suit at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made in the book of registry of the Stationers' Company of such book, pursuant to this Act. It is worthy of note, that a different system is adopted in regard to fine arts copyright, the Act of 1862 not permitting actions or proceedings to be taken in respect to anything done before the registration is effected under section 4. This appears a fairer principle. If the process of registration is to be considered as useful as an authentic notice of the copyright, it would seem that it ought in all conscience to be effected at a date prior to that on which the infringement of the right takes place in order to operate on it, for, otherwise, the infringer cannot reasonably be affected by notice, when such notice is wholly subsequent to the commission of the act for which he is

(a) *Per Malins, V.C., in Cox v. The Land and Water Co.*, 18 W. R. 207.

(b) *Tonson v. Clifton*, 1 Wm. Bl. 330; *The University of Cambridge v. Blyer*, 16 East, 317; *Beckford v. Hood*, 7 T. R. 620.

(c) See *Chappell v. Davidson*, 25 L. J. (C.P.) 225; 18 C. B. 194.

(d) *Murray v. Bogue*, 1 Drew. 353; 17 Jur. 219; 22 L. J. (Ch.) 457. This applies only to books first published after the Act; it does not affect any book published prior.

called upon to make amends, by the legal process issued out against him.

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Where the first edition of a work of compilation was published before the 5 & 6 Vict. c. 45, and several editions were published after the Act but were not registered, it was held that, as to so much of the matter contained in the original as was contained in the subsequent editions, the proprietor of the copyright might sue, although such subsequent editions were not registered; but as to the new matter the subsequent editions were books which ought to have been registered, and the owner could not sue for infringement on that point (a).

A copy of every book (b), published since the 5 & 6 Vict. c. 45, together with all maps, prints, or other engravings belonging thereto, finished and coloured in the same manner as the best copies of the same shall be published, and also of any subsequent edition, whether the first edition of such book shall have been published before or after the passing of the Act, and also of any second or subsequent edition of every book of which the first or some preceding edition shall not have been delivered for the use of the British Museum, bound, sewed, or stitched together, and upon the best paper on which the same shall be printed, shall, within one calendar month after the day on which such book shall first be published within the bills of mortality, or within three months if the same shall first be published in any other part of the United Kingdom, or within twelve months after the same shall first be published in any other part of the British dominions, be delivered, on behalf of the publisher thereof, at the British Museum.

Copy of every book to be delivered to the British Museum.

Copies are likewise to be delivered for the benefit of the Bodleian Library at Oxford, the Public Library at Cambridge, the Faculty of Advocates at Edinburgh, and Trinity College, Dublin, on demand at the place of abode of the publishers thereof, at any time within a month after

Copies for the use of university libraries.

(a) *Murray v. Bogue, supra.*

(b) *Routledge v. Low*, Law Rep. 3 H. L. 100; 37 L. J. (Ch.) 454.

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demand, during the period of twelve months from the publication thereof.

Distinction between a delivery to the British Museum and the other libraries.

According to these provisions, the main distinctions between a presentation to the British Museum, and a presentation to any of the other four libraries, are these: first, that the delivery to the Museum is to be made without demand on the part of that institution; whereas delivery to one of the other libraries need not be made at all, unless there be a written demand within twelve months after publication; and secondly, that the copy presented to the Museum must be one from the best copies of the work, while that for any of the other libraries need be only a copy from the set the most numerous. Thus, if a publisher produce a superior and an inferior edition at the same time (as in cases of quarto and octavo editions, so frequent in illustrated works), he must give a copy of the more valuable impression to the Museum; whereas he need only make presentations to the other libraries from the set of lesser cost, provided that set exceed the other by even a single copy (*a*).

Penalty for default:

The 10th section of the same statute enacts, that if the publisher of a book, or of a second or subsequent edition of a book, neglect to deliver a copy of it pursuant to this Act, he shall for every default forfeit, besides the value of the copy he ought to have delivered, a sum not exceeding £5, to be recovered by the librarian or other authorized officer of the library for whose use the copy should have been delivered; either summarily, on conviction before two magistrates for the county or place where the publisher making default resides, or by action of debt or similar proceeding at the suit of such librarian or other officer in any court of record in the United Kingdom, in which action, if the plaintiff obtain a verdict, he shall recover his costs reasonably incurred, or taxed as between attorney and client (*b*).

The first enactment extant, encouraging the establish-

(*a*) Burke's Sup. to Godson's Pat. and Copy. p. 97.

(*b*) *Ibid.*

ment of libraries for the use of the learned bodies, is in the reign of Charles II., when two copies of every work were ordered to be delivered by the publisher for the two English universities, and one copy for the king's library, 13 & 14 Car. 2, c. 33, s. 17, continued by 16 Car. 2, c. 18; 17 Car. 2, c. 4; 1 Jac. 2, c. 17, s. 15, &c., but expired in 1679. The clauses of the 17 Car. 2, appear to be perpetual, as far as they relate to the three copies, although it seems it was not so considered, from their not being adverted to in the statute of Anne. The first foundation for the claim by any public library of a gratuitous delivery of new publications is in a deed of 1610, by which the Company of Stationers in London, at Sir Thomas Bodley's request, engaged to deliver a copy of every book printed by the company, and not before printed, to the University of Oxford. The next provision is to be found in 8 Anne, which extended the number of copies demandable to nine, viz., one for the royal library, two for the Universities of Oxford and Cambridge, four for the libraries of the four Scotch Universities, the library of Sion College in London, and the library of the Faculty of Advocates in Edinburgh. This provision was afterwards enforced in 1775 (15 Geo. 3, c. 53, s. 6), by an express enactment that no person should be subject to the penalties of those Acts for pirating books, unless the whole title to the copyright of the book was entered at Stationers' Hall, and the nine copies delivered there for the use of the libraries. Two additional copies were given to Trinity College and the society of King's Inn in Dublin by 41 Geo. 3. The 54 Geo. 3, c. 156, s. 1, repealed so much of the 8 Anne, c. 19, s. 5, and the 41 Geo. 3, c. 107, s. 6, as required that any copy or copies of every book printed should be delivered to the warehouse-keeper of the Stationers' Company for the use of the libraries mentioned, or by him for their use, or which imposes any penalty on such printer or warehouse-keeper for not delivering the copies; and provided that eleven copies should be delivered for the use of the British Museum, Sion College, the Bodleian Library at

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Delivery of copies to the various libraries—origin of claim.

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(*a*) In the United States, the law establishing the Smithsonian Institute (Act of Congress, August, 1846, c. 178), directs, without any penalty, that a copy of every book, of which the copyright shall be secured, shall be sent to the library of that institution. Repealed by s. 6 of the Act of 1859, c. 22.

CHAPTER V.

ASSIGNMENT OF COPYRIGHT.

COPYRIGHT is personal property, and may be assigned. Copyright
It must, however, be in existence to be assigned at personal
law (a). property.

It is a local right only, embracing Great Britain and A local right.
Ireland, the islands of Jersey and Guernsey, the British
dominions in the East and West Indies, and the colonies,
settlements, and possessions of the British Crown, acquired
on or since the 1st day of July, 1842, or which hereafter
may be acquired (b).

It may be the subject of a bequest, and on the death of Its distinctive
the person to whom it belongs, without any such bequest, features.
will devolve on his personal representatives (c). An exe-
cution purchaser, however, does not acquire the rights of
an assignee of the article sold in execution. Thus a seizure
and sale on execution of the engraved plate of a map, for
which the debtor has obtained a copyright, does not transfer
the copyright to the purchaser; and the debtor is entitled,
without reimbursing to the purchaser the money paid by
the latter on such sale, to an injunction, to restrain the
purchaser from striking off and selling copies of the
map (d). The assignees under a commission of bank-

(a) *Sweet v. Shaw*, 8 L. J. (N.S.) Ch. 216; 3 Jur. 217; *Colburn v. Duncombe*, 9 Sim. 151.

(b) 5 & 6 Vict. c. 45, s. 3, cited Phillips on Copy. 55.

(c) See *Thompson v. Stanhope*, Amb. 737; *Burnett v. Chetwood*, 2 Mer. 441, n. As to the right of executors to publish, see *Dodsley v. M^r Farquhar*, Mor. Dict. of Dec. 19 & 20 App. pt. 1, p. 1; and as to their right to receive the payment of the stipulated price of a portion of a work, although the author died before completing the other portion, see *Constable and Co. v. Robinson's Trustees*, 1 June, 1808; Mor. Dict. of Dec. No. 5, App., Mut. Contract.

(d) 2 Hilliard on 'Torts,' 58, n.; *Stephens v. Cady*, 14 How. 528; *Stephens v. Gladding*, 17 How. 447.

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ruptcy are not entitled to the manuscripts of an author, although the copyright of a book which has been printed and published will legally pass for the benefit of the creditors (a), and the price paid by the bookseller is as completely open to the diligence of creditors as the price of any other commodity or piece of merchandize. The reason assigned for this distinction is, that the author's right of withholding the publication continues till the very moment his book is actually given out to the public. Even the printer of the book would not be entitled to sell it for his payment, although there is not the smallest doubt that he has a complete lien over it, till delivery, to prevent the author or his creditors from taking advantage of the publication, till he shall have been paid (b).

An assign-
ment not to be
presumed.

A transfer of the right will not be presumed, unless the intention is manifest; such, for instance, as the acceptance of a receipt in writing for the price paid for the copyright (c); and evidence that the plaintiff, in an action for printing a musical work, acquiesced in the defendant's publication of it for six years, did not raise the presumption that the plaintiff had transferred his interest in the copyright. But where a copyright was not asserted for *fifteen years*, the Court of Chancery refused an injunction, until the right should be established at law; the Lord Chancellor saying: "I admit this to be the subject of copyright; but the plaintiff has permitted several people to publish these dances, some of them for fifteen years; thus encouraging others to do so. That, it is true, is *not a justification*; but under these circumstances a court of equity will not interfere in the first instance. If, as is represented, some of them were published only last year, and one two months ago, the bill ought to have been confined to those. You may bring your action, and then apply for an injunction" (d).

(a) *Longman v. Tripp*, 2 Bos. & Pull. New. 67; see 4 Burr. 2311; Amb. 695; *Stevens v. Cady*, 14 How. (Amer.) 528; *Stevens v. Gladding*, 17 How. (Amer.) 447; *Cooper v. Gunn*, 4 B. Mon. (Amer.) 594, 596; see *Atcherley v. Vernon*, 10 Mod. 518. (b) 1 Bell's Com. 68; cited Kerr on Inj. 186.

(c) Otherwise held previous to 5 & 6 Vict. c. 45; see *Latour v. Bland*, 2 Stark, 382.

(d) *Platt v. Button*, 19 Ves. 447; Coop. Ch. Cas. 303.

An assign-
ment under
the Statute of
Anne.

An assignment of the copyright of a work, under the Statute of Anne, must have been in *writing*, and attested by two witnesses, in order to entitle the assignee to maintain an action for pirating it (a). True, this was not expressly demanded, but the statute required that there should be two witnesses to a consent to a publication, and it was naturally inferred that an assignment, which was of a higher nature than a mere consent, must have at least the same solemnity (b). The 41 Geo. 3, c. 107, required the consent to be in writing, and to be signed in the presence of two or more credible witnesses. The 54 Geo. 3, c. 156, reciting the former enactments, generally extended the copyright, and spoke of the consent in writing, but said nothing about the two witnesses. Opinions differed upon this subject. It was contended by some that as it was only by implication from two witnesses being required to the consent it was held that two witnesses were required to an assignment, therefore, when the latter Act, the 54 Geo. 3, c. 156, no longer required two witnesses to a consent, the reason failed for requiring, by implication, two witnesses to an assignment. Lord St. Leonards, however, was of opinion that it was properly decided that the assignment ought to be attested by two witnesses; that, he said, was decided upon the Act of Anne as it stood originally and as it was originally construed. "If, by a later Act," said he, "you take away that which was, no doubt, the ground of the decision, viz., the necessity for two witnesses to a consent, does it follow, that you therefore repeal that which was the proper construction of the law applicable to the higher instrument, viz., that the assignment also required two witnesses? It would rather seem, after such a tenor of determination, after the law

(a) *Power v. Walker*, 4 Camp. 8; S. C. 3 M. & S. 7; *Morris v. Kelly*, 1 Jac. & W. 481; *Clementi v. Walker*, 2 B. & C. 861; *Davidson v. Bohn*, 6 C. B. 456; 12 Jur. 922; 18 L. J. (C.P.) 14; *Leader v. Purday*, 7 C. B. 4; *Jefferys v. Boosey*, 4 H. L. C. 815; *Cumberland v. Copeland*, 31 L. J. (Exch.) 19, *post*, p. 80.

(b) Lord Ellenborough, in *Power v. Walker*, *supra*; as to the distinction between a licence to publish and an assignment, see 27 L. J. (Ch.) 254, and the principle on which was decided the late case of *Lacy v. Toole*, 15 L. T. (N.S.) 512.

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had been so settled, that the legislature, by being silent with regard to the assignment, meant that to remain, although it alters the law with respect to the consent." "The Act of Anne and the Act of the 54 Geo. 3 may well stand together; the latter one does not repeal the former expressly, and there is no reason why it should do so by intendment; and with respect to the assignment, the Act of Anne, being referred to generally by the 54 Geo. 3, must be considered to be referred to as bearing the construction put upon it by the authorities."

This opinion was followed in *Cumberland v. Copeland* (a), which was a claim for copyright under the 3 & 4 Will. 4, c. 15, it being held by the majority of the Court of Exchequer that an assignment of copyright made previous to the statute 5 & 6 Vict. c. 45, must be attested by two witnesses.

Assignment under the 5 & 6 Vict. c. 45.

Under the 5 & 6 Vict. c. 45, s. 13, the proprietor of a copyright in a composition, if he desire to sell and transfer his right, must make an entry in the register of the Stationers' Company of such work, the time of the first publication thereof, and the name and place of abode of the publisher and proprietor of the copyright; and every such registered proprietor may assign his interest, or any portion thereof, by making an entry in the register of the assignment and of the name and place of abode of the assignee (b); and the assignment so entered is expressly exempted from stamp duty, and is of the same force and effect as if it had been made by deed (c).

No partial assignment of copyright.

There cannot be a partial assignment of copyright (d). Copyright is one and indivisible; it is a right which may be transferred, but cannot be divided. Nothing could be more absurd or inconvenient than that this abstract right

(a) 31 L. J. (Ex.) 19.

(b) *Ante*, p. 69.

(c) The proposition that an assignment in writing, since the 5 & 6 Vict. c. 45, need not be attested (4 H. L. C. 855, 881, 891, 931, 943), has been ably disputed in the 8th volume of the *Jurist* (N.S.) pt. ii. p. 148. And see *Power v. Walker*, 3 M. & S. S. Lord Ivory, in *Jeffreys v. Kyle*, 18 Ct. of Sess. 2nd ser. p. 911, and others have thought that both *Power v. Walker*, and *Bohn v. Davidson*, were wrongly decided.

(d) *Quære*, in America. See *Roberts v. Myers*, 13 Mo. Law Rep. 396; *contra*, *Keane v. Wheatley*, 9 Amer. Law Rep. 33.

should be divided, as if it were real property, into lots, and that one lot should be sold to one man, and another lot to a different man. It is impossible to tell what the inconvenience would be. You might have a separate transfer of the right of publication in every country in the kingdom (a). Thus, where Ricordi, the assignee of Bellini, being resident in Milan, assigned the copyright in '*La Sonnambula*' to Boosey for publication in the United Kingdom only, Lord St. Leonards, in passing judgment, observed: "The exercise of the right is confined in that assignment to the United Kingdom. Now, by the 41 Geo. 3, c. 107, copyright is extended to any part of the British dominions in Europe; and by the 54 Geo. 3, c. 156, it was further extended to every other part of the British dominions. It is quite clear, therefore, that if, in this case, there was a copyright under the law of this country, it was a copyright which extended to every part of the British dominions; even considering the right in England, if I may so call it, as being capable of being secured from any foreign right, it would consequently be a partial assignment; and, as a partial assignment, I should venture to recommend your Lordships to decide that it was wholly void, and therefore gave no right at all.

"There is also, let me observe, this particularity: that as the assignment from Ricordi is confined to the United Kingdom, Ricordi himself might, without any breach of his contract, have published this composition in any other part of the British dominions; he might, also, by his Milanese right, have published it the very next day in Milan, without infringing on the right of Boosey under the assignment. The more, therefore, the question is considered, the more, I apprehend, will it appear clear that the assignment in question was void because it was limited to the United Kingdom, and did not extend to the whole of the British dominions."

An assignment made by an assignee of a foreigner, though his title be good by the law of the country in

Assignment
by foreigner.

(a) Lord St. Leonards, in *Jefferys v. Boosey*, 4 H. L. C. 993.

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which the assignment is made, and to which law both assignee and foreigner are subject, yet (being a foreigner), he has not, by the English law, an interest in the copyright, such as he may assign to an Englishman for exclusive publication in England; nor would such an assignment hold good though made according to the law of this country.

This point was determined in *Jefferys v. Boosey*, to which we have already referred. Bellini, a foreigner, while living at Milan composed a musical work, in which, by the laws there in force, he had a certain copyright. In February, 1831, he there, by an instrument in writing valid by the law of Milan, assigned the copyright to S. Ricordi, who afterwards came to this country, and in June, 1831, by deed under his hand and seal, in the presence of, and attested by, two witnesses, assigned for a valuable consideration the copyright in the composition to Boosey, for publication in the United Kingdom only. Boosey then printed and published the work in this country, and Jefferys, without licence from Boosey, printed and published a portion of it in England. The case was carried eventually into the Upper House, and judgment given by Lords Cranworth, Brougham, and St. Leonards. The last-named learned judge was of opinion that copyright by the law of Milan could have no effect in this country; that the law of Milan, which gave to Bellini this copyright, could of course give him no right in this country. The first question was, how could a right exist in Bellini, as a foreigner, to copyright in this country? He had it by the law of Milan, because he was a native-born subject, or a subject, at all events, by residence, and the law of that country gave it to him; but the moment he stepped out of that country he could have no other right than was involved in the mere possession of the subject-matter in his hands, except so far as the law of any country to which he resorted might give him such a right. Then, in order to obtain copyright here, he must come and perform the conditions annexed to the enjoy-

ment of that right; and he (Lord St. Leonards) held it to be perfectly clear that that condition is, that he must reside in this country. Then, if that were so, as Bellini did not perform the condition, he never had the right to assign, and he could not assign that which never existed. Remaining abroad, he could not have the right, for the common law of this country gave him no such right. Neither did the statute law of this country give him any such right. Therefore, whilst at Milan he had a Milanese copyright; but he had not, and could not acquire, a British copyright; and if he had no right in this country he could assign none. And in this view he was supported by the other learned judges.

This case completely overruled that of *Cocks v. Purday* (a). It had been held that, in the instance in which (by the law of Austria, which prevailed where A., the author of a musical composition, and B., his assignee, were respectively domiciled) A. assigned his right to B., and B., before the publication of the work, sold his copyright to C., an Englishman, there being a sale valid by the law of Austria, the country in which the sale took place, the interest of the author became vested in C. before publication, so as to make him an assignee within the meaning of the 5 & 6 Vict. c. 45, s. 3, and to confer upon him a good derivative title.

Cocks v. Purday overruled.

The absence of an assignment in writing must be specially pleaded at law (b), unless, of course, admitted by the other side (c).

It has lately been determined that, in the absence of a special contract to the contrary, the assignor of a copyright is entitled, after the assignment, to continue selling copies of the work printed by him before the assignment and remaining in his possession (d).

Right of assignor to sell stock on hand after assignment.

(a) 5 C. B. 860; 12 Jur. 677; 17 L. J. (C.P.) 273; and that of *Boosey v. Davidson*, 13 Q. B. 257; 13 Jur. 678; 18 L. J. (Q.B.) 174; and *Boosey v. Jefferys* (in error), 6 Ex. 580; 15 Jur. 540; 20 L. J. (Ex.) 354; overruled by *Jefferys v. Boosey*, 4 H. L. C. 815; 24 L. J. (Ex.) 81; 1 Jur. (N.S.) 615.

(b) *Barnett v. Glossop*, 1 Bing. N. C. 633; *De Pinna v. Polhill*, 8 C. & P. 78; *Cocks v. Purday*, 5 C. B. 860.

(c) *Moore v. Walker*, 4 Camp. 9, n.

(d) *Taylor v. Pillow*, Law Rep. 7 Eq. 418.

CHAPTER VI.

INFRINGEMENT OF COPYRIGHT.

"O imitatores, servum pecus!"

"Quid nos dura refugimus
Ætas? quid intactum nefasti
Liquimus?"

HORACE.

Infringement
of copyright.

THE question must obviously arise somewhat frequently, what is, and what is not, a piracy. In many cases the line of demarcation is so loosely and indifferently drawn, that arrival at a just conclusion is a matter of difficulty. So entirely must each case be governed and regulated by the particular circumstances attending it, that any general rules on the subject must be received with extreme caution. Regard must be had to the value of the work, and the value of the extent of the infringements; for while, on the one hand, the policy of the law allows a man to profit by all antecedent literature, yet, on the other, the use made of such antecedent literature may not be so extensive as to injure the sale of the original work, even though made with no intention to invade the previous author's right (*a*); for the copyright having been violated, the penalty must be paid (*b*).

The result, in such cases, is the true test of the act. Full acknowledgment of the original, and the absence of any dishonest intention, will not excuse the appropriator

(*a*) *Roworth v. Wilkes*, 1 Camp. 94; *Emerson v. Davies*, 3 Story (Amer.) 768; *Campbell v. Scott*, 11 Sim. 31; *Clement v. Maddick*, 1 Giff. (Ch.) 98; 5 Jur. (N.S.) 592; *vide Kindersley, V.C.*, in *Murray v. Bogue*, 1 Drew. 358; *Wood, V.C.*, in *Reade v. Lacy*, 1 J. & H. 524; and *Story, J.*, in *Folsom v. Marsh*, 2 Story (Amer.) 115; see *Gambart v. Sumner*, 5 H. & N. 5.

(*b*) *Millett v. Snowden*, 1 West. L. J. (Amer.) 240; *Parker v. Hulme*, 7 *ibid.* 426; *Webb v. Powers*, 2 Wood & M. (Amer.) 497.

when the effect of his appropriation is, of necessity, to injure and supersede the sale of the original work; for a man must be presumed to intend all that the publication of his work effects (a).

Plagiarism does not necessarily amount to an invasion of copyright, and the author of a published book has no monopoly in the theories and speculations, or even in the results of observations therein contained; but no one, whether with or without acknowledgment, can be permitted to take a material and substantial portion of the published work of another author, for the purpose of making or improving a rival publication (b).

Plagiarism not necessarily an invasion of copyright.

La Bruyère declares that we are come into the world too late to produce anything new, that nature and life are preoccupied, and that description and sentiment have been long exhausted. However this may be, it is apparent that some similarities, and a use, to a certain extent, of prior works, even to the copying of small parts, must be tolerated in the case of such works as dictionaries, gazetteers, grammars, maps, arithmetics, almanacs, concordances, encyclopædias, itineraries, guide books, and similar productions, if the main design and execution are in reality novel and improved, and not a mere cover for important piracies (c).

Want of originality in modern works.

All definitions of the same thing must be nearly the same, and descriptions, which are definitions of a more lax and fanciful kind, must always have in some degree that resemblance to each other which they all have to their object. Consequently, in compiling such works, the materials, to a considerable extent, must be nearly identical, and the prior compiler cannot monopolize what was not original with himself, nor a subsequent compiler

(a) Wood, V.C., in *Scott v. Stanford*, Law Rep. 3 Eq. 723; *Reade v. Lacy*, 9 W. R. 531; 7 Jur. (N.S.) 463; 30 L. J. (Ch.) 655; *Millett v. Snowden*, 1 West. L. J. (Amer.) 240; *Nichols v. Ruggles*, 3 Day (*ibid.*) 158; *Story v. Holcombe*, 4 McLean (*ibid.*) 306; McLean, J., Ohio, 1847.

(b) *Pike v. Nicholas*, 38 L. J. (Ch.) 529; 20 L. T. (N.S.) 906; reversed, Law Rep. 5 Ch. 251, but not in opposition to the principle above laid down.

(c) *Webb v. Powers*, 2 Wood & M. (Amer.) 497-512; *vide* 2 Hilliards on 'Torts,' 49.

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employ a prior arrangement and materials to such an extent as to be a substantial invasion of the anterior compilation.

Encyclopædias may not outstrip the limits of fair quotation.

Thus, where it appeared that 75 out of 118 pages of a work on fencing had been transcribed into an encyclopædia, the court held that a piracy had been committed; for though it is true that an encyclopædia may be allowed to embrace all the information contained in the newest works on the subject, yet definite limits must be set to its extracts. The same rule holds in respect of works under review; the reviewer may fairly make extracts, and may comment on those portions, but it would be unfair if he were allowed to exhibit the substance of the work he chose to review. Sufficient may be taken to form a correct idea of the whole, but no one is allowed to review in such a manner as to make the review serve as a substitute for the work reviewed (*a*).

The latter, to be a piracy, need not serve as a substitute for the former work.

And yet to be a piracy it is not necessary that the latter work should be a substitute for the original composition. It can seldom be the criterion. Vice-Chancellor Shadwell, on one occasion, put the case in a simple aspect: "We all know that there has been a very valuable Greek lexicon published by Mr. Liddell and another friend of his at Oxford; no person who published this lexicon, omitting three or four words at the end of each letter of the alphabet, could have done a work of which it could be said, that it might be taken as a substitute, for nobody would take it as a substitute. But can it be doubted that it might have a very material effect in diminishing the price of the first book? For, though nobody would take it as a substitute, many people might not care about so much, and might take it cheaply for what it really did contain, which might be more than ninety-nine hundredths of the whole, and yet it would in no manner be a substitute; and, therefore, the language is not generally correct, so as to be capable of application to every case."

(*a*) 1 Camp. 97; 4 Esp. 168; 17 Ves. 422; Eden on Injunc. 281; see *Murray v. M'Fargilhar*, June 25, 1785, Mor. Dic. of Dec. 8309.

Where a work entitled 'A Practical Treatise on the Law Relative to the Sale and Conveyance of Real Property, &c.,' contained piratical extracts from an earlier standard work, which was entitled 'A Practical Treatise on the Law of Vendors and Purchasers of Estates,' the Vice-Chancellor Shadwell observed, "In cases of this nature, if the pirated matter is not considerable, that is, where the passages, which are neither numerous nor long, have been taken from different parts of the original work, this court will not interfere to restrain the publication of the work complained of, but will leave the plaintiff to seek his remedy at law. But in this case it is plain that the passages which have been pointed out have been taken from the plaintiff's book, and they are so considerable, both in number and length, as to make it right that this court should interfere (a)."

The inquiry in most cases, is not, whether the defendant has used the thoughts, conceptions, information, and discoveries promulgated by the original, but whether his composition may be considered a *new work*, requiring invention, learning, and judgment, or only a mere transcript of the whole or parts of the original, with mere colourable variations (b).

Principles by which a piracy is judged.

In *Scott v. Stanford* (c), the plaintiff had published statistical returns of all coal imported into London, and the defendant, in giving the universal statistics of the United Kingdom, had copied from the plaintiff's work to the extent of one-third of the whole of the defendant's work, at the same time acknowledging the source from which his information was derived. Vice-Chancellor Wood decided, that having regard to the quantity and matter of the information which had been taken and republished without the exercise of any independent thought and labour, and the prejudice to the plaintiff in

(a) *Sweet v. Cater*, 11 Sim. 580. See *Kelly v. Hooper*, 4 Jur. 21.

(b) *Storce v. Thomas*, 2 Wall. C. Ct. (Amer.) 547; S.C. 2 Amer. L. Reg. 231.

(c) Law Rep. 3 Eq. 718; *Morris v. Ashbee*, 19 L. T. (N.S.) 550; Law Rep. 7 Eq. 34. *Mawman v. Tegg*, 2 Russ. 398; *Jarrold v. Houlston*, 3 K. & J. 703; *Cox v. The Land and Water Co.*, 18 W. R. 205.

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having the sale of his work superseded by this republication, the plaintiff was entitled to an injunction. If the defendant, after collecting the information for himself, had checked his results by the plaintiff's tables, that would have been a widely different thing from the wholesale extraction of the vital part of his work. But no man is entitled to avail himself of the previous labours of another for the purpose of conveying to the public the same information, although he may append additional information to that already published. This is consonant to the law as laid down in *Kelly v. Morris* (a), which was in the following terms: In the case of a dictionary, map, guide-book, or directory, where there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In the case of a road-book, he must count the milestones for himself, . . . and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained.

From these observations it is not to be inferred that in compiling a directory the compiler may not look into the previous directory of another for the purpose of ascertaining where a particular person lives, and for the purpose of ascertaining from that book whether or not it is worth his while to call upon that person (b); they imply no further than that he may not take a passage from the directory, and go and see whether it happens to be accurate, and if it be accurate, bodily copy it into his directory.

This latter is precisely what was done in *Morris v. Ashbee* (c). The defendant copied the plaintiff's book, and then sent out canvassers to see if the information so copied was correct. If the canvasser did not find the occupier of the house at home, or could get no answer

(a) Law Rep. 1 Eq. 697. (b) *Morris v. Wright*, 22 L. T. (N.S.) 78.

(c) 19 L. T. (N.S.) 550; Law Rep. 7 Eq. 34.

from him, then the information copied from the plaintiff's book was repeated bodily, as if it were a question for the occupier of the house merely, and not for the compiler of the previous directory. The copying was as direct in the case of *Kelly v. Morris*, to which we have already referred. Not only were the slips for the purpose of canvassing copied, but the course pursued really was, that when a slip was presented to the person who was canvassed, and his permission received for the insertion of the particular entry, the slip was forthwith copied into the book. "Now it is plain," observed Lord Justice Giffard, "that it could not be lawful for the defendants simply to cut the slips, which they have cut from the plaintiff's directory, and insert them in theirs. Can it then be lawful to do so, because, in addition to doing this, they sent persons with the slips to ascertain their correctness? I say, clearly not. . . . In *Pike v. Nicholas* (a) we had this: 'Two rival books were published with reference to the same subject matter, and we thought certainly that the defendant had been guided by the plaintiff's book, more or less, to the authorities which the plaintiff had cited; but it was a perfectly legitimate course for the defendant to refer to the plaintiff's book, and if he did, taking that book as his guide himself, go to the original authorities, and compile his book from the original authorities, he made no unfair or improper use of the plaintiff's book.'

The question as to how far advantage may be reaped from the work of another, and what use may be legitimately made of it, is difficult of solution. Perhaps the strongest case in favour of the adoption by a subsequent compiler of the work of a preceding one, is that of *Cary v. Kearsley* (b), where Lord Ellenborough thought that the former might fairly adopt part of the work of the latter, and might so make use of his labours for the promotion of science and the benefit of the public; but having done so, he was of opinion that the question would be, was the matter so taken used fairly with that view, and with-

(a) 38 L. L. Ch. 529

(b) 4 Esp. 168.

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out what he might term the *animus furandi*? For while he considered himself bound to secure every man in the enjoyment of his copyright, he was fearful of putting manacles upon science.

In *Jarrold v. Houlston* (a), the publishers of Dr. Brewer's 'Guide to Science' obtained an injunction against the publication of the 'Reason Why.' The judge said: "The question I really have to try is, whether the use that in this case has been made of the plaintiff's book has gone beyond a fair use. Now, for trying that question, several tests have been laid down. One, which was originally expressed, I think, by a common law judge, and was adopted by Lord Langdale in *Lewis v. Fullarton*, is, whether you find on the part of the defendant an *animus furandi*—an intention to take for the purpose of saving himself labour. I take the illegitimate use as opposed to the legitimate use of another man's works on subject matters of this description to be this: if, knowing that a person whose work is protected by copyright has, with considerable labour, 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 a 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 labour of your predecessor, adopt his arrangements, adopt, moreover, the very questions he has asked, or adopt them with but a slight degree of colourable variation, and thus save yourself pains and labour by availing yourself of the pains and labour which he has employed, that I take to be an illegitimate use."

A compiler must produce an original result.

The rule appears now to be settled, that the compiler of a work in which absolute originality is of necessity excluded, is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction

(a) 3 K. & J. 708; 3 Jur. (N.S.) 1051.

as to produce an original result, provided that he does not deny the use made of such preceding works, and the alterations are not merely colourable (a).

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For an example, take the case of a dictionary. There may be a certain degree of skill exhibited as to order and arrangement, and there may be a good deal of ingenuity exhibited in the selection of phrases and illustrations, which are the best exponents of the sense in which the word is to be used; and there may also be great labour in the logical deduction and arrangement of the word in its different senses, when the sense of the word departs from its primary signification; but there cannot be copyright in much of the information contained in the numerous dictionaries published, each necessarily having a large number of words identically similar. The great point to decide in such cases is, as we have already stated, whether in the particular case the work is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work. (b)

The case of a dictionary analyzed.

Lord Hatherley, while Vice-Chancellor, in the case of *Spiers v. Brown* (c), thus summed up the law in his peculiarly lucid style: All cases of copyright were very simple when a work of an entirely original character was concerned, being a work of imagination or invention on the part of the author, or original in respect of its being a work treating of a subject common to mankind, such as history, or other branches of knowledge varying much in their mode of treatment, and in which the hand of the artist would be readily discerned. But the difficulty that arose in cases of the class then before him was, that they not only related to a subject common to all mankind, but that the mode of expression and language was necessarily so common that two persons must, to a very great extent, express themselves in identical terms in conveying the instruction or

The case of *Spiers v. Brown*.

(a) *Spiers v. Brown*, 6 W. R. 352; *Reade v. Lacy*, 1 J. & H. 524.

(b) *Vide Wilkins v. Aiken*, 17 Ves. 422; *Bramwell v. Halcomb*, 3 My. & Cr. 737; *Cornish v. Upton*, 4 L. T. (N.S.) 863.

(c) 6 W. R. 352.

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information to society which they were anxious to communicate. The most obvious case was that of figures, such as the table of logarithms—the case before Sir John Leach—where it would be impossible to deviate in the calculations, or to vary the order, and the result must be identical. The same might be said of directories, calendars, court guides, and works of that description. Those were cases in which the only mode of arriving at the amount of labour bestowed was by the common test resorted to of discovering the copy of errors and misprints, indicating a servile copying. Copyright was considered, for the highest purposes of society in every country, as necessary to be secured to those who contributed to the civilization, refinement, or instruction of mankind, and extended, in this country, if not elsewhere, to every description of work, however humble it might be, even to the mere collection of the abodes of persons, and to streets and places; and labour having been employed upon subjects even of that class, no one had a right to avail himself of it. . . . The real question was, how far the courts had decided that a certain amount of use of preceding works was legitimate in carrying out a second work of a similar description, calculated to afford instruction by means of a dictionary, vocabulary, or the like. In the case of *Cary v. Kearsley* (a), Lord Ellenborough laid down the law in a manner which had not been questioned. He said, “that part of the work of one author found in another is not of itself piracy, or sufficient to support an action. A man may fairly adopt part of the work of another; he may so make use of another’s labour for the promotion of science and the benefit of the public; but, having done so, the question will be, was the matter so taken used fairly with that view, and without what I may term the *animus furandi*? Look through the book, and find any part that is a transcript of the other; if there is none such, if the subject of the book is that which is subject to every man’s observation, such as the names of the places and their

(a) 4 Esp. 168.

distances from each other, the places being the same, the distances being the same, if they are correct, one book must be a transcript of the other; but when in the defendant's book there are additional observations, and in some parts of the book I find corrections of misprintings, while I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles on science." Then there was the case of *Longman v. Winchester* (a), in which Lord Eldon said, "Take the instance of a map describing a particular county, and a map of the same county afterwards published by another person; if the description is accurate in both they must be pretty much the same, but it is clear that the latter publisher cannot, on that account, be justified in sparing himself the labour and expense of actual survey, by copying the map previously published by another. So, as to Paterson's 'Road Book,' it is certainly competent to any other man to publish a book of roads, and if the same skill, intelligence, and diligence are applied in the second instance, the public would receive nearly the same information from both works; but there is no doubt that this court would interpose to prevent a mere republication of a work which the labour and skill of another person had supplied to the world. So, in the instance mentioned by Sir Samuel Romilly, a work consisting of a selection from various authors, two men perhaps might make the same selection, but that must be by resorting to the original authors, not by taking advantage of the selection already made by another." And again: "The question before me is, whether it is not perfectly clear that in a vast proportion of the work of these defendants no other labour has been applied than copying the plaintiff's work. From the identity of the inaccuracies it is impossible to deny that the one was copied from the other *verbatim et literatim*. To the extent, therefore, in which the defendant's publication has been supplied from the other work the injunction must go; but I have said nothing that has a tendency to prevent any person from

(a) 16 Ves. 269.

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giving to the public a work of this kind if it is the fair fruit of original labour, the subject being open to all the world." Another case—which seemed to condense into one point the view taken by the courts in cases where actual use is avowed and the only question is, whether it is a fair use (a),—where Lord Eldon says this: "Upon inspection of the different works, I observe a considerable proportion taken from the plaintiff's that is acknowledged, but also much that is not; and in determining whether the former is within the doctrine upon this subject the case must be considered as also presenting the latter circumstance. The question upon the whole is, whether this is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work." These were the words which had been relied on by Lord Cottenham in *Bramwell v. Halcomb* (b), and it was with the view thus taken by those learned judges that he (the Vice-Chancellor) had gone through a very laborious investigation of the works then in question, there being, as it seemed to him, a considerable portion of the defendant's work which came within the doctrine of its being a legitimate use and a fair exercise of mental operation, and (adding the negative used by Lord Ellenborough) not being done colourably. . . . His Honour said, that the real issue which the court was called on to decide was one of the most difficult ever presented to him, namely, as to how far this very considerable use of the work of another might be taken to be legitimate. There was no concealment of some use having been made; no colourable alteration proved, nor anything tending to show a fraudulent design to make an unfair use of the work of another. The present case went as far as any previous, though not perhaps further than *Mawman v. Tegg* (c), where a very large and considerable portion of the plaintiff's work had been taken without any alteration or addition. Though a good deal had been taken from the plaintiff, yet a good deal of labour had been bestowed upon what had been taken. . . . Upon the whole,

(a) *Wilkins v. Aiken*, 17 Ves. 422.

(b) 3 My. & Cr. 737.

(c) 2 Russ. 385.

he could not think that the defendant had gone beyond what the court would allow, having produced that which in the result was, in fact, a different work from that of the plaintiff.

Copyright may be invaded in several ways:—

1st. By reprinting the whole work *verbatim*.

2nd. By reprinting *verbatim* a part of it.

3rd. By imitating the whole or a part, or by reproducing the whole or a part with colourable alterations.

4th. By reproducing the whole or a part under an abridged form (a).

5th. By reproducing the whole or a part under the form of a translation.

Modes in which copyright may be infringed.

Piracies of the nature of the first division are seldom committed, on account of the ease with which they could be detected and punished.

1. By reprinting the whole *verbatim*.

Piracies of the nature of the second division are far more frequent and more difficult of detection. The quantity of matter subtracted cannot in all cases be a true criterion of the extent of the piracy, for a work may be a piracy upon another, though the passages copied are stated to be quotations, and are not so extensive as to render the piratical work a substitution for the original work.

2. By reprinting *verbatim* a part.

If so much is taken that the value of the original is sensibly diminished, or the labours of the original author are substantially, to an injurious extent, appropriated by another, that is sufficient, in point of law, to constitute a piracy *pro tanto*. The entirety of the copyright is the property of the author; and it is no defence that another person has appropriated a part and not the whole of such property.

Lord Cottenham, in the cases of *Bramwell v. Halcomb* and *Saunders v. Smith*, adverting to this point, said, "When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion

Quantity but slight criterion of piracy.

(a) Curtis on Copy. chap. 9.

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of the book in quantity. It is not only quantity, but value, that is always looked to. It is useless to refer to any particular cases as to quantity." In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases a considerable portion of the materials of the original work may be fused into another work, so as to be distinguishable in the mass of the latter, which has other professed and obvious objects, and cannot fairly be treated as a piracy; or they may be inserted as a sort of distinct and mosaic work into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy. If a person should, under colour of publishing "elegant extracts" of poetry, include all the best pieces at large of a favourite poet, whose volume was secured by copyright, it would be difficult to say why it was not an invasion of that right, since it might constitute the entire value of the volume. The case of *Mawman v. Tegg* is to this purpose. There was no pretence in that case that all the articles of the encyclopædia of the plaintiffs had been copied into that of the defendants; but large portions of the materials of the plaintiffs' work had been copied. Lord Eldon, upon that occasion, held that there might be a piracy of a part of a work, which would entitle the plaintiffs to a full remedy and relief in equity. In prior cases he had affirmed the like doctrine. In *Wilkins v. Aiken*, he said, "There is no doubt that a man cannot, under the pretence of quotation, publish either the whole or a part of another's book, although he may use, what in all cases it is difficult to define, fair quotation."

Reviews or
criticisms.

In a case in which the work alleged to be pirated was a play, extending over forty pages, and the defendant had published a journal of theatrical criticism, in which, as

illustrative of his critical remarks, he had introduced broken and detached fragments of the piece in question, amounting in the whole to six or seven pages, some weight appears to have been allowed by the court to the fact of the extent of the extracts being so inconsiderable, as affording ground for doubt whether the defendant had transgressed the limits of fair quotation (a).

It is manifest, also, from what fell from Lord Chancellor Cottenham in *Saunders v. Smith* (b), that he entertained no doubt (although he did not decide the point) that there might be a violation of the copyright of volumes of reports, by copying *verbatim* a part only of the cases reported. In *Lewis v. Fullarton* (c), Lord Langdale, in the case of a typographical dictionary, held that largely copying from the work, in another book having a similar object, was a violation of that copyright, although the same information might have been (but, in fact, was not) obtained from common sources, open to all persons; and accordingly in that case he granted an injunction as to the parts pirated, notwithstanding the fact that there was much which was original in the new work (d).

3rd. Copyright may be infringed by imitating the whole or a part, or by reproducing the whole or a part with colourable alterations.

3. By imitating the whole or part by reproduction with colourable alterations.

A copy is one thing, an imitation or resemblance another. It is indeed certain, that whoever attempts any common topic will find unexpected coincidences of his thoughts with those of other writers; nor can the nicest judgment always distinguish accidental similitude from artful imitation. "There is likewise," says Dr. Johnson, "a common stock of images, a settled mode of arrangement, and a beaten track of transition, which all authors suppose themselves at liberty to use, and which produce the resemblance generally observable among contemporaries. So that in books which best deserve the name of

Distinction between a copy and an imitation.

(a) *Whittingham v. Wooler*, 2 Swans. 428.

(b) 3 My. & Cr. 711.

(c) 2 Beav. 6.

(d) See *Cox v. The Land and Water Co.*, 18 W. R. 206.

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originals, there is little new beyond the disposition of materials already provided; the same ideas and combinations of ideas have been long in the possession of other hands; and by restoring to every man his own, as the Romans must have returned to their cots from the possession of the world, so the most inventive and fertile genius would reduce his folios to a few pages. Yet the author who imitates his predecessors only by furnishing himself with thoughts and elegances out of the same general magazine of literature, can with little more propriety be reproached as a plagiarist, than the architect can be censured as a mean copier of Angelo or Wren because he digs his marble from the same quarry, squares his stones by the same art, and unites them in columns of the same order."

There are many imitations of Homer in the '*Æneid*;' but no one would say that the one was a copy of the other. So also can similar passages be found in Virgil and Horace:

*"Ha tibi erunt artes—
Parcere subjectis, et debellare superbos."*
VIRGIL.

*"Imperet, bellante prior, jacentem
Lenis in hostem."*
HORACE.

And Cicero observes of Achilles, that had not Homer written, his valour had been without praise: *Nisi Ilias illa extitisset, idem tumulus qui corpus ejus contexerat, nomen ejus obruisset*; while Horace remarks that there were brave men before the wars of Troy, but they were lost in oblivion for the want of a poet:

*"Vixere fortes ante Agamemnona
Multi; sed omnes illacrymabiles
Urgentur, ignotique longâ
Nocte, carent quia vate sacro."*

There may be a strong likeness without an identity. The question is, therefore, in many cases a very delicate one: what degree of imitation constitutes an infringement of the copyright of a particular composition? Certainly

not such a similitude as the instances from the classics given above.

It is very evident that any use of materials, whether they are figures or drawings, or other things which are well known and in common use, is not the subject of a copyright, unless there be some new arrangement thereof. Still, even here, it may not always follow that any person has a right to copy the figures, drawings, or other things, made by another, availing himself solely of his skill and industry, without any resort to such common source. In all cases the question of fact to come to the jury is, whether the alterations be colourable or not. There must be a similitude, so as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript; so with regard to charts, there is no monopoly in that subject; but upon a question of the above nature the jury must decide whether the latter work be a servile imitation of the former or not.

In *Trusler v. Murray* (a) Lord Kenyon put the point in the same light, and said, "The main question here is, whether, in substance, the one work is a copy and imitation of the other; for undoubtedly, in a chronological work (such was the character of the work before the court) the same facts must be related." And Mr. Justice Story, in his elaborate and learned judgment in *Emerson v. Davies* (b), laid it down as the clear result of the authorities in cases of this nature, that the true test of piracy or not, is to ascertain whether the defendant has, in fact, used the plan, arrangements, and illustrations of the plaintiff as the model of his own book, with colourable alterations and variations only to disguise the use thereof; or whether his work is the result of his own labour, skill, and use of common materials and common sources of knowledge, open to all men, and the resemblances are either accidental or arising from the nature of the subject. In other words, whether the defendant's book is. *quoad*

(a) 1 East, 363, note.

(b) 3 Story (Amer.) 768, 793.

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An American court, in speaking of a case in which the defendant had pirated a portion of an arithmetic belonging to the plaintiff, observed that the real question on the point was not whether certain resemblances existed, but whether these resemblances were purely accidental and undesigned, and unborrowed, because arising from common sources accessible to both the authors, and the use of materials equally open to both—whether, in fact, the defendant used the plaintiff's work as his model, and imitated and copied that, and did not draw from such common sources or common materials. Then again, it had been said that, to amount to piracy, the work must be a copy and not an imitation. This, as a general proposition, could not be admitted. It was true the imitation might be very slight and shallow. But, on the other hand, it might be very close, and so close as to be a mere evasion of the copyright, although not an exact and literal copy. "It falls within that class of cases," said Mr. Justice Story, "where the differences between different works are of such a nature, that one is somewhat at a loss to say whether the differences are formal or substantial; whether they indicate a resort to the same common sources to compile and compose them, or one is (as it were) *uno flatu* borrowed from the other, without the employment of any research or skill, with the disguised but still apparent intention to appropriate to one what in truth belongs exclusively to the other, and with no other labour than that of mere transcription, with some omissions or additions as may serve merely to veil the piracy. It is like the case of patented inventions in art or machinery, where the resemblances or diversities between the known and the unknown, and between invention and imitation, are so various or complicated, or minute or shadowy, that it is exceedingly difficult to say what is new or not, or what has been pirated and what is substantially different. The

approaches on either side may be almost infinitely varied, and the identity or diversity sometimes becomes almost evanescent. In many cases, the mere inspection of a work may at once betray the fact that it is borrowed from another author, with merely formal or colourable omissions or alterations. In others, again, we cannot affirm that identity in the appearance or use of the materials is a sufficient and conclusive test of piracy, or that the one has been fraudulently or designedly borrowed from the other. Take the case, for example, of two maps of a city, a county or a country. We cannot predicate that the one is a piracy from the other, simply because their external appearance is in nearly all respects the same, with or without some additions or alterations or omissions. Take the case of two engravings copied from the same picture, or two pictures of natural objects by different artists; it would not be practicable, in many cases, from the mere inspection of them and their apparent identity, to say, that the one was a transcript of the other. It would be necessary to resort to auxiliary and supplementary evidence to establish the fact either way (a)."

"As not every instance of similitude," observes Dr. Johnson, "can be considered as a proof of imitation, so not every imitation ought to be stigmatized as plagiarism. The adoption of a noble sentiment, or the insertion of a borrowed ornament, may sometimes display so much judgment as will almost compensate for invention; and an inferior genius may, without any imputation of servility, pursue the path of the ancients, provided he declines to tread in their footsteps."

4th. Copyright may be infringed by reproducing the whole or a part under an abridged form.

A fair abridgment, when the understanding is employed in retrenching unnecessary circumstances, is not a piracy of the original work. Such an abridgment is allowable, and is regarded in the light of a new work. The law with reference to abridgments might, we think, with justice

(a) *Emerson v. Davies et al.*, 3 Story (Amer.) 768-784.

Not every imitation a proof of plagiarism.

4. By reproduction under an abridged form.

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receive some modification. The decisions on the subject are somewhat inconsistent. The fundamental principle on which is based the protection afforded to authors from piracies, appears to be the injury or damage caused to them by the depreciation in the value of their original works. It seems a very unsatisfactory answer to an original author, who has been injured by an abridgment, to say, that because the wrongful taker has exhibited talent and ingenuity, both in the taking and in the use which he has made of it, the original author has no remedy. "The form," says Mr. Curtis (a) "under which the original matter reappears should be treated as a disguise; and the extent of the transformation shows only the extent to which the disguise has been carried, as long as anything remains, which the original author can show to be justly and exclusively his own."

Now, few abridgments do not affect in some way the original work. By the selection of all the important passages in a comparatively moderate space, the quintessence of a work may be piratically extracted, so as to leave a mere *caput mortuum*. These considerations have been relied upon by the judges in coming to a determination upon the subject, and the proposition, that an abridgment is not a piracy of the original copyright, must be received with many qualifications.

The first case is that of *Dodsley v. Kinnersley* (b), where

(a) 'Copyright,' 272.

(b) Amb. 403. See *Pinnock v. Rose*, 2 Bro. C. C. 85, note. Mr. Curtis, the learned author of an American work on copyright, thus states, in his lucid style, the injustice of the law respecting abridgments: "When the author of a book," says he, "of whatever kind, possessing the legal attributes of originality, has secured his copyright according to the prevailing law of his country, he has secured the exclusive right to print and publish his own book. In the jurisprudence with which we are concerned, this right includes the whole book and every part of it; for we have seen that there may be a piratical taking of extracts and passages, and that the quantity thus taken may be immaterial. It includes also, or may include, the style, or language and expression; the learning, the facts, or the narrative; the sentiment and ideas, as far as their identity can be traced; and the form, arrangement, and combination which the author has given to his materials. These are, or may be, all distinct objects of the right of property; and in every work of originality, likely to be abridged or capable of being abridged, they are all important objects of that right. However imperfectly the subject may have been regarded in

an injunction was applied for, to restrain the publication of an abridgment of Dr. Johnson's 'Rasselas.' It appeared that not one-tenth part of the first volume had been abstracted, and that the injury alleged to have been sustained by the author arose from the abridgment containing the narrative of the tale, and not the moral reflections. The Master of the Rolls, Sir Thomas Clarke, refused the injunction, saying, "I cannot enter into the goodness or badness of the abstract.

former times, it is now, I think, to be regarded as settled, that whatever is metaphysically part or parcel of the intellectual contents of a book, if in a just sense original, is protected and included under the right of property vested by law in the author; and it is very material to observe, that the arrangement, the method, the plan, the course of reasoning, or course of narrative, the exhibition of the subject, or the learning of the book, may be, according to its character, as much objects of the right of property, as the language and the ideas.

"What then does the maker of an abridgment print, publish and sell, after he has made it? He has been employed, according to the definition above quoted, 'in retrenching unnecessary and uninteresting circumstances, which rather deaden the narration;' that is to say, he has rejected what *in his judgment* are redundancies. Does this make him the author or proprietor of what remains? If the work be a history, did he, the person abridging it, compile the materials into their present shape, and describe the course of events, and embody the whole of what constitutes the intellectual contents of the book, or are these things the product of another's labour, research and faculty of writing? If it be a fictitious narrative, whose genius created the characters, and animated them with the sentiments which they utter, and invented the pleasing incidents of their mock existences, and wove the whole into the novel or the poem; which exists as an intellectual whole, after as well as before the process by which 'the unnecessary and uninteresting circumstances' are 'retrenched?' Or, if it be a work of science, or a treatise in any branch of knowledge, whose are the ideas, the course of reasoning and illustration, the plan and analysis of the subject, and the collection and arrangement of materials which constitute the identity of the book? These questions can have but one answer; and if the abridgment, in any given case, consists solely in the reduction of the bulk of the volume by the rejection of redundancies, it is a mere republication of a connected series of extracts, in a different juxtaposition from the original author's, to which the party had no title whatever. On the other hand, if the abridgment not only rejects redundancies, but also clothes the sentiments and ideas which may be left, in different phraseology, then it falls under the predicament of a colourable alteration, which cannot escape the censure of justice." And in a note he takes the above case of Dr. Johnson's 'Rasselas,' and adds, "The moral reflections are left out, the narrative goes into the 'Gentleman's Magazine.' Whose genius produced that stately and immortal fiction? Who described and created the characters of Imlac, and the Princess, and the Prince of Abyssinia, and placed them in the Happy Valley, and sent them forth in a series of gentle trials and pleasing and sad perplexities, in the world beyond its walls? Who wrote that narrative? Not, certainly, the Grub Street hack, who was employed to 'leave out the reflections.' What he took and his employers published, was the literary property of another, the profits of which the law had not vested in them."—Page 273.

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It may serve the end of an advertisement. In general, it tends to the advantage of an author, if the composition be good; if it be not, it cannot be libelled. What I materially rely upon is, that it could not tend to prejudice the plaintiffs, when they had before published an abstract of the work in the 'London Chronicle.' If I were to determine this to be elusory, I must hold every abridgment to be so." Chancellor Kent, in referring to this case, says, "This latitudinarian right of abridgment is liable to abuse, and to trench upon the copyright of the author. The question as to a *bonâ fide* abridgment may turn, not so much upon the quantity as the value of the selected materials" (a).

In *Dickens v. Lee* (b), the plaintiff's work was an imaginative tale; the defendant had taken the fable, the characters, the incidents, the names, and even the style of language. It is to be gathered from the report, that thus using all the plaintiff's materials, he had told the story in a shorter manner, and he relied upon abridgment as his defence; but the court held that such an abridgment was not an exercise of mental labour deserving the character of an original work, and granted an injunction, putting the plaintiff to establish his right at law, if the defendant desired it. In this case, Vice-Chancellor Knight Bruce is reported to have said, that he was not aware that one man had the right to abridge the works of another; on the other hand, he did not mean to say that there might not be an abridgment which might be lawful, which might be protected; but, to say that one man had the right to abridge, and so publish in an abridged form, the work of another, without more, was going much beyond his notion of what the law of this country was.

In the case of *Butterworth v. Robinson* (c), a motion was made upon certificate of the bill, for an injunction to restrain the defendant from selling a work, entitled, 'An

(a) 2 Kent's Com. 382, note; *Gyles v. Wilcox*, 2 Atk. 141. See Campbell's 'Lives of the Chancellors,' vol. v. p. 56; 2 Story, Eq. Jur. s. 939.

(b) 8 Jur. 183.

(c) 5 Ves. 709.

Abridgment of Cases argued and determined in the Courts of Law, &c.,' until answer or further order. A copy of the work was handed to the Lord Chancellor. In support of the motion it was stated, that this work was by no means a fair abridgment; that, except in colourably leaving out some parts of the cases, such as the arguments of counsel, it was a mere copy *verbatim* of several of the reports of cases in the courts of law, and among them of the 'Term Reports,' of which the plaintiff was proprietor; comprising not a few cases only, but all the cases published in that work; the chronological order of the original work being artfully changed to an alphabetical arrangement under heads and titles, to give it the appearance of a new work. In support of the motion, *Bell v. Walker* (a) was cited. The Lord Chancellor said, "I have looked at one or two cases, with which I am pretty well acquainted, and it appears to me an extremely illiberal publication. Take the injunction upon the certificate of the bill filed, to give them an opportunity of stating what they can upon it."

The leading case on the subject of piracy, by way of digest, is that of *Sweet v. Benning* (b), where it was held by a majority of the judges that parties who take *verbatim* portions of reports (as the head-notes), the copyright of which belongs to others, and put them together, merely arranged in a different manner (as in an alphabetical order), so as to form a different work, of which they make any considerable proportion, will be guilty of piracy. The court were divided, and accordingly the judges delivered their judgments *seriatim*. Jervis, C.J., on the question of piracy, said: "The head-notes of the 'Jurist' reports may indeed be considered, perhaps, as in themselves a species of brief and condensed reports, the reporter furnishing in each case two reports, in one of which he gives the facts, the arguments, and the judgments at length, and in the other an abstract of the decision, conveying the principle

(a) 1 Bro. C. C. 451.

(b) 16 C. B. 459; Com. Law. Rep. vol. ii. pt. ii. 1452.

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upon which it is founded, and the pith and substance of the case. The defendants have, for the purposes of their digest, copied *verbatim* the head-notes, the shorter species of reports. But if they were allowed to take the head-note, it is plain that they might equally have taken the report. And if they might take either, they might take both, and might republish the entire of the reports, merely altering their arrangement by putting them in an alphabetical order. The question is, whether, by this arrangement of matter, which is taken *verbatim* from the plaintiffs' periodical, they acquire a right so to use it. I think not. I admit that a digest may be made from a copyright work without piracy upon it, but that is a work in which a man applies his mind to the labour of extracting the principles of the original work, and by his labour, really produces a new work. It is not so where he merely reduces extracts or passages of another man's work to an alphabetical order, which is a work a clerk might accomplish, and requires neither learning nor study, but may be little more than a merely mechanical operation of cutting out and classifying under certain letters of the alphabet. In one of the cases cited the 'Term Reports' were so dealt with, and it was held to be a piracy. I think that case is decisive of the present, and therefore that the plaintiffs are entitled to our judgment."

What use of former musical composition constitutes a piracy.

In *D'Almaine v. Boosey* (a) the question arose as to what imitation or use of a musical composition constituted a piracy. In this case the plaintiffs published, first, the overture to Auber's opera of '*Lestocq*,' and then a number of airs, and all the melodies. It was admitted that the defendant had published portions of the opera containing the melodious parts of it; that he had also published entire airs; and that in one of his waltzes he had introduced seventeen bars in succession, containing the whole of the original air, although he added fifteen other bars which were not to be found in it. It was, nevertheless, contended that this was not a piracy, because the whole of the air

(a) 1 Y. & Col. 288.

had not been taken; and because the latter publication was adapted for dancing only, and that some degree of art was needed for the purpose of so adapting the piece; and, moreover, but a small part of the merit belonged to the original composer. Lord Lyndhurst, then Lord Chief Baron, observed that it was a nice question, what should be deemed such a modification of an original work as should absorb the merit of the original in the new composition. "No doubt," said he, "such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are in their nature original. Their compiler intends to make of them a new use; not that which the author proposed to make. Digests are of great use to practical men, though not so, comparatively speaking, to students. The same may be said of an abridgment of any study; but it must be a *bonâ fide* abridgment, because if it contains many chapters of the original work, or such as made that work most saleable, the maker of the abridgment commits a piracy. Now it will be said that one author may treat the same subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite distinct from that of others who preceded him; but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the author, and which may in such case be the subject of piracy; and you commit a piracy if, by taking, not a single bar, but several, you incorporate in the new work that in which the whole meritorious part of the invention consists.

"I remember, in a case of copyright, at *nisi prius*, a question arising as to how many bars were necessary for the constitution of a subject or phrase. Sir George Smart, who was a witness in the case, said, that a mere bar did not constitute a phrase, though three or four bars might do so. Now it appears to me that if you take from the composition of an author all those bars consecutively which form

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the entire air or melody, without any material alteration, it is a piracy; though, on the other hand, you might take them in a different order, or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is, where the appropriated music, though adapted to a different purpose from that of the original, may still be recognised by the ear. The adding variations makes no difference in the principle."

5. By translation.

5th. Copyright may be infringed by reproducing the whole or part under the form of a translation. Translations are protected in this country, and an unauthorized copy of a translation, though the original be not entitled to copyright here, is a piracy.

Though it does not appear, if the original work be a foreign work, not entitled to protection in this country, and a translation of it be made and published first by A., and a translation be subsequently made and published by B., that this latter would be necessarily a piracy of A.'s translation or an infringement of his right; yet, a re-translation without the consent of the author of the original work is a piracy whenever that original work is entitled to copyright.

In *Murray v. Bogue* (a), a case respecting an alleged infringement of the copyright in a guide book, the Vice-Chancellor put the following case: If Boedeker's were a translation of Murray's into German, and the other defendant had re-translated Boedeker's work into English,

(a) 1 Drew. 353, 368.

even if he did not know that Boedeker's was taken from Murray, the plaintiff's book could not be thus indirectly pirated. CAP. VI.

By the International Copyright Act, translations, entitled under that Act to protection in this country, are prohibited (a).

(a) See *post*, chapter on International Copyright, and App. liv.

CHAPTER VII.

REMEDY AT LAW IN CASES OF INFRINGEMENT OF
COPYRIGHT.

Three remedies for infringement of copyright.

THERE are three remedies in cases of infringement of copyright—an action at law, a suit in equity, and in some instances by summary proceeding before justices of the peace. We propose to deal, in the first place, with the remedy provided by the 5 & 6 Vict. c. 45.

Remedy for piracy by action on the case.

By the 15th section of this Act, it is provided, that if any person in any part of the British dominions shall print or cause to be printed, either for sale or exportation, any book in which there shall be a subsisting copyright, without the consent in writing of the proprietor, or import for sale or hire any such book unlawfully printed from parts beyond the sea, or knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose for sale or hire, or shall have in his possession for sale or hire, any such book without the consent of the proprietor, such offender shall be liable to a special action on the case, at the suit of the proprietor of the copyright, to be brought in any court of record in that part of the British dominions in which the offence shall be committed: Provided always, that in Scotland such offender shall be liable to an action in the Court of Session, there to be brought and prosecuted in the same manner as any other action of damages to the like amount (*a*). No person except the proprietor of the copyright, or some one authorized by him, may import into the United Kingdom,

(*a*) 5 & 6 Vict. c. 45, s. 15; App. xxvii.

or other parts of the British dominions, for sale or hire, any printed book first composed or written, or printed and published, in the United Kingdom, wherein there is copyright, and reprinted in any country or place out of the British dominions; and if any person, not the proprietor or party authorized by him, shall import or bring, or cause to be imported or brought, for sale or hire, any such printed book into the British dominions, or shall knowingly sell, publish, or expose for sale, or let to hire, or have in his possession for sale or hire, any such book, then every such book shall be forfeited and be seized and destroyed by any officer of the customs or excise, and every person so offending shall, on conviction, forfeit the sum of ten pounds, and double the value of every such book so unlawfully imported, sold, published, or exposed for sale, or let to hire; five pounds to the use of such officer of customs or excise, and the remainder of the penalty to the use of the proprietor of the copyright in such book (a).

By the customs laws it is absolutely prohibited to import into the United Kingdom books wherein the copyright shall be subsisting, (first composed, or written, or printed in the United Kingdom, and printed or reprinted in any other country), as to which the proprietor of such copyright or his agent shall have given to the Commissioners of Customs a notice in writing that such copyright subsists, such notice also stating when such copyright will expire.

All copies of any book wherein there may be copyright, and of which entry shall have been made in the registry book, and which shall have been unlawfully printed or imported without the consent of the registered proprietor of such copyright, shall be deemed to be the property of

(a) 5 & 6 Vict. c. 45, s. 17; App. xxix. As to separate penalties upon each separate violation of the Act on the same day, see 12 Geo. 2, c. 36, and *Pouke v. Milliken*, 3 T. R. 509. A publisher of a piratical work will not be liable at law for the infringement, unless guilty knowledge can be brought home to him; such knowledge will not be presumed from the mere fact of his selling piratical works in print: *Leader v. Strange*, 2 Car. & Kir. 1010.

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the proprietor of such copyright; and such proprietor shall, after demand thereof in writing, be entitled to sue for and recover the same, or damages for the detention thereof, in an action of detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover (*a*).

Notice of
objection to
plaintiff's title
to be given.

The 16th section of the Copyright Act, 1842, enacts that in actions for piracy the defendant shall give notice of the objections to the plaintiff's title on which he intends to rely; and if the nature of his defence be that the plaintiff in such action was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person whom he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when and the place where such book was first published; otherwise the defendant in such action shall not, at the trial or hearing of such action, be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein; and at such trial or hearing no other objection shall be allowed to be made on behalf of such defendant than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified in such notice, or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication, with the title, time, and place specified in such notice. (*b*)

In *Leader v. Purday* (*c*) a gentleman named Bellamy

(*a*) 5 & 6 Viet. c. 45, s. 23; App. xxxii. (*b*) App. xxviii. (*c*) 7 C. B. 4.

adapted words to an old air called 'Pestal,' and procured a friend of the name of Horne to write an accompaniment. The defendant, in an action for piracy of the same, gave notice of the following objections, among others: 'That the plaintiffs were not the owners of the copyright; that there was no subsisting copyright in the musical publication.' It was held that the objection could not be taken by the defendant, *that the copyright of the air was in Horne, and not assigned by writing to Bellamy, Horne's name not being mentioned in the objections, as required by the above section.* This was decided, although the objection appeared upon the plaintiff's case.

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Notice of objection by defendant.

The notice of objection is sufficient, if it allege a definite publication of the disputed work at some particular place, by some definite party, either before, or simultaneously with, the publication by the plaintiff, or with a publication in another place (a).

When sufficient.

And on application by the plaintiff to have the notice of objections delivered with the defendant's pleas under this same section, amended, it was held that the alleged first publication having occurred abroad, and so far back as the year 1831, it was sufficient for the defendant to state the year of the first publication, and that it was not necessary that he should be bound to specify the day or month; but that he was bound to state the name of the party whom he alleged to be the proprietor or first publisher, the title of the work, the place where and the time when the first publication took place (b).

Amending notice of objection.

In *Chappell v. Purday* (c), however, the defendant was allowed to plead that the plaintiff was not the proprietor of the copyright at the time of commencing the grievance; and also that he was not the proprietor of the copyright when the books were printed.

(a) *Boosey v. Purday*, 10 Jur. 1038; see *Boosey v. Davidson*, 4 D. & L. 147; *Leader v. Purday*, 7 C. B. 4; 1 D. & L. 408; *Sweet v. Benning*, 16 C. B. 459; Bullen and Leake's 'Pleadings,' 298, 720; and see *Neilson v. Harford*, 8 M. & W. 806. For form of particulars of objections, *Cocks v. Purday*, 5 C. B. 862.

(b) *Boosey v. Davidson*, *supra*. (c) 1 D. & L. 458; 12 M. & W. 303.

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In any action the defendant may plead the general issue and give special matter in evidence.

The 26th section of the Act enacts that if any action or suit be commenced or brought against any person for doing or causing to be done anything in pursuance of this Act, the defendant may plead the general issue and give the special matter in evidence; and if upon such action a verdict be given for the defendant, or the plaintiff become nonsuited, or discontinue his action, then the defendant shall have and recover his full costs, for which he shall have the same remedy as a defendant has by law in any case.

Construction of the words "in pursuance of this Act."

According to numerous decisions, the words, *in pursuance of this Act*, do not only refer to those who have kept within the strict line of their duty, but also to those who intended to do so, but have by mistake gone beyond it. The general rule seems to be settled, that persons who *bonâ fide* and honestly believe that they are acting in the execution of the powers conferred on them by such a statute as the above, are within its privilege, although, in fact, they may have mistaken the extent of their power and have exceeded it, or failed to comply with the directions of the enactment (a).

All actions to be commenced within twelve months.

All actions, suits, bills, indictments, or informations for any offence committed against this Act, must be commenced within twelve calendar months after the commission of the offence; but this limitation does not extend to any actions, suits, or proceedings commenced under this Act in respect of copies of books required to be delivered to the British Museum and the four other libraries (b); nor to suits in equity, or to actions at common law for infringement (c).

In an action of damages for infringement of copyright, the *locus* of the infringement was not specified; yet the

(a) *Smith v. Shaw*, 10 Barn. & Cres. 277; cited Burke's Sup. to Godson's Copy, 99; *Gaby v. The Wilts and Berks Canal Co.*, 3 M. & Selw. 580; *Theobald v. Crichmore*, 1 B. & Ald. 227; *Parton v. Williams*, 3 *ibid.* 330; *Smith v. Wiltshire*, 2 B. & B. 619; *Cook v. Leonard*, 6 B. & C. 351.

(b) 5 & 6 Vict. c. 45, s. 26.

(c) See the principle on which were decided the cases of *Clark v. Bell*, 29 Feb. 1801; *Mor. Dict. of Dec. No. 3*, App., Lit. Prop.; and *Stewart v. Black*, 9 Sess. Cas., 2nd series, 1026.

plaintiff was allowed to amend his statement on payment of expenses incurred since the closing of the record (a). CAP. VII.

The Act 2 & 3 Vict. c. 22, imposes a penalty of 5*l.* per copy for every omission to print the name and place of abode of the printer, on the first or the last leaf of every paper or book. It is no answer, however, to an action for infringing the copyright of a work, that it was printed and published without the name and residence as required by this Act (b).

(a) *Graves & Co. v. Logan*, 7 Sess. Cas. 3rd series, 204.

(b) *Chappell v. Davidson*, 18 C. B. 154.

CHAPTER VIII.

REMEDY IN EQUITY IN CASES OF INFRINGEMENT OF
COPYRIGHT.Remedy by
injunction.

IN equity is to be found the most usual and expeditious means of obtaining redress from piracy, and for preventing the continuance of the injury. "*Melius est in tempore occurrere, quam post causam vulneratam remedium querere*" (a). Here, by the preliminary process of injunction, justice is more readily administered than in a court of law—the property in question protected from, perhaps, irreparable damage pending the trial of the right; and the wrong is not permitted to continue until the final decision of the court, at which time, frequently, from the circumstances of the case, the mischief may be irremediable (b).

Where the question of legal injury is referred to a court of law under the sanction of a court of equity, an injunction is granted to restrain the evil complained of until the merits of the case can be finally heard, when, if the opinion of the court of law be in favour of the plaintiff, it will grant its final preventive relief, which, by way of distinction from the temporary process just mentioned, is termed a perpetual injunction.

Definition of
an injunction.

An injunction may be described as a prohibitory writ, issuing out of Chancery to restrain the defendant from using some legal right, the exercise of which would be contrary to equity and good conscience; or from doing some act inconsistent with the admitted or probable legal rights of the complainant, and with the due preserva-

(a) 2 Inst. 299.

(b) *Vide* 2 Story, Eq. Jur. 926; 1 Fonbl. Eq. 34, *notis*; Kerr. on Injunc. 439; *Saunders v. Smith*, 3 My. & Cr. 728; *Platt v. Button*, 19 Ves. 447.

tion of the property affected by the act sought to be CAP. VIII.
restrained (a).

Formerly, courts of equity would not interfere by way of injunction, to protect copyrights any more than patent rights, until the title had been established at law (b). Thus, in an anonymous case reported in Vernon (c), upon a motion by the king's patentees for an injunction to stay the sale of English Bibles printed beyond the sea, Lord Keeper King refused the application until the validity of the patent had been established at law. The same judge again refused, in a subsequent case (d), to grant an injunction against printing Bibles, until the plaintiffs had brought their action in the King's Bench.

In the general discussion of the common-law right of literary property, in *Millar v. Taylor* (e), great stress was laid upon the different injunctions which had been granted by courts of equity in favour of such right. Lord Mansfield (who had had very great experience in the Court of Chancery) said, that he looked at the injunctions which had been granted or continued before hearing, as equal to any final decree; for, such injunction never was granted upon motion, unless the legal property of the plaintiff was made out, nor continued after answer, unless it remained clear. The Court of Chancery never granted injunctions in cases of this kind, when there was any doubt. Sir Joseph Yates, on the contrary, in combatting the general common-law right, expressed his opinion that the injunction, being temporary only, decided nothing at all. Lord Camden, in his speech in *Donaldson v. Becket*, already referred to, expressed himself upon this part of the argument as follows: "All the injunction cases have been

Lord Mansfield's opinion upon the issuing of injunctions.

(a) Drewry on Injunc. Intro. 5.

(b) 2 Story Eq. Jur. chap. 23. s. 935; *Hills v. University of Oxford*, 1 Vern. 275; *Baskett v. Cunningham*, 2 Eden, 137; *East India Co. v. Sandys*, 1 Vern. 127; *Jefferys v. Baldwin*, Amb. 164; *Bateman v. Johnson*, Fitzgib. 106; *Blanchard v. Hill*, 2 Atk. 485. See *Redfield v. Myddleton*, 7 Bosw. (Amer.) 649.

(c) 1 Vern. 120.

(d) *Hills v. University of Oxford*, 1 Vern. 275. See *Baskett v. Cunningham*, 2 Eden, 137; *Grierson v. Jackson*, 2 Ridg. Irish T. R. 304.

(e) 4 Burr. 2303.

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ably given; though I shall only add, in general terms, that they can prove nothing if a thousand injunctions had been granted, unless the Chancellor, at the time he granted them, had pronounced a solemn opinion, that they were grounded upon the common law. Lord Hardwicke, after twenty years' experience, in the last case of the kind that came before him, declared that the point had never yet been determined. Lord Northington granted them on the idea of a doubtful title. I continued the practice on the same foundation, so did the present Lord Chancellor. Where then is the Chancellor who had declared, *ex cathedra*, that he decided upon the common-law right? Let the decision be produced in direct terms" (a).

The modern practice.

The modern practice of granting injunctions is somewhat different; for now, in cases where the circumstances warrant it, the party will be entitled to an injunction, not only to the hearing, but, upon proper application, a perpetual injunction will issue.

Where this remedy applied, and on what evidence.

The jurisdiction will be exercised in all cases where there is a clear colour of title founded upon long possession and assertion of right (b). Even an equitable interest limited in point of time or extent is sufficient (c). But a mere agent to sell has not such a real interest in a work as will entitle him to relief (d). Where the plaintiff states circumstances showing a good equitable title, the court will, for the purpose of determining the fact of piracy, order the defendant to admit the legal title of the plaintiff (e). Judge Story remarks: "In some cases a court of equity will take upon itself the task of inspection and comparison of books alleged to be piracies; but the usual

(a) Cited from Evans' 'Statutes,' vol. ii. p. 26. *Vide Bruce v. Bruce*, cited 13 Ves. 505; *Harmer v. Plane*, 14 Ves. 130; *Hogg v. Kirby*, 8 Ves. 215, 224; and Lord Erskine, in *Gurney v. Longman*, 13 Ves. 493, 505.

(b) *Univ. of Ox. and Cam. v. Richardson*, 6 Ves. 689; *Martman v. Tegg*, 2 Russ. 385, 391; *Sheriff v. Coates*, 1 Russ. & My. 159, 167; *Colburn v. Duncombe*, 9 Sim. 151; *Chappell v. Purday*, 4 Y. & C. 485; *Bohn v. Bogue*, 10 Jur. 420.

(c) *Sweet v. Cator*, 11 Sim. 572.

(d) *Nicol v. Stockdale*, 3 Swans. 687.

(e) Kerr on Injunc. 439, citing *Dickens v. Lee*, 8 Jur. 183; *Bohn v. Bogue*, *supra*; *Sweet v. Shaw*, 8 L. J. (N.S.) Ch. 216; *Sweet v. Cator*, 11 Sim. 572.

practice is, to refer the subject to a master, who then reports whether the books differ, and in what respects; and upon such a report the court usually acts in making its interlocutory, as well as its final decree" (a). And Mr. Curtis, on the same head, says: "In general, if the court sees strong ground for supposing that the defendant's work is a violation of the plaintiff's copyright, the course is to grant an injunction *ex parte*, until answer or further order. Then, in order to ascertain the fact of piracy or no piracy, it is referred to a master to examine into the originality of the new book, or the court takes upon itself the inspection of both works. Where the works are long and of a complex character, containing original matter mixed with much that is common property, they will be referred to a master; but where they are of a class affording facility for the detection of piracy by immediate inspection, the court will examine them" (b). At the present day the court usually takes upon itself the inspection of the book (c).

In all cases of injunctions in aid of legal rights, whether it be copyright, patent right, or some other description of legal right which comes before the court, the office of the court is consequent upon the legal right; and it generally happens, that the only question the court has to consider is, whether the case is so clear and so free from objection upon the grounds of equitable consideration, that the court ought to interfere by injunction without a previous trial at law, or whether it ought to wait till the legal title has been established. That distinction depends upon a great variety of circumstances, and it is utterly impossible to lay down any general rule upon the subject, by which the discretion of the court ought in all cases to be regulated (d).

Injunction auxiliary to legal right.

If irreparable damage would be caused to the property

In what cases it will be granted.

(a) 2 Story, Eq. Jur. 124, s. 941; Eden on Injunc. chap. 13, 289; *Carnan v. Bowles*, 2 Bro. C. C. 80; — v. *Leadbetter*, 4 Ves. 681; *Carey v. Faden*, 5 Ves. 24; *Jeffery v. Bowles*, 1 Dick. 429. (b) Curtis on Copy. 325.

(c) *Murray v. Bogue*, 1 Drew. 368; *Spiers v. Brown*, 6 W. R. 352; *Jarrald v. Houlston*, 3 K. & J. 708; *Holton v. Arthur*, 1 H. & M. 603; *Pike v. Nicholas*, 38 L. J. (Ch.) 529; L. R. 5 Ch. Ap. 251.

(d) Per Lord Cottenham, in *Saunders v. Smith*, 3 My. & Cr. 728.

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of the plaintiff by the refusal of the court to interfere, the injunction will be immediately granted (a). If, however, an injunction would cause a severer injury to the defendant than that occasioned the plaintiff by reason of his being required, in the first instance, to establish his legal right, the other alternative will be adopted (b).

Equitable remedy refused in cases of a certain description.

Though the author or his assignee may enjoy a *prima facie* legal title sufficient to support an application for an injunction, yet the subject of his title may be such that, for reasons of morality or public policy, no action at law could be maintained upon it (c). The doctrine of equity in reference to works of such a nature is, that if an author can maintain an action he may, at least with some exceptions, come into equity to have his remedy made more effectual. But if the action could not be maintained in the former court, nothing can be done in equity, which is only auxiliary to the law, and therefore gives not relief, except where the law gives damages (d). In Scotland the question is disposed of otherwise; the principle adopted in English practice is not sanctioned. Even if property in the work be the sole ground of interdict, the proof of ownership alone (undistracted by any inquiry into the nature or value or subject of it) in that country guides judicial interference. For the use or abuse of that property the law provides another remedy, in administering which, that particular use forms the true point of inquiry.

Scotch law on this subject.

As to the continuation of the injunction, or its dissolution.

It is frequently a matter of difficulty to decide whether the injunction should be continued, or whether it should be dissolved until hearing (e). An injunction should in general be granted and maintained in the interim, if the defendant's publication is prejudicial to the plaintiff,

(a) *Sweet v. Shaw*, 8 L. J. Ch. (N.S.) 266; *Dickens v. Lee*, 8 Jur. 183.

(b) *Saunders v. Smith*, *supra*; *Bramwell v. Halcomb*, 3 My. & Cr. 737; *Spottiswoode v. Clarke*, 2 Ph. 154, 157; *M'Neil v. Williams*, 11 Jur. 344; *Kerr on Injunc.* 442.

(c) *Vide* 2 Mer. 439; *Hime v. Dale*, 2 Camp. 31, *notis per* Lord Ellenborough.

(d) *Walcot v. Walker*, 7 Ves. 1; *Lawrence v. Smith*, 1 Jac. 471; *Murray v. Benbow*, 1 Jac. 474, *notis*; *Southey v. Sherwood*, 2 Mer. 435.

(e) *Bramwell v. Halcomb*, 3 My. & Cr. 737; *Univ. of Oxf. and Cam. v. Richardson*, 6 Ves. 689.

although the plaintiff's right admits of a fair doubt; but in cases of works the sole or the chief value of which arises from a temporary demand, the court acts upon the opposite principle, and if there be a doubt as to the legal right, does not grant the injunction before the establishment of that right at law (a).

Thus, in *Spottiswoode v. Clarke* (b), the Lord Chancellor laid down the principles which ought to govern the discretion of the court, as follows: "The first question to be determined is as to the legal right, and if the court doubts about that, it may commit great injustice by interfering until that question has been decided."

Where a very large proportion of a work of a piratical nature is unquestionably original, but the parts which have been copied cannot be separated from those which are original without destroying the use and value of the original matter, he who had made an improper use of that which did not belong to him must suffer the consequences of so doing, for an injunction will be issued against the whole. Where a portion only of the work is piratical.

In cases of this nature the court has first to decide whether there ought to be an injunction; and if there is to be one, it has next to determine whether the injunction should be issued against the entire work, or only against a portion of it. The extent to which the injunction ought to go, must, in each case, depend on the particular circumstances attending it.

The opinion of Lord Hardwicke (c) appears to have been that an injunction might be granted against the whole, although only a portion was pirated; and in the instance of Milton's 'Paradise Lost,' with Dr. Newton's notes, there being nothing new in that work except the notes, he granted an injunction against the entire book. There is the record of a case tried before Lord Kenyon (d), in which he states that the question whether

(a) Curtis on Copy. 317.

(b) 2 Phillips' Ch. Rep. 154.

(c) 4 Burr. 2326. See *Story's Executors v. Holcombe*, 4 McLean. (Amer.) 306, 315.

(d) Vide *Cary v. Longman*, 1 East, 360; *Trusler v. Murray*, 1 East, 363.

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an injunction could be issued against the whole of a book on account of the piratical quality of a part, came before Lord Bathurst; and Lord Bathurst seems to have held it could not, unless the part pirated was such, that granting an injunction against such part necessarily destroyed the whole. Lord Kenyon, who possessed great information on this subject, states himself to have been perfectly satisfied with the opinion of Lord Bathurst, as bearing upon the judgment of Lord Hardwicke and the other cases. In the case referred to before Lord Kenyon the declaration at law contained a count for publishing the whole work, and another for publishing a part; and Lord Kenyon's direction to the jury seems to have been to find damages for publishing the part only.

“In the cases which have come before me,” said Lord Eldon, in *Mawman v. Tegg* (a), the case from which we have already quoted, “my language has been, that there must be an injunction against such part as has been pirated; but in those cases the part of the work which was affected with the character of piracy was so very considerable, that if it were taken away there would have been nothing left to publish except a few broken sentences. Now, the difficulty here is this: whether I have before me sufficient grounds to authorize me to say, how far the matter which is proved (if I may use the word) to have been copied, is sufficient to enable me to decide how much I may enjoin against; and if I can be thus authorized to say how much I can enjoin against, then the question is, what will be the effect if that injunction applied to so much of the work, in the state of uncertainty in which we now are? Or whether, on the other hand, as the matter cannot be tried by the eye of the judge, I must not pursue a course which has been adopted in cases of a similar nature, namely, refer it to the Master (b) to report to what extent the one book is a copy of the other, upon

(a) 2 Russ. 385, 399.

(b) *Carnan v. Bowles*, 1 Cox. 283, S. C.; 2 Bro. C. C. 85; *Jeffrey v. Bowles*, 1 Dick. 429; *Nicol v. Stockdale*, 12 Ves. 277; ——— v. *Leadbetter*, 4 Ves. 681. In America, in *Smith v. Johnson*, 4 Blatch. (Amer.) 252.

the comparison of all the numbers [the works were periodicals] that have been published? CAP. VIII.

“Another way of ascertaining the facts of the case is to send it to a jury; and, in either of those ways of disposing of it, the court will order the defendant to keep an account of the profits in the mean time. But one difficulty in all these cases is that, though keeping an account of the profits may prevent the defendant from deriving any profit, as he may ultimately be obliged to account to the plaintiff for all his gains, yet, if the work, which the defendant is publishing in the meantime, really affects the sale of the work which the plaintiff seeks to protect, the consequence is, that the rendering the profits of the former work to the complaining party may not be a satisfaction to him for what he might have been enabled to have made of his own work, if it had been the only one published; for he would argue, that the profits of the defendant, as compared with the profits which he, the plaintiff, has been improperly prevented from making, could only be in the proportion of 8s., the price of a copy of the one book, to one guinea, the price of a copy of the other. If the principle upon which the court acts, is, that satisfaction is to be made to the plaintiff, I cannot see, though I never knew it done, why, if a party succeeds at law in proving the piracy, the court could not give him leave to go on to ascertain, if he can, his damages at law; or if, after applying the profits which are handed over to him by the defendants, he can shew that they were not a satisfaction for the injury done to him, I cannot see why the court might not in such a case direct an issue to try what further damnification the plaintiff had sustained.”

A person who solicits the assistance of the court for the protection of his copyright from violation, must evince due assiduity and diligence in coming to the court. Delay or acquiescence will be fatal to the success of the application, unless it can be satisfactorily accounted for (a). Due diligence to be observed in obtaining an injunction.

(a) *Mawman v. Tegg*, 2 Russ. 385, 393; *Baily v. Taylor*, Tam. 295; 1 Russ. & My. 73; *Campbell v. Scott*, 11 Sim. 31; *Buxton v. James*, 5 De G. & Sm. 80; *Tinsley v. Lucy*, 1 H. & M. 747.

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In *Mawman v. Tegg* five months' delay was adequately explained by the necessity of comparing the whole of the two works for the purpose of discovering the extent of the piracy (*a*).

If the conduct of the party complaining has conduced to the condition of affairs that occasions the application he cannot have relief (*b*). According to 5 & 6 Vict. c. 45, s. 26, all suits and bills should be commenced within twelve months of the offence (*c*).

Methods usually adopted by the court in particular instances.

If the court is satisfied that the alleged title is good, and that there has been a piracy, it may interfere at once and restrain the piracy *simpliciter* by injunction; but if the title is not clear, or the fact of violation is denied, the course the court usually adopts is either to grant the injunction pending the trial of the legal right, or to direct the motion to stand over until hearing, on the terms of the defendant keeping an account of the number of copies sold, in order that justice may ultimately be done between the parties (*d*).

The 25 & 26 Vict. c. 42, commonly known as Rolt's Act, confers upon the Court of Chancery power to determine every question of law and fact incident to the relief sought; and this is now the duty of that court (*e*).

In instances where the publication is of a temporary character.

It is here worthy of remark, that if the work be of such a character that the sale is temporary, the Court of Chancery is more cautious, inasmuch as an intermediate injunction in such a case may be of equal effect with a perpetual injunction (*f*). Where, indeed, an intermediate injunction

(*a*) Vide *Smith v. London and S. W. Railway Co.*, 1 K. 408, 412; *Lewis v. Chapman*, 3 Beav. 133, 135; *Bridson v. Benecke*, 12 Beav. 3; *Lewis v. Fullarton*, 2 Beav. 8; *Buxton v. James*, *supra*; *Wittle v. Bristol and S. Wales Union Railway Co.*, 6 L. T. (N.S.) 20; *Bacon v. Jones*, 4 My. & Cr. 433.

(*b*) *Rundell v. Murray*, Jac. 311; *Saunders v. Smith*, 3 My. & Cr. 711. See also *Lewis v. Chapman*, 3 Beav. 135; *Platt v. Button*, 19 Ves. 447; *Rundell v. Murray*, *supra*; *Campbell v. Scott*, 11 Sim. 31.

(*c*) Kerr on Injunc. chap. 20. s. 1.

(*d*) *Ibid.* chap. 20.; *Walcot v. Walker*, 7 Ves. 1; *Wilkins v. Aikin*, 17 Ves. 422.

(*e*) *Re Hooper*, 11 W. R. 130; 32 L. J. (Ch.) 55; *Baylis v. Watkins*, 7 L. T. (N.S.) 843.

(*f*) See *Gurney and Longman*, 13 Ves. 493, *ante*, p. 120.

is granted it does not often happen that the cause is brought to a hearing; for the merits of the case will probably have been discussed upon the motion (a), and therefore it rarely happens that a perpetual injunction is decreed (b). If, however, the cause should be brought to a hearing, the court will then, if the plaintiff's cause be relieved of all doubt, grant a perpetual injunction (c), or it will dismiss the plaintiff's bill (d).

As to the piratical copies which may have been sold, the registered proprietor is not entitled in equity to the gross produce of the sale, but only to the *profits* which the defendant may have made by the sale (e). Nor will a court of equity grant its assistance to the party seeking its relief, unless he waive the penalty or forfeiture imposed by the Acts of Parliament (f).

Direct invasions of copyright by several persons, cannot be restrained in one suit (g).

The mode of procedure is extremely simple. A bill is filed by the proprietor of the copyright, stating his title to the original work, the nature of the piracy, and the consequent injury. If the plaintiff has merely an equitable title, the person in possession of the legal title should be made a party (h).

Every application for an injunction before answer must be supported by an affidavit of merits verifying the material statements of the bill (i); and where the plaintiff had forgotten a material fact when he made his application

(a) 4 Burr. 2324, 2400; *Tonson v. Walker*, 3 Swans. 672; 2 Eden, 328.

(b) 2 Sw. 430. See *Whittingham v. Wooler*, 2 Swans. 428, n.

(c) *Macklin v. Richardson*, Amb. 694.

(d) *Dodsley v. Kinnersley*, Amb. 403.

(e) *Delf v. Delamotte*, 3 Jur. (N.S.) Ch. 933; 3 K. & J. 581.

(f) *Colburn v. Simms*, 2 Hare, 554; see *Geary v. Norton*, 1 De G. & Sm. 9; and *Stevens v. Gladding*, 17 How. (Amer.) 455; *Mason v. Murray*, cited 3 Bro. C. C. 38; *Brand v. Cumming*, 22 Vin. Abr. 315, pl. 4.

(g) *Dilly v. Doig*, 2 Ves. 486; and see *Hudson v. Maddison*, 12 Sim. 416; and *Milwinter v. Kincaid*, (H. L.), 11 Feb. 1751, 1 Pat. App. 488.

(h) *Colburn v. Duncombe*, 9 Sim. 151.

(i) No affidavit as to the title of the author or proprietor will be received after the defendant's answer has been filed, though affidavits in opposition to the answer may be read as to the facts: *Platt v. Button*, 19 Ves. 447; and see *Norway v. Rowe*, *ibid.* 143.

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Neither the bill nor affidavit needs specify the parts of the work stated to have been pirated, though no copyright is claimed in all the identical passages. The Vice-Chancellor, in *Sweet v. Maugham* (a), said, "It has always been considered sufficient to allege, generally, that the defendant's work contains several passages which have been pirated from the plaintiff's work. Then, when the injunction has been moved for, the two works have been brought into court, and the counsel have pointed out to the court the passages which they rely upon as shewing the piracy."

But where A. applied for an injunction against the stereotyper, to prevent his selling copies printed by him from advance sheets, furnished him by A., of a work written by B., it was held that, an allegation "That sheets were sent to him for the advantage of said B.," and of himself, was too vague to be made the foundation of an injunction on the ground of protecting B.'s rights (b).

If the plaintiff claims as assignee, he must, by affidavit or otherwise, show that the assignment to him has been in accordance with the provisions of the Act (c); and if there has been a complete assignment, the assignor should not be made a party to the suit (d). Any one associated by the proprietor of a copyright with himself in an entry in the book of registry has *prima facie* a title to sue jointly with him in a court of equity (e).

In the majority of cases, the bill prays that an account may be taken of the books printed, and of the profits

(a) 11 Sim. 51. (b) *Redfield v. Myddleton*, 7 Bosw. (Amer.) 619.

(c) *Morris v. Kelly*, 1 Jac. & W. 481. He must make a particular title, by tracing his title either to the author or his assign, who alone have title under the statute: *Gilliver v. Snuggs*, 2 Eq. Abr. 522; 4 Vin. Abr. 278, A. 4.

(d) *Sweet v. Maugham*, *supra*; *Colburn v. Simms*, 2 Hare, 560.

(e) *Stevens v. Wildy*, 19 L. J. (N.S.) Ch. 190.

thereof, from the person who has pirated from the plaintiff's works, and moreover that an injunction may be issued to restrain the further sale (a).

Should the cause be brought to a hearing, and a perpetual injunction be issued, the right to the account will invariably be decreed as incidental to the plaintiff's other relief (b). The account is in practice generally waived; but where it is not, the court grants it upon the principles enumerated in *Colburn v. Simms* (c). "It is true," said Sir James Wigram in that case, "that the court does not, by an account, accurately measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The court, by the account, as the nearest approximation which it can make to justice, takes from the wrongdoer all the profits he has made by his piracy, and gives them to the party who has been wronged. In doing this the court may often give the injured party more, in fact, than he is entitled to, for *non constat* that a single additional copy of the more expensive book would have been sold, if the injury by the sale of the cheaper book had not been committed. The Court of Equity, however, does not give anything beyond the account."

We will conclude this subject with the words of Sir William D. Evans: "It is clear," says he in the second volume of his 'Statutes' (d), "that the proceeding by injunction is the most ready and effectual remedy which can be resorted to on the part of the plaintiff, but that a great degree of caution in the application of that

(a) Where in America an account only was sought for, and no injunction applied for, the court held that the party must proceed at law for damages: *Monck v. Harper*, 3 Edw. Ch. (Amer.) 109.

(b) *Hogg v. Kirby*, 8 Ves. 215; *Bailey v. Taylor*, 1 Russ. & My. 73; *Sheriff v. Coutts*, 1 R. & M. 159; *Kelly v. Hooper*, 1 Y. & Coll. 197; *Girson v. Eyre*, 9 Ves. 311; *Univer. of Oxf. and Cam. v. Richardson*, 6 Ves. 689; 2 Story's Eq. Jur. s. 933.

(c) 2 Hare, 513, 560.

(d) Part iii. class 1, note 29.

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proceeding, in the first instance, is requisite for preventing injustice to the defendant, whose loss does not, from the nature of it, admit of reparation if the injunction should, upon further investigation, be found to have been erroneously applied; and the judges of courts of equity have in many cases expressed a strong sense of the importance of this principle."

CHAPTER IX.

CROWN COPYRIGHT.

THE prerogative copyrights of the Crown constitute a peculiar branch of literary property which has given rise to much controversy. Prerogative copyright.

The sovereign's prerogative in granting letters patent for the privilege of printing prerogative copies, as they are called, is said to embrace the English translation of the Bible, the Book of Common Prayer, the statutes, almanacs, and the Latin grammar.

The validity of this privilege has been questioned on the ground that grants of this exclusive nature, tend to a monopoly. They contribute forcibly to enhance the prices of books, to restrain free trade, to discourage industry, and by discountenancing competition they serve to render the patentees careless and remiss in their duty. Notwithstanding, it must be admitted that the sovereign has a peculiar prerogative in printing, which has been vindicated, allowed, and maintained through all ages.

The right is said to be founded on grounds of public policy. Lord Mansfield considered it as merely a modification of the general and common right of literary property; and from the cases which had been decided in favour of the particular copies, he inferred, as a necessary consequence, the existence of the general right. They rested upon property arising from the king's right of original publication. The copy of the Hebrew Bible, of the Greek Testament, or of the Septuagint, did not belong to the king—it was common; but the English translation he bought, and therefore it was concluded to be his property. Nature of the right.

Printing, on its first introduction, was considered, as

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well in England as in other countries, to be a matter of state. The quick and extensive circulation of sentiments and opinions which that invaluable art produced could not but fall under the gripe of government, whose principal strength was built upon the ignorance of the people governed. The press was, therefore, wholly under the coercion of the Crown, and all printing, not only of public books, containing ordinances, religious or civil, but of every species of publication whatsoever, was regulated by the king's proclamations, prohibitions, charters of privilege, and, finally, by the decrees of the Star Chamber. After the demolition of that odious jurisdiction (a), the Long Parliament, on its rupture with Charles I., assumed that power which had previously existed solely in the Crown. After the Restoration, the same restrictions were re-enacted and re-annexed to the prerogative by the statute 13 & 14 Car. 2, and continued down, by subsequent Acts, until after the Revolution. The expiration of these disgraceful statutes, by the refusal of Parliament to continue them any longer, formed the great era of the liberty of the press in this country, and stripped the Crown of every prerogative over it, except that which, upon just and rational principles of government, must ever belong to the executive magistrate in all countries, namely, the exclusive right to publish religious or civil constitutions, in a word, to promulgate every ordinance by which the subject is to live and be governed. These always did belong, and from the very nature of civil government always ought to belong, to the sovereign, and hence have gained the title of "prerogative copies" (b).

The Bible and Book of Common Prayer (c).

The Bible and
Common
Prayer Book.

For two hundred years and more the kings have in England granted patents to their printers. From the time of Henry VIII. have different persons enjoyed, by letters

(a) "Where change of favorites made no change of laws,
And senates heard before they judged a cause" (?)—JOHN.

(b) Lord Erskine's Speeches, vol. i. p. 40, by Ridgway.

(c) See *Mayo v. Hill*, cited 2 Show. 260; *King's Printer v. Bell*, Mor. Dict. of Dec. 19-20, p. 8316.

patent, the privilege of printing prerogative copies to the exclusion of all other persons.

These patents have, from time to time, come under the consideration of the courts, and the judges have been invited to settle their limits. Many have given it as their opinion, that the prerogative is founded on the circumstance of the translation of the Bible having been actually paid for by King James, and its having thus become the property of the Crown (*a*). Others have referred it to the circumstance of the king of England being the supreme head of the Church of England, and have invested him with the prerogative in virtue of that character. This latter argument, Mr. Godson (*b*) contends, destroys the proposition it is adduced to support; for, if the sovereign *as head of the church*, has the exclusive right of printing *all books of Divine service*, why not, as head of the church, have a right to print the principal book used in the Divine service—*the Bible*—and all kinds of Bibles, in whatever language they may be written? And yet the principle of *property* is resorted to for the right of printing the present edition of the Bible; and Lord Mansfield has declared that there is no prerogative right to the Bible in the original languages (*c*).

Others again have been of opinion that it is to be referred to another consideration, namely, to the character of the duty imposed upon the chief executive officers of the government, to superintend the publication of the acts of the legislature and acts of state of that description; and also of those works upon which the established doctrines of our religion are founded, that it is a duty imposed upon the first executive magistrate, carrying with it a corresponding prerogative. That was the opinion of Lord Camden as expressed in the case of *Donaldson v. Becket*, and of Chief Baron Skinner in *Eyre and Strahan v. Carnan* (*d*).

(*a*) *Nullum tempus occurrit regi. Rex nunquam moritur.*

(*b*) 'Patents and Copyrights,' p. 437.

(*c*) 4 Burr. 2405, cited Godson's Pat. and Copy. 437.

(*d*) Exchequer, 1781, cited 6 Ves. 697, and reported at length in 6 Bac. Abr., tit., Prerog. 509.

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No attempt has ever been made to prevent any person from publishing a translation of one book, or of a part of the Bible, from the original text, and enjoying a copyright in his production. And, with respect both to Acts of Parliament and Bibles, any one is at liberty to print them *with notes*.

Mr. Reeves, one of the royal patentees, and the writer of several learned juridical publications, in the preface to his edition of the Bible (divided into sections), observes, that all the authorized Bibles published by the king's printer and the universities are wholly without explanatory notes. These privileged persons have confined themselves to printing the bare text, in which they have an exclusive right, forbearing to publish it with notes, which it is deemed may be done by any of the king's subjects as well as themselves. He subjoins to this passage, a note in the following terms: "I mean such notes as are *bonâ fide* intended for annotations, not the pretence of notes which I have seen in some editions of the Bible and Common Prayer Book, placed there merely as a cover to the piracy of printing upon the patentees, as if fraud could make legal anything that was in itself illegal. In some of these editions the notes are placed purposely to be cut off by the binder" (a).

View taken in
Ireland.

In *Grierson v. Jackson* (b), upon an application for an injunction against printing an edition of a Bible in numbers with prints and notes, Lord Clare, as Chancellor of Ireland, asked if the validity of the patent had ever been established at law, and said he did not know that the Crown had a right to grant a monopoly of that kind. In the course of the discussion he made the following observations: "I can conceive that the king, as head of the church, may say that there shall be but one man who shall print Bibles and Books of Common Prayer for the use of churches and other particular purposes, but I cannot conceive that the king has any prerogative to grant a monopoly as to Bibles for the instruction of mankind in the revealed religion; if he had, it would be in the power

(a) 2 Evans' 'Statutes,' 2nd ed. p. 19.

(b) Irish T. R. 304.

of the patentee to put what price he pleased upon the book, and thus prevent the instruction of men in the Christian religion. If ever there was a time which called aloud for the dissemination of religious knowledge, it is this, and therefore I should with great reluctance decide in favour of such a monopoly as this, which must necessarily confine the circulation of the book.”

This has not been the view taken of the subject in England, for in the case of the *Universities of Oæford and Cambridge v. Richardson* (a), an injunction upon motion was granted against the king's printer in Scotland, who had a patent for the sale of Bibles, printing or selling them in England, upon the ground that possession, under colour of title, was sufficient to injoin and to continue the injunction till it was proved at law that it was only colour and not real title. In the course of the case it appeared that, in the year 1718, Sir Joseph Jekyll, as master of the rolls, had granted an injunction in a similar case, which was supported on appeal before the Lord Chancellor; and also, that a decree of the Court of Session had, in the year 1717, been reversed by the House of Lords in favour of the right of the king's printer in England, confining the right of the Scotch printer to Scotland. With respect to the precedent of the injunction, it is clear that there had been abundance of injunctions before upon private copyright, until the claim was finally put an end to by the decree of the Lords; and questions between rival patentees were not the most probable method of bringing into fair discussion the general rights of the subject to resist the claim of prerogative, root and branch (b). The Lord Chancellor, in his judgment, said, “My opinion is, that the public interest may be looked to upon a subject, the communication of which to the public in an authentic shape, if a matter of right, is also a matter of duty in the Crown, which are commensurate. It is not accurate to say, these privileges are not granted for the sake of unlimited sale, and for the

(a) 6 Ves. 689. See *Manners v. Blair*, 3 Bli. R. (N.S.) 391.

(b) 2 Evans' 'Statutes,' 2nd ed. 17.

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sake of the universities, &c. They are, to a certain degree, like all other offices, calculated for that sort of advantage which will secure to the public the due execution of the duty; upon this principle proceed all the branches of our constitution, (which does not adopt the wild theories that require the execution of a duty without a due compensation), that the duty is well secured in one way by giving a responsibility, in point of means, to the person to execute it. The reasoning which affects to depreciate monopoly, will perhaps tend to create it." There certainly is no great risk that false copies of the Bible would get into general circulation by an unlimited right of printing them. We do not find it materially the case in other works; and there are, I conceive, very few persons indeed who would admit that the beneficial circulation of any commodity in general, or of these writings in particular, can be promoted by means of an exclusive monopoly; and the principal object, both of the right and the duty, with respect to the particular subject, appears to be the benefit arising to the privileged individual (a).

The question was afterwards brought before the House of Lords, and the injunction against the Scotch printer continued.

The Universities of Oxford and Cambridge and the queen's printer long exercised this monopoly, under patents from the Crown, but the claim has not been very rigidly enforced. The patent granted to the queen's printer expired a short time back, and it was recommended by a committee of the House of Commons that the exclusive privilege of publishing the sacred volume should not be renewed. The House, however, took no action on this recommendation, and the Crown renewed the patent during pleasure.

Acts of Parliament and Matters of State.

The right in state documents.

The exclusive right of printing Acts of Parliament has been regarded somewhat more favourably than the other

(a) 2 Evans' 'Statutes,' 2nd ed. p. 18.

branches of the royal prerogative in question. Upon what ground, however, it is in some degree difficult to discover. Lord Clare, while negating the prerogative in the matter of the Bible, said he could well conceive that the king should have a power to grant a patent to print the statute books, because it was necessary that they should be correctly printed, and because the copy can only be had from the rolls of Parliament, which are within the authority of the Crown.

There was no king's printer by patent till the reign of Edward VI. He, in 1547, granted one to Grafton.

The right seemed to have been in effect recognised and established in the case of *Millar v. Taylor*, by the unanimous opinion of the judges, though they differed respecting the origin of it. This is certain respecting its origin, that it has ever been a trust reposed in the king, as executive magistrate, to promulgate to the people all those civil ordinances which are to be the rule of their civil obedience. There are traces of the ancient mode of promulgating the ordinances of the state yet remaining to us, suited to the gloominess of the times when few who heard them could have read them; the king's officers transmitted authentic copies of them to the sheriffs, who caused them to be publicly read in their county court (a). When the demand for authentic copies began to increase, and when the introduction of printing facilitated the multiplication of copies, the people were supplied with them by the king's patentee. From such source they were far more likely to be correct and accurate than if obtained from those unable to resort to the fountain head; and our courts of justice appear to have so considered, when they established it as a rule of evidence, that Acts of Parliament printed

(a) The statute itself was drawn with the aid of the judges and other grave and learned men, and was entered on a roll called the 'Statute Roll.' The tenor of it was afterwards transcribed into parchment, and annexed to the proclamation-writ, directed to the sheriff of every county in England, and commandment given him, that he should not only proclaim it through his whole bailiwick, but see that it was firmly observed and kept; and the usage was, to proclaim it at his county court, and there to keep the transcript, that whoso would might read or take a copy of it.—Dwarris on Stat. p. 16; 4 Inst. cap. 1.

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The patent was to print "all law books that concern the common law." The first case on the subject arose between Atkins, the law-patentee, and some members of the Stationers' Company. The plaintiff claimed under the letters patent. The defendants had printed 'Rolle's Abridgment.' The bill was brought for an injunction, and the Lord Chancellor issued one against every member of the company. The defendants appealed to the House of Lords, but the decree was affirmed.

It was argued that printing was a power of the Crown, acquired by Henry VI. by purchase, the first printer established in England having been brought to Oxford, by Archbishop Bouchier, at that king's expense! (a)

Perhaps the most important case on this head is that of *Roper v. Streater* (b), the facts of which were these:—Roper bought of the executors of Justice Croke the third part of his reports, which he printed; Colonel Streater had a grant for years from the Crown for printing all law books, and he reprinted Roper's work without permission; on which Roper brought an action under the Licensing Act. Streater pleaded the king's grant, and on demurrer it was adjudged for the plaintiff against the validity of the patent, on these grounds: that the patent tended to a monopoly; that it was of a large extent; that printing was a handicraft trade, and no more to be restrained than other trades; that it was difficult to ascertain what should be called a law book; that the words in the patent "touching or concerning the common or statute law," were loose and uncertain; that if this were to be considered as an office, the grant for years could not be good, as it would go to executors and administrators; and that there was no adequate remedy in the way of redress in case of abuses by unskilfulness, selling dear, printing ill, &c. This judgment, however, was reversed on a writ of error in Parlia-

(a) 1 Bl. 113; 6 Bac. Abr. 507; Carter, 89; 10 Mod. 105.

(b) Skin. 234. See 1 Mod. 257; 2 Show. 260; 10 Mod. 105.

ment, for the following reasons: that the invention of printing was new; that this privilege had been always allowed, which was a strong argument in its favour, although it could not be said to amount to a prescription, as printing was introduced within time of memory; that it concerned the state, and was matter of public care; that it was in the nature of a proclamation, which none but the king could make; that the king had the making of judges, serjeants, and officers of the law; that as to the uncertainty, these words in the patent were to be taken *secundum subjectam materiam*, and not to be extended to a book containing a quotation of law, but where the principal design was to treat on that subject; that as to its being an office, it was not so properly an office as an employment, which may well enough be managed by executors or administrators; and that as to abuses, these, like all others, were punishable at common law, or the patent itself might be repealed by *sci. fac.* (a)

In the case of *Baskett v. The University of Cambridge* (b) the prerogative right of printing Acts of Parliament was sanctioned by a decision of the Court of King's Bench. That case arose upon a bill filed by the plaintiffs for an injunction to restrain the defendants from printing and selling a book entitled 'An Exact Abridgment of all the Acts of Parliament relating to the Excise on Beer, &c.'" Both parties claimed under letters patent from the Crown; the plaintiffs as the king's printers. The court were of opinion that during the term granted by the letters patent to the plaintiffs, they were entitled to the right of printing Acts of Parliament and abridgments of Acts of Parliament, exclusive of all other persons not authorized to print the same by prior grants from the Crown; but they thought that by the letters patent granted to the university, it was entrusted with a concurrent authority to print Acts of Parliament and abridgments of Acts, within the university, upon the terms contained in those letters patent.

Soon after the Restoration an Act of Parliament having

(a) 3 Mod. 77; 6 Bac. Abr. 507.

(b) 1 W. Bl. 105; 2 Burr. 661.

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prohibited the printing of law books without the licence of the lord chancellor, the two chief justices, and the chief baron, it became the practice to prefix such a licence to all reports published after that period, in which it was usual for the rest of the judges to concur, and to add to the *imprimatur* a testimonial of the great judgment and learning of the author. This Act was renewed from time to time, but finally expired in the reign of the third William. The form of licence and testimonial, however, was continued till the reign of George II., when the judges seemed to have arrived at the determination not to grant any more of them (a). Sir James Burrow offers an apology for publishing his reports without an *imprimatur* (b).

As to the publication of proceedings in courts of justice.

Though a court of justice appears to have the sole power of authenticating the publication of its own proceedings, it does not necessarily follow that it has an exclusive right of publication.

Since the year-books, it seems that no judicial proceedings, with the exception of state trials, have been published under authoritative care and inspection, either by the House of Lords or by any court in Westminster Hall.

In *Sayer's Case* (c) the judges of the Court of Queen's Bench directed, and in part revised, a report of the trial. The trial of Lord Melville (d) was likewise published by order of the Lords; and the person appointed for that purpose by the Lord Chancellor obtained an injunction against a bookseller for publishing another report of the case. *Manley v. Owen* (e) recognises the exclusive right of the Lord Mayor of London, as head of the commission, to appoint a person to print the sessions papers of the Old Bailey. Formerly, it was held to be a contempt of court to publish any reports whatever, but the practical application of this doctrine was soon relaxed, and publication is

(a) Pref. to Dougl. R.

(b) Burr. R. Pref. viii.

(c) 16 How. St. Tr. 93; 8 Parl. Hist. 54.

(d) 29 How. St. Tr. 549. See *Bathurst v. Kearsley*, cited *Gurney v. Longman*, 13 Ves. 493, 509.

(e) Cited *Millar v. Taylor*, 4 Burr. 2329. See 13 Ves. 493; *Stockdale v. Hansard*, 9 Ad. & E. 1, 97.

now only treated as a contempt in those cases in which the report is published in opposition to an order of the court.

Publication during the course of a trial will be prohibited, when the publication would have a tendency to interfere with a fair and impartial decision; on this principle Lord Abbott, C.J., sitting at the Old Bailey, acted on the indictment of Thistlewood and others for high treason in the year 1820 (a). The prohibition was infringed by the proprietor of the *Observer* newspaper, and the proprietor was fined 500*l.* for contempt of court. He appealed subsequently to the Queen's Bench, on which occasion Holroyd, J., in refusing to make absolute a rule *nisi* obtained, said: "This was an order made in a proceeding over which the court had judicial cognizance; the subject matter respecting which it was made was then in the course of judicature before them. The object for which it was made was already, as it appears to me, one within their jurisdiction, viz., the furtherance of justice in proceedings then pending before the court; and it was made to remain in force so long, and so long only, as those proceedings should be pending before them. Now, I take it to be clear, that a court of record has a right to make orders for regulating their proceedings and for the furtherance of justice in the proceedings before them, which are to continue in force during the time that such proceedings are pending. It appears to me, that the arguments as to a further power of continuing such orders in force for a longer period, do not apply. It is sufficient for the present case, that the court have that power during the pendency of the proceedings. This order was made to delay publication only so long as it was necessary for the purposes of justice, leaving every person at liberty to publish the report of the proceedings subsequently to their termination. I am therefore of opinion, that this was an order which the court had the power to make."

A criminal information will lie for publishing an *ex parte* Publication of *ex parte* statement of the proceedings upon a coroner's inquest, statements

(a) *Reg. v. Clement*, 4 Barn. & Ald. 218.

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upon a coron-
er's inquest.

accompanied with comments, although the statement be correct, and the party has no malicious motive in the publication. Mr. Justice Bayley on one occasion observed that it was a matter of great criminality; for the inquest before the coroner leads to a second inquiry, in which the conduct of the accused is to be considered by persons who ought to have formed no previous judgment in the case. A jury who are afterwards to sit upon the trial ought not to have *ex parte* accounts previously laid before them; they ought to decide solely upon the evidence which they hear upon the trial (a).

No prerogative claim to the exclusive publication of judicial proceedings has now been asserted for very many years, and in *Butterworth v. Robinson* (b), and *Saunders v. Smith* (c), individuals were treated as authors and proprietors of copyright in law reports (d).

Almanacs.

As to the
right in
almanacs.

The origin of this absurd claim is put upon still more ridiculous grounds. Property in almanacs is said to be the king's: 1st, because derelict; 2nd, because they regulate the feasts of the church (e).

On the 8th of March, 1615, the king by letters patent granted to the Stationers' Company and their successors for ever (*inter alia*) exclusive power and licence to print, or cause to be printed, "all manner of almanacs and prognostications whatsoever in the English tongue, and all manner of books and pamphlets tending to the same purpose, and which are not to be taken and construed other than almanacs or prognostications being allowed by the Archbishop of Canterbury and the Bishop of London, or one of them, for the time being."

In an action of debt by the *Company of Stationers against Seymour* (f), for printing 'Gadbury's Almanac,' it was ad-

(a) *Rex v. Fleet*, 1 Barn. & Ald. 379, 384.

(b) 5 Ves. 709.

(c) 3 My. & Cr. 711, and *Vesey v. Sweet*, cited 5 Ves. 709, note 3.

(d) Phillips on Copy. 196.

(e) 2 Show. 258; *Stationers' Co. v. Wright*, 2 Ch. Cas. 76.

(f) 1 Mod. 256.

judged that the letters patent granted to the company for the sole printing of almanacs were valid; and though the jury found that the almanac so printed contained some additions, yet having likewise found that the said almanac had all the essential parts of the almanac that was printed before the Book of Common Prayer, the additions were regarded as immaterial.

So also was an injunction granted against Lee (a), on the application of the Stationers' Company, to restrain him from selling "primers, psalters, *almanacs*, and singing psalms, imported from Holland," the sole privilege of printing these belonging to that company; and that without any trial directed as to the validity of the patent. Notwithstanding the above decisions, the prerogative right to the printing of almanacs was strongly protested against in the case of the *Stationers' Company v. Partridge* (b). No judgment, indeed, was given in that case, but it stood over that the company might see if they could make it like the case of the Common Prayer Book,—whether they could show that the right of the Crown had any foundation in property; and it was never referred to again.

In a subsequent case, that of the *Stationers Company v. Carnan* (c), the right was successfully combated, and judgment given in favour of the defendant. An account of these various phases of legal doubt and indecision is succinctly given by Lord Erskine in *Gurney v. Longman* (d): "It appears in the case of *Millar v. Taylor* that the Crown had been in the constant course of granting the right of printing almanacs; and at last King James II. granted that right by charter to the Stationers' Company and the two universities, and for a century they kept up that monopoly by the effect of prosecutions. At length Carnan, an obstinate man, insisted upon printing them. An injunction was applied for in the Court of Exchequer, and was granted to the hearing; but at the hearing, the Court of Exchequer directed the question to

(a) 2 Ch. Ca. 76, 93; 2 Show. 258.

(b) 10 Mod. 105, cited 2 Bro. P. C. 137.

(c) 2 Wm. Bl. 1004.

(d) 13 Ves. 508.

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be put to the Court of Common Pleas, whether the king had a right to grant the publication of almanacs, as not falling within the scope of the necessity or expediency, the foundation of prerogative copies. It was twice argued in the Court of Common Pleas; and the answer returned by that court to the Court of Exchequer was, that the charter was void, and almanacs were not prerogative copies. The injunction was accordingly dissolved, that usurpation having gone on for a century; and the House of Commons threw out a bill, brought in for the purpose of vesting that right in the Stationers' Company."

In consequence of this decision, an Act was passed, which, after reciting, that the power of granting a liberty to print almanacs and other books was theretofore supposed to be an inherent right in the Crown, and that the Crown had, by different charters under the great seal, granted the universities of Oxford and Cambridge, among other things, the privilege of printing almanacs; and that the universities had demised to the Company of Stationers their privilege of vending almanacs and calendars, and had received an annual sum of £1000 and upwards as a consideration for such privilege, and that the sum so received by them had been laid out and expended in promoting different branches of literature and science, to the great increase of religion and learning and the great benefit and advantage of these realms; and that the privilege or right of printing almanacs had been, by a late decision at law, found to have been a common right, over which the Crown had no control and consequently the universities no power to demise the same to any particular person or body of men, whereby the payments so made to them by the Company of Stationers had ceased and been discontinued, enacted that £500 a year should be paid to each of the universities, out of the moneys arising from the duties upon almanacs (a).

Any person may now make the calculations usually published in almanacs, and claim a copyright therein.

(a) 21 Geo. 3, c. 56, s. 10.

A power was given by Act of Parliament to certain commissioners, to publish a 'Nautical Almanac, or Astronomical Ephemeris,' and to *license* some one to print it. Any other person printing, publishing, or vending it, subjects himself to a penalty. The 'Nautical Almanac' is now, however, placed under the control of the Lords of the Admiralty, and the penalty is increased to £20, with costs of suit, to be paid and applied to the use of the Royal Hospital for Seamen at Greenwich (a).

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The Nautical Almanac.

The claim to the prerogative right in 'Lilly's Latin Grammar' was founded on an allegation that the work had been originally written and composed at the king's expense. Mr. Justice Yates observed in *Millar v. Taylor* that the expense of printing prerogative books was "in fact no private disbursement of the king, but done at the public charge, and formed part of the expense of government." How, then, could they be his private property, like private property claimed by an author in his own compositions? (b) The claim has long been abandoned.

As to the Latin grammar.

(a) 9 Geo. 4, c. 66.

(b) See *Stationers' Co. v. Partridge*, 4 Burr. 2339, 2382, 2402; 10 Mod. 105; *Nicol v. Stockdale*, 3 Swans. 687.

CHAPTER X.

UNIVERSITY AND COLLEGE COPYRIGHT.

Copyright at
the univer-
sities and
colleges.

UPON the introduction of the art of printing into England by Henry VI. a press was set up at Oxford; and an important dominion over the publication of books was, for many years, very naturally assumed by that learned body. The sway was extended to the sister university, and increased in power by charters and grants conferred upon them by the liberality and bounty of several kings.

Immediately after, and in consequence of, the decision in *Donaldson v. Becket* (a), the universities hastened to Parliament, and in the same year obtained an Act (b) for enabling the two universities in England, the four universities in Scotland, and the several colleges of Eton, Westminster, and Winchester, to hold in perpetuity their copyright in books given or bequeathed to them for the advancement of useful learning and other purposes of education.

The right exists in all such books as had, before the year 1775, or have since, been given or bequeathed by the authors of the same, or their representatives, to or in trust for those universities, or any college or house of learning within them, or to or in trust for the colleges of Eton, Westminster, and Winchester, or any of them, for the beneficial purpose of education within them or any of them.

The exception in favour of the universities and colleges is to extend only to their own books, so long as they are printed at the college press and for their sole benefit; and any delegation of the right works a forfeiture, and the privilege becomes of no effect.

(a) 1 Burr. 2408.

(b) 15 Geo. 3, c. 53; App. vi.

A power is given to the universities to sell or dispose of the copyrights given or bequeathed to them, but if they delegate, grant, lease, or sell the copyright of any book, or allow any person to print it, their privilege ceases to exist. The copyright of any work presented to the universities must be registered at Stationers' Hall within two months after any such gift shall come to the knowledge of the officers of the universities.

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As to their
registration
and sale.

By an Act passed in the forty-first year of Geo. 3, c. 107 (a) a similar copyright is given to Trinity College, Dublin. And by the 27th section of the 5 & 6 Vict. c. 45 (b) the rights of the respective universities and colleges above enumerated are saved from the operation of the Copyright Act.

(a) App. xii.

(b) App. xxxiii.

CHAPTER XI.

MUSICAL AND DRAMATIC COPYRIGHT.

Dramatic compositions within the Literary Copyright Act.

DRAMATIC compositions, when in manuscript, are protected like other literary compositions; when printed and published they are books within the meaning of the Literary Copyright Act.

The point whether there could be copyright in a musical composition first came before Lord Mansfield in *Bach v. Longman*. It was a case sent out of Chancery for the opinion of the Court of King's Bench: "Whether, in a composition for the harpsichord, called a *sonata*, the original composer had a copyright?" The opinion given, was that the same rules of law apply both to literary and musical compositions. It was said that the words of the Act of Parliament were very extensive: "Books, or other writings," and consequently they were not confined to language and letters only. Music is a science; it may be written, and the mode of conveying the ideas is by signs and marks. If the narrow interpretation contended for were to hold (*i.e.*, confined to books only), it would apply equally to mathematics, algebra, arithmetic, or hieroglyphics. The case being one sent out of Chancery, the certificate of the judge was: that a musical composition is a writing within the statute of 8 Anne, c. 19, and that of course the plaintiff was entitled to the copyright given to the author by that Act.

Now, by the interpretation clause of the 5 & 6 Vict. c. 45, the word "book," in the construction of the Act, is to mean and include "every volume, part or division of a

volume, pamphlet, sheet of letterpress, *sheet of music*, map, chart, or plan separately published.” CAP. XI.

Musical compositions intended for the stage come under the head of dramatic compositions.

In an early case, it was declared that the acting a play was not a publication of it; and by analogy, it was subsequently held, at common law, that the mere *acting* of a play which had been printed and published did not constitute a piracy or an infringement of the copyright (a). Formerly representation not equivalent to publication.

In the former case, the plaintiff was the author of a farce called ‘Love à la Mode,’ consisting of two acts, which was performed, by his permission, several times at the different theatres in successive years, but was never printed or published by him. When the farce was over he used to take the copy away from the prompter, and when it was played at the benefits of particular actors he made them pay a certain sum for the performance. The defendants, who were proprietors of a magazine, employed a shorthand writer to take down the words of the play at the theatre, and thus published the first act, giving notice that they would publish the second, in their next number. An injunction, however, was obtained on the ground that acting a play was not a publication of it (b).

The latter case was an action on the Statute of Anne, for publishing an entertainment called ‘The Agreeable Surprise.’ The plaintiff had purchased the copyright from O’Keefe, the author, and the only evidence of the publication by the defendant was the representation of the piece upon his stage at Richmond. It was held that there was no publication; the statute for the protection of copyright only extending to prohibit the publication of the work itself by any other than the author (c).

When the play is an abridgment or alteration of a

(a) In equity, injunctions have been granted to stop the performance of printed dramatic works at the request of the authors of them: *Morris v. Harris*, *Morris v. Kelly*, 1 Jac. & W. 481; cited Godson on ‘Patents and Copyrights,’ 390.

(b) *Macklin v. Richardson*, Amb. 694; but see 5 & 6 Vict. c. 45, s. 20.

(c) *Coleman v. Wathen*, 5 T. R. 245: see, however, 5 & 6 Vict. c. 45, s. 20.

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former dramatic representation, no action can be maintained by the original author. Thus where Lord Byron's tragedy of 'Marino Faliero,' altered and abridged for the stage, was performed without the consent of the owner of the copyright, who applied for an injunction, it was laid down, that an action could not be maintained, "for publicly acting and representing the said tragedy, abridged in manner aforesaid (a)."

The 3 & 4 Will. 4, c. 15, to amend the law relating to dramatic copyright.

The many defects existing in the law of dramatic copyright led to the passing of the 3 & 4 Will. 4, c. 15 (b), which gave to the author, or his assignee, of any printed and unpublished tragedy, comedy, play, opera, farce, or other dramatic piece or entertainment (c), the sole right of having it represented in any part of the British dominions; and to the author, or his assignee, of any such dramatic production which was printed or published after the passing of the Act, or ten years before, the sole right of representation from the time of publication, or of the passing of the Act, for a period of twenty-eight years, or, if the author were living at the end of that time, for the remainder of the author's life. And further enacted, that if any person should represent, or cause to be represented, without the consent in writing of the author or other proprietor, at any place of dramatic entertainment, any such production, or any part thereof, every such offender should be liable for each and every such representation to the payment of an amount not less than 40s., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages, to the author or other proprietor of such production so represented, to be recovered, together with double costs of suit.

Double costs were taken away in all cases by the 5 & 6

(a) *Murray v. Elliston*, 5 Barn. & Ald. 657.

(b) App. xv.

(c) In *Lee v. Simpson*, 3 C. B. 871, it was determined that a pantomime, or rather the introduction to one, which is the only written part of the entertainment, is protected from piracy under this Act.

Vict. c. 97, and the plaintiff can now only recover a full CAP. XI. and reasonable indemnity as to all expenses incurred, to be taxed by the proper officer in that behalf.

The provisions of the 3 & 4 Will. 4, c. 15, are extended to musical compositions, and the term of copyright as provided by the 5 & 6 Vict. c. 45, applied to the liberty of representing dramatic pieces and musical compositions, by the 20th section of the latter Act (a), which enacts that the sole liberty of representing or performing, or causing (b) or permitting to be represented or performed, any dramatic piece or musical composition shall endure and be the property of the author thereof and his assigns for the term in the Act provided for the duration of copyright in books (c); and the provisions thereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were therein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of the Act, to the first publication of any book: provided always, that in case of any dramatic piece or musical composition in manuscript, it shall be sufficient for the person having the sole liberty of representing or performing, or causing to be represented or performed, the same, to register only the title thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor thereof, and the time and place of its first representation or performance.

Provisions of the 3 & 4 Will. 4, c. 15, extended to musical compositions, and representation made equivalent to publication.

Pursuant, however, to the 24th section of the same statute, the omission to register will not prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece has by virtue of this Act or of the 3 & 4 Will. c. 15.

Omission to register does not affect the copyright.

There are several points which we propose now to con-

(a) App. xxxi. (b) See *Parsons v. Chapman*, 5 Car. & Payne, 33.

(c) Strictly, a copyright song cannot be publicly sung, or a tune publicly played, without the permission of the composer or his assigns.

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sider in the order in which they are enumerated in the sections before us.

As to the consent of the author.

The penalties are only incurred if the representation be without the *consent in writing of the author or other proprietor*. The consent may be given by the author's agent, and it has been decided that the Dramatic Authors' Society is agent to its members, for the purpose of authorizing managers of theatres to perform pieces composed by its members (a).

The consent may apply to works not in existence at the time it is given. It is not as it is under the Statute of Frauds, which expressly requires that the contract shall be signed by the party to be charged; and even that is satisfied, if it is signed in his name by an agent duly authorized so to sign. It is very rarely the case that a document required by the law need be wholly in the handwriting of the party on whose behalf it is to be given. The present statute does not require signature, nor the *handwriting* of the author. All that it requires is that there should be his consent, and that it should appear in writing (b).

Performance at a place of dramatic entertainment.

Again, although by a former Act the performance which is alleged to be an infringement of the original right must have taken place at some place of dramatic entertainment, for the author to have maintained an action, yet the above provision does not appear to be so restrictive. It has never been judicially decided that an infringement which is not committed in a place of dramatic entertainment would be the subject of an action; but, from the general aspect of the above, we are inclined to think that it would. The question was raised in *Russell v. Smith* (c), but the judges did not express an opinion upon it, because the case was decided upon other grounds. Mr. Russell, who was the composer of a song called 'The Ship on Fire,' brought an action against a man of the name of Smith for singing the same song, among others, at an entertain-

(a) *Moreton v. Copeland*, 16 C. B. 517; S.C. 24 L. J. (C.P.) 169; *Fitzbull v. Brooke*, 2 Dow. & Lown. 477; *Shepherd v. Conquest*, 25 L. J. (C.P.) 127; 17 C. B. 427.

(b) *Per Maule, J.*, in *Moreton v. Copeland*, *supra*. (c) 12 Q. B. 217.

ment which he opened at Crosby Hall, Bishopsgate, and to which he gave admission by shilling and two-shilling tickets. The building called Crosby Hall belonged to a literary institution, and contained a large room in which elocution classes met periodically, but which, at other times, was let out for concerts and musical entertainments. It had been hired for recitations intermixed with songs, and for performances of ventriloquy; and a music licence had been taken out for it under statute 25 Geo. 2, c. 36. On the trial it was objected that Crosby Hall was not a "place of dramatic entertainment" within the meaning of statute 3 & 4 Will. 4, c. 15, s. 1 (a), referred to by statute 5 & 6 Vict. c. 45, s. 20 (b). But Lord Denman held, that as Crosby Hall was used for the public representation for profit of a dramatic piece, it became a place of dramatic entertainment for the time within the statutes in question. "The use for the time in question," added the learned chief justice, "and not for a former time, is the essential fact. As a regular theatre may be a lecture-room, dining-room, ball-room, and concert-room on successive days, so a room used ordinarily for either of those purposes would become for the time being a theatre, if used for the representation of a regular stage play. In this sense, as 'The Ship on Fire' was a dramatic piece in our view, Crosby Hall, when used for the public representation and performance of it for profit, became a place of dramatic entertainment."

In an action for penalties brought under the 3 & 4 Will. 4, c. 15, the declaration stated that the plaintiff was the author of a certain dramatic piece or musical composition, &c., and that defendant caused the said piece to be represented at a certain place of dramatic entertainment, &c., whereby, &c. It was determined, first, that the introduction of a pantomime was a dramatic entertainment within the meaning of the statute; secondly, that it was not necessary to allege in the declaration, or to prove at the trial, that the defendant knew that the

(a) App. xv.

(b) App. xxxi.

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plaintiff was the author; thirdly, that the allegation in the declaration, that the same was represented at a certain place of dramatic entertainment, was sufficient.

Punishment for infringement not to be visited on one not actually taking part in the performance.

Though it was here decided that a person ignorant of the piratical nature of a representation may be an offender within the meaning of the Act, yet one cannot be considered a transgressor of the provisions of the statute, so as to subject himself to an action of the above nature, unless he himself, or his agent, actually takes part in the representation which is a violation of copyright. Were it to be otherwise held, all those who supply some of the means of representation to him who actually represents, would have to be considered as thereby constituting him their agent, and thus *causing* the representation, within the meaning of the Act; such a doctrine would embrace a class of persons not at all intended by the legislature (a).

A person, therefore, who lets for hire by the evening a place of dramatic entertainment for the public performance of songs and music, and provides the hirer, who performs songs and music which he has not liberty to perform, with lights, benches, &c., is not liable to pay damages to the author for causing or permitting to be represented or performed a musical composition without the author's written consent (b).

This doctrine was followed in *Lyon v. Knowles* (c). The defendant, the proprietor of a theatre, allowed one Dillon to have the use of it for the purpose of dramatic entertainments. The defendant provided the band, the scene-shifters, the supernumeraries, the money-takers, and paid for printing and advertising. Dillon employed his own company of actors and actresses, and selected the pieces which were to be represented, free from control on the part of the defendant. It was arranged that the money taken at the doors should be divided equally between the defendant and Dillon. During the period of such occupation of the theatre by Dillon, certain pieces

(a) *Russell v. Briant*, 19 L. J. (C.P.) 33; 14 Jur. 201; 8 C. B. 536.

(b) *Ibid.* (c) 11 W. R. 266; 32 L. J. (Q.B.) 71; 10 L. T. (N.S.) 876.

were performed which the plaintiff had the sole liberty of representing or causing to be represented; and it was held, in an action to procure the penalties imposed by the above sections, that the plaintiff could not recover, inasmuch as, under the circumstances, the defendant was not shewn to have represented, directly or indirectly, the said dramatic pieces. If the representation of the pieces could have been considered a joint act of the defendant and Dillon, the defendant would have been liable. The defendant had no right to interfere in the choice of the pieces to be represented; and in short, though the proprietor, he was not the manager. Neither was he a partner; for the receipt of the moneys at the door was a receipt of gross proceeds, not net profits, and was merely a mode of receiving and securing the rent. There was an agreement between them to divide the gross receipts in lieu of payment of a specific sum as rent. But this did not make them partners. The defendant, then, having no control over the performances, could not be said to have caused them to be represented, and was consequently not liable. The defendant, to have been made liable, must have been shewn to have been either the partner or principal of Dillon, the person who actually directed the representation (a).

Representing, within the meaning of the Act, is defined to be the bringing forward on a stage or place of public representation; and the question whether in any particular case the act done amounts to a representation, is a proper question for a jury.

If the words of one song only be taken from a musical or dramatic piece protected by the Act, or be sung on a stage or in any place of theatrical entertainment, without the permission of the proprietor, the representation will be actionable (b).

A song which related the burning of a ship at sea and the escape of those on board, describing their feelings in vehement language, and sometimes expressing them in

(a) *Lyon v. Knowles*, 11 W. R. 266; 3 B. & S. 556: affirmed on appeal 5 B. & S. 751; 12 W. R. 1083; 10 L. T. (N.S.) 876.

(b) *Planché v. Braham*, 1 Jur. 823; 8 C. & P. 68; 4 Bing. (N.S.) 17.

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As to what is
a dramatic
piece.

the supposed words of the suffering parties, was considered dramatic, and consequently within the meaning of the statute, even though it was sung by one person only, sitting at a piano, giving effect to the verses by the delivery, but not assisted by scenery or appropriate dress (a).

That the whole is expressed in music makes no difference. The early Greek drama was musical throughout; so in the modern Italian Opera. Nor can any distinction arise from the want of scenery or appropriate dress; an oratorio has neither, yet it is often dramatic. Nor, again, is it material that no second person performs. No one would suggest that Mr. Matthews' representations, or the readings of Shakespeare by Mrs. Siddons or Mr. Charles Kemble, were not dramatic. The character of Eliza is essentially a dramatic one; requiring, however, not dramatic action, but dramatic sentiment, in order to delineate it. Sometimes the wrath and gloom of such a character must be displayed, at other times the most pathetic tenderness. If the character of drama were denied to this species of entertainment, nothing short of requiring all the ingredients of a play would be admitted as a dramatic representation. If the interpretation clause of statute 5 & 6 Vict. c. 45 (b) be referred to, it will be remarked that the second section declares that "dramatic pieces" within that Act include "tragedy, comedy, play, opera, farce," or "other scenic, musical, or dramatic entertainment." These words comprehend any piece which can be called dramatic in its widest sense; any piece which, on being presented by any performer to an audience, will produce the emotions which are the purpose of the regular drama, and which constitute the entertainment of the audience (c).

Assignment
of the right.

By the 22nd section of the 5 & 6 Vict. c. 45 (d) it is enacted that no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition, shall be holden to convey to the assignee the right of representing or performing such dramatic piece or

(a) *Russell v. Smith*, 12 Q. B. 217.

(b) App. xxii.

(c) Lord Denman, J.C., in *Russell v. Smith*, 12 Q. B. 217; 17 L. J. (Q.B.) 225.

(d) App. xxxii.

musical composition, unless an entry in the registry book, to which reference has already been made (a), shall be made of such assignment, wherein shall be expressed the intention of such parties that such right should pass by such assignment.

This provision will prevent the recurrence of what took place in *Cumberland v. Planché* (b), where, by the transfer of the copyright of a play, the right of representation was held to have passed also.

It is competent for an assignee of the sole right of representing a dramatic piece to sue for penalties under 3 & 4 Will. 4, c. 15 (c), notwithstanding the assignment is now made by deed, or registered under 5 & 6 Vict. c. 45 (d).

The administrator of an author of a dramatic piece first acted in 1843, by deed dated the 14th of April, 1859, in consideration of £100, assigned to the plaintiff the copyright and right of representation in all dramatic pieces written by the author; no entry of the assignment to the plaintiff had been made in the registry book in pursuance of the section under consideration; and it was held that the plaintiff might maintain an action for penalties under statute 3 & 4 Will. 4, c. 15, against the defendant, for representing the piece without his licence within twenty-eight years of its publication, the period for which the sole liberty of representation is given by that statute, although the deed was not registered under statute 5 & 6 Vict. c. 45, s. 22 (e).

That section in terms applies only to the effect of an assignment of the copyright, and was intended to correct what had probably been an omission in previous legislation; for upon the construction of statute 3 & 4 Will. 4, c. 15, s. 1, by the Court of Queen's Bench in *Cumberland v. Planché*, the assignment of the copyright of a dramatic piece carried with it, incidentally, the exclusive right of representation. Section 22 of statute 5 & 6 Vict. c. 45 was intended to meet that decision by enacting that no

(a) *Ante*, p. 67.

(b) 1 Ad. & E. 580.

(c) App. xvii.

(d) *Marsh v. Conquest*, 17 C. B. (N.S.) 418.

(e) App. xxxii.

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assignment of the copyright of a dramatic piece or musical composition should be holden to convey the right of representing or performing it, unless an entry was made in the registry book that it was the intention of the parties that such right should pass by the assignment. That enactment does not apply to a case in which there is an assignment of the *right of representing or performing*. In the case of *Lacy v. Rhys*, there was an assignment of the right of acting, as well as of the copyright; and it was held, that it did not follow that, because section 24 required registration of an assignment of the copyright, and there was such an assignment there, therefore the assignment of the *right to represent* was in any way affected: *Utile per inutile non vitatur*. When a person professes to convey two things, one of which he has a right to convey and the other he has not, the instrument operates to pass the property in that which he has a right to convey, and the rest is surplusage (a).

Assignment of the right of representation need not be registered.
The legal assignment must be in writing.

It is clear, therefore, that an assignment merely of the right of representation needs not to be registered under the 22nd section.

The legal assignment must be in writing. This was decided in *Shepherd v. Conquest* (b), where it appeared that the plaintiffs, being proprietors of the Surrey Theatre, verbally agreed with one Courtney that the latter should go to Paris for the purpose of adapting a piece there in vogue for representation on the English stage; that the plaintiffs should pay all Courtney's expenses, and should have the sole right of representing the piece in London, Courtney retaining the right of representation in the provinces. Courtney accordingly proceeded to Paris, produced a piece called 'Old Joe and Young Joe,' and was paid by the plaintiffs as agreed. The piece was brought out at the Surrey Theatre by the plaintiffs, and afterwards at the Grecian Saloon by the defendant, who had obtained an assignment from Courtney. The representations by the

(a) *Per* Cockburn, C.J., in *Lacy v. Rhys*, 4 B. & S. 573, 583; 12 W. R. 309; 33 L. J. (Q. B.) 157; 10 Jur. (N. S.) 612. See *Marsh v. Conquest*, 10 L. T. (N. S.) 717; 17 C. B. (N. S.) 418.

(b) 17 C. B. 427; 25 L. J. (C. P.) 127.

defendant at the Grecian Saloon were the infringements of the plaintiffs' right complained of. The defendant objected that, as there was no assignment in writing from Courtney to the plaintiffs, the action was not maintainable. The plaintiffs contended that no assignment was necessary, for that, by virtue of Courtney's employment by them, they were the proprietors of the piece in question from the first moment of its composition, or that at least they were entitled to the sole right of representation in London. The Court of Common Pleas were of opinion that though Courtney made the adaptation at the suggestion of the plaintiffs, he acquired for himself, as the author of the adaptation, and as far as that adaptation gave any new character to the work, the statutory right of representing it; and that, inasmuch as the plaintiffs had no assignment in writing of that right, they could not sue for an infringement of it.

In the course of the delivery of the judgment, Jervis, C.J., doubted whether, under any circumstances, the copyright in a literary work, or the right of representation of a dramatic one, could become invested *ab initio* in an employer other than the person who had actually composed or adapted the work. But he was clearly of opinion that no such effect could be produced when the employers merely suggested the subject, and had no share in the design or execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed. It appeared to him to be an abuse of terms to say that, in such a case, the employers were the authors of a work to which their minds had not contributed an idea; and it is upon the author, in the first instance, that the right is conferred by the statute which creates it. Literary property stands upon a different and higher ground from that occupied by mechanical invention. The intention of the legislature in the enactments relating to copyright was to elevate and protect literary men; such an intention can only be effectuated by holding that the actual composer of the work is the author and proprietor of the copyright, and that no

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relation existing between him and an employer, who himself takes no intellectual part in the production of the work, can, without an assignment in writing, vest the proprietorship of it in the latter (a).

The enactments upon which literary property and patents for inventions are respectively founded differ widely in their origin and in their details. In order to show that the position and rights of an author with the former Acts are not to be measured by those of an inventor within the latter, it is only necessary to bear in mind that, whilst on the one hand a person who imports from abroad the invention of another, previously unknown here, without further originality or merit in himself, is an inventor entitled to a patent; on the other hand, a person who merely reprints for the first time in this country a valuable foreign work, without bestowing on it any intellectual labour of his own, as by translation (which, to some extent, must impress a new character), cannot thereby acquire the title of an author within the statutes relating to copyright (b). In *Morris v. Kelly* (c) an injunction was granted to restrain the performance of a comedy, the copyright of which had been sold by the author and had been afterwards assigned by writing to the plaintiffs, although it did not appear whether the original assignment was in writing, that fact being presumed till the contrary was shewn.

The composer's interest is not affected by showing that the song was composed to be sung by a particular performer at the opera, and that by the regulations of that establishment such compositions become the property of the house (d).

Infringement
of the copy-
right in a
musical com-
position.

As to what amounts to an infringement of the copyright in a musical composition (e), it has been decided that to publish, in the form of quadrilles and waltzes, the airs of an opera of which there exists an exclusive copyright,

(a) *Ante*, p. 44.

(b) Jervis, C.J., in *Shepherd v. Conquest*, 25 L. J. (N.S.) (Ch.) 127.

(c) 1 Jac. & W. 481.

(d) *Storace v. Longman*, 2 Camp. 27.

(e) Assumption of the name and description of a song, see *Chappell v. Sheard*, 2 K. & J. 117.

amounts to such. In *D'Almaine v. Boosey (a)*, the plaintiff published, first the overture, and then a number of airs, and all the melodies. It was admitted that the defendant had published portions of the opera containing the melodious parts of it; that he had also published entire airs; and that, in one of his waltzes, he had introduced seventeen bars in succession containing the whole of the original air, although he added fifteen other bars which were not to be found in it. This, it was contended, was not a piracy: first, because the whole of each air had not been taken; and secondly, because what the plaintiff had purchased of the original author was the entire opera, and the opera consisted, not merely of certain airs and melodies, but of the whole score. Lord Lyndhurst, Chief Baron, however, held, as to the first argument, that piracy might be of part of an air as well as of the whole; and with reference to the second, that, admitting that the opera consisted of the whole score, yet if the plaintiff was entitled to the work, *à fortiori* he was entitled to publish the melodies which formed a part. The Lord Chief Baron regarded the subject of music on a different principle to that which he regarded other literary works; for he would not admit that the adapting for dancing, or otherwise, from the original composition, in which some degree of art is needed, could be deemed such a modification of an original work as should absorb the merit of the original in the new composition. It is the air or melody which is the invention of the author, and which may, in such case, be the subject of piracy; and a piracy is committed if, by taking, not a single bar, but several, that in which the whole meritorious part of the invention consists is incorporated in the new work.

“If,” said Lord Lyndhurst, “you take from the composition of an author all those bars consecutively which form the entire air or melody, without any material alteration, it is a piracy; though, on the other hand, you might take them, in a different order, or broken by the intersection of

(a) 1 Y. & C. 288. See *Chappell v. Sheard*, 1 Jur. (N.S.) 996.

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others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now, the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is, when the appropriated music, though adapted to a different purpose from that of the original, may still be recognised by the ear. The adding variations makes no difference in the principle."

A novel may be dramatized without infringement.

Though no person may, without the author's written consent, represent the incidents of his published dramatic piece, however indirectly taken, yet no action will lie, at the suit of the author of a novel, against a person who dramatizes it and causes it to be acted on the stage (a).

This was decided in *Reade v. Conquest* (b). The second count of the declaration alleged that the plaintiff was the duly registered proprietor of the copyright in a certain registered book, namely, a tale or novel or story entitled 'It is Never too Late to Mend,' and complained that the defendant, without the plaintiff's consent, dramatized the said novel, and caused it to be publicly represented and performed as a drama at the Grecian Theatre for profit, and thereby the sale of the book was injured, &c. To this count there was a demurrer; and it was insisted, on the part of the defendant, that representing the incidents of a published novel in a dramatic form upon the stage, although done publicly and for profit, is not an infringement of the plaintiff's copyright therein; and the Court of Common Pleas were of opinion that the defendant was right (c).

(a) *Reade v. Conquest*, 9 C. B. (N.S.) 755; S.C., 30 L. J. (N.S.) (C.P.) 209; 9 W. R. 434; 7 Jur. (N.S.) 265.

(b) *Ibid.*

(c) In a French case cited in *Le Blanc* on 'Piracy,' p. 233, under the

Neither the 3 & 4 Will. 4, c. 15, nor the 5 & 6 Vict. c. 45, contemplated the conversion of a book into a dramatic piece, and the definition of copyright in the second section of the latter Act, "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied," evidently did not include the claim of the plaintiff in the above case.

All that was here decided was, that the defendant had a right to act, that is to say, to speak and *represent, the drama* which was constructed out of the plaintiff's novel; it was not held that the defendant had a right to *print it*. But the drama may not be printed.

In a subsequent case, in 1862 (a), Lush, as counsel for the defendant, submitted that he had a right to print and publish such a drama, with the exception of any passages which were mere copies of the novel; but the circumstances of the case did not render it necessary that the point should be decided. "If that question should arise," said Erle, C.J., "it would then be time to decide whether the defendant could find any defence; but it is clear he could not in that case defend himself on the ground that he was the author of the parts which he copied."

The question, however, has since arisen in the case of *Tinsley v. Lacy* (b). A bill was filed by the publishers and owners of the copyright in two novels, called 'Aurora Floyd' and 'Lady Audley's Secret,' written by Miss Brad-don. The novels had been dramatized by a Mr. Suter and performed at the Queen's Theatre. The defendant, Mr. Lacy, had *published* the two plays as they were performed. It was proved that a large portion of the dramas, including the most striking incidents and much of the

name of *Leirane v. Paul de Brusset*, a different principle was followed. The defendant there had dramatized a tale written by the plaintiff, and represented it upon the stage for profit; the plaintiff claimed to be entitled, as *collaborateur*, to a portion of the profits, and the court decided that, although he could not claim in that capacity, inasmuch as the adaptation of the tale to the stage was without his knowledge or consent, still he had a good claim for damages against the defendant for the piracy, and they mulcted the defendant in damages and costs.

(a) *Reade v. Conquest*, 31 L. J. (C.P.) 153; 8 Jur. (N.S.) 764; 11 C. B. (N.S.) 179. (b) 32 L. J. (Ch.) 535; 11 W. R. 876; 1 Hem. & Mill. 747.

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actual language of the novels, had been taken bodily from the novels. Vice-Chancellor Wood, in passing judgment, admitted that the defendant was entitled to dramatize the novels for the purpose of a mere acting drama; but held that he was not so entitled for the purpose of printing or selling his compilation. "He has taken," said the Vice-Chancellor, "to use the language of Lord Cottenham in *Bramwell v. Halcomb*, the vital portion of the novels, the leading incidents of the plot, and in many instances the very language of the novel itself. He reprints in his books (and I confine myself to what appears in the books, and say nothing as to the represented drama), the very words of the most stirring passages of the novels. It is no answer to say that similar infringements have often been committed. Although Sir Walter Scott and other authors did not choose to assert any claim of this kind, this does not affect the rights of the plaintiff; and it is to be observed, moreover, that there has been a considerable alteration of the law since the time referred to by the extension of copyright to dramatic performances. . . . The question of the extent of appropriation which is necessary to establish an infringement of copyright is often one of extreme difficulty; but, in cases of this description, the quality of the piracy is more important than the proportion which the borrowed passages may bear to the whole work. Here it is enough to say, that the defendant admits that one-fourth of the dramas is composed of matter taken from the novels. In *Campbell v. Scott* (a), which has a strong bearing on this point, the defendants had published a work containing biographies and selections from the works of a large number of modern poets, and among others, six short poems and extracts from larger poems written by the plaintiff. The defence was, that the poems were *boni fide* selections, forming a very small proportion of the writings of the plaintiff; that such compilations were cautiously made by the most respectable publishers; that the price of the compilation was £1 1s.,

(a) 11 Sim. 31.

while the plaintiff's entire works were published at 2s. 6d.; and that the plaintiff would be rather benefited than injured by the defendant's work, which contained 10,000 lines, of which only a few hundreds were taken from the plaintiff's poems." The Vice-Chancellor, after observing that in the case of the '*Encyclopædia Londinensis*' the jury found for the plaintiff, though the matter taken formed but a very small proportion of the work into which it was introduced, adds, that "it is not necessary to consider whether the selections were the cream and essence of all that Mr. Campbell ever wrote. There is no doubt that in this case, as in that of Campbell's poems, the passages taken were the striking passages, and these have been taken by the author of the defendant's publications for the express purpose of using Miss Braddon's property for his own benefit. So long as he confined himself to dramatic representation she could not be interfered with; but when he printed his plays he brought himself within the letter of the law."

The only way in which it appears possible for an author to prevent other persons from reciting or representing as a dramatic performance the whole or any portion of a work of his composition, is himself to publish his work in the form of a drama, and thus bring himself within the scope of the dramatic copyright clauses.

Where the plaintiff, the author of a drama, published a novel founded thereon, containing in substance the same incidents, characters and language, and the defendant's son dramatized the novel, and in so doing took many of the characters and incidents and much of the language of the novel, and, consequently, much which was the same as in the plaintiff's drama, but without having seen or in any way known of the plaintiff's drama, and the defendant then represented what his son had so dramatized, at his theatre; such representation was held to be an infringement of the plaintiff's stage copyright in his drama, as the defendant's son was not the author in respect of such parts of his drama copied from the novel which were

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the same as the corresponding parts of the plaintiff's drama (a).

The pianoforte score of an opera.

The pianoforte score of an already existing opera, whether arranged by the composer himself or by another person, is the subject of copyright. The arrangement of the opera score for the pianoforte involves labour as well as intelligence and skill, which constitutes it a new work (b). In Renouard's '*Traité des Droits d'Auteurs*,' tome ii. p. 190, pt. iv. ch. 2, p. 78, it is said: "*Des arrangemens, variations, valse, contredanses, etc., composés sur un thème, un air, un motif même, appartenant au domaine public; des pots-pourris, sorte de compilation musicale, disposés dans un certain ordre et avec certaines liaisons ou transitions, sont-ils des objets de privilège? Je n'hésite pas à croire que la solution affirmative résulte des principes généraux sur la matière, exposés au commencement de ce chapitre. Il résulte des mêmes principes que ces compositions ne conféreront un privilège qu'autant qu'elles supposeront de l'art, du travail, un effort d'intelligence; qu'elles seront, en un mot, une production de l'esprit.*"

Remedy in cases of infringement.

The 21st section of the 5 & 6 Vict. c. 45 (c) gives to the proprietors of the right of dramatic or musical representation or performance, during the term of their interest, all the remedies provided by the 3 & 4 Will. 4, c. 15. By the second section of this latter Act it is enacted, that if any person, during the continuance of the exclusive right of representing a dramatic piece, cause to be represented, without the author's or the proprietor's previous written consent, such production at any place of dramatic entertainment within the British dominions, every such offender shall, for each representation, be liable to the payment of not less than 40s., or of the full amount of the advantage arising from the representation, or of the loss sustained by the plaintiff, whichever shall be the greater damage.

(a) *Reade v. Conquest*, 31 L. J. (C.P.) 153; 8 Jur. (N.S.) 764; 11 C. B. (N.S.) 479.

(b) *Wood v. Boosey*, 7 B. & S. 869; L. R. 2 Q. B. 340; 36 L. J. (Q.B.) 103; 15 W. R. 309; 15 L. T. (N.S.) 530; affirmed 9 B. & S. 175; L. R. 3 Q. B. 223; 37 L. J. (Q.B.) 84; 16 W. R. 485; 18 L. T. (N.S.) 105.

(c) App. xxxi.

These penalties are recoverable by the author or proprietor in any court having jurisdiction in such cases in that part of the British dominions where the offence is committed.

The third section of the 3 & 4 Will. 4, c. 15, provides that all proceedings for any offence or injury against that Act shall be brought within twelve months from the committing of the offence, or else the same shall be void and of no effect.

Actions to be brought within twelve months.

CHAPTER XII.

COPYRIGHT IN ENGRAVINGS, PRINTS, AND LITHOGRAPHS.

Nature and
origin of the
right.

STRANGE yet true it is, that an art of so much importance—one which has exercised such an influence on the refinement of the people, and tended so apparently, yet indirectly, to the formation of the polished character of civilized Europe—should have remained for years without any protection whatever from the legislature.

In England, protection was not afforded to the artist until that great engraver and designer, Hogarth, arose like a giant from the most elevated of his associates in the art, and without the aid of his keen and penetrating intellect discovered, that, toil and labour how much soever he might, the product of his intellectual genius was by no means regarded as solely his, nor he deemed to have acquired a more permanent property in it than the purchaser or imitator of one of his numerous works of art.

Engravings resemble literary works as regards the incorporeal right in them accruing to the author by the exertion of his mental powers in their production; but differ, as they also require a considerable amount of his manual skill and labour; they are, therefore, his property upon the same general principles as any other manufacture.

In handling the present state of the law on this branch of the fine arts we may properly investigate, under one view, the various Acts of Parliament which are particularly appurtenant to the collective arts of designing, engraving, and etching, inasmuch as they, unlike those respecting literary copyright, have not yet been consolidated. A bill, however, to effectuate this, and to

consolidate the whole of the law of copyright in works of fine arts, is certainly now before the House, but when it will probably become law is a matter difficult of solution. CAP. XII.

Engravings are works having a commercial value, and as such have a double claim upon the protection of the legislature. On the one hand, the artist claims that the productions of his genius may be protected, and injury to his fame and reputation, by the circulation of inferior imitations, prevented, or preventively guarded against; and on the other hand, security in the possession of the money value of the creation of his own mind.

During the reign of the Stuarts the fine arts received more or less patronage, and engraving and other productive arts began to flourish accordingly: George I. knighted the engraver of the Cartoons. Line engraving, however, had been most cultivated, and the amount of skill required to imitate a plate must have nearly equalled that of its first production; every stroke of the graver would have to be repeated, so that the pirate could hardly undersell the original; and from the costliness of this style and its refinement few could afford to purchase, and few, perhaps, would appreciate. As so much talent had to be spent by the engraver in transferring the forms to a new medium, from the canvas to the copper-plate, the value of the right of engraving to the owner of the picture was small; and the picture itself, whether a portrait or work of imagination, was executed solely as an individual work of art. Gradually, however, it became a practice to publish small prints, not for the profit on them, but to assist in spreading the reputation of the painter, and this was done in the case of portraits of public men. Of course the name of the artist was not omitted; it was attached to the corner, to secure, not, as now, the property in the print, but the fame of the picture. The diffusion of some new mechanic or chemic arts of engraving or etching facilitated this (a). Fine arts encouraged by the Stuarts.

The first Act recognising engraving as an art, and

(a) Turner on 'Copyright in Designs,' p. 13.

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The first
copyright en-
graving Act.

extending towards its professors the protection they so unquestionably deserved, was that of the 8 Geo. 2, c. 13 (a), entitled "An Act for the Encouragement of the Arts of designing, engraving, and etching historical and other Prints, by vesting the Properties thereof in the Inventors and Engravers during the time therein mentioned." After reciting that "divers persons had, by their genius, industry, pains, and expense, invented and engraved, or worked, in mezzotinto or chiaro-oscuro, sets of historical and other prints, in hopes to have reaped the sole benefit of their labours, and that printsellers and other persons had of late, without the consent of the inventors, designers, or proprietors of such prints, frequently taken the liberty of copying, engraving, and publishing, or causing to be copied, engraved, and published, base copies of such works, designs, and prints, to the very great prejudice and detriment of the inventors, designers, and proprietors thereof," it enacted, that from and after the 24th of June, 1735, every person who should invent and design, engrave, etch, or work in mezzotinto or chiaro-oscuro any historical or other print or prints, should have the sole right and liberty of printing and representing the same for the term of fourteen years, to commence from the day of the first publishing thereof, which should be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints. And the Act inflicted on other persons pirating the same "without the consent of the proprietor thereof first had and obtained in writing," the penalty of forfeiting the plate, the sheets on which the prints were copied, together with 5s. for every print so pirated, the one moiety to the king, and the other to any person who should sue for the same. And it further provided, that it should be lawful for any person who should thereafter purchase any plate for printing from the original proprietor, to print and reprint from the said plates without incurring any penalty.

Under this Act Lord Hardwicke refused relief to a person complaining of the piracy of a drawing or design

(a) App. i.

which he had only procured to be made; "for," said he, "the case was not within the statute, which was made for the encouragement of genius and art; if it was, any person who employs a printer or engraver would be so too. The statute is, in this respect, like the statute of new inventions, from which it is taken."

No provision, it will be seen, is in this Act made for the protection of any work of which the engraver is not also the designer; and this has been accounted for by the fact that Hogarth, by whose influence the Act was introduced, was invariably the designer as well as the engraver of his celebrated works.

The 7 Geo. 3, c. 38 (a), was made to remedy this oversight, and protection consequently extended to any person making an engraving from the original work of another. Its title is, "An Act to amend and render more effectual an Act made in the 8 Geo. 2, for Encouragement of the Arts of designing, engraving, and etching historical and other Prints, and for vesting in and securing to Jane Hogarth, widow, the Property in certain Prints." The first section recites that the former Act had been found ineffectual for the purposes thereby intended, and enacts that all and every person and persons who shall invent or design, engrave, etch, or work in mezzotinto or chiaro-oscuro, any historical print or prints, or any other print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, shall have the benefit and protection of the said Act and this Act, under the restrictions and limitations thereafter mentioned. The second section enacts that all and every person and persons who shall engrave, etch, or work in mezzotinto or chiaro-oscuro, or cause to be engraved, etched or worked, any print taken from any picture, drawing, model, or sculpture, either ancient or modern, shall have the benefit and protection of the said Act and this Act for the term thereafter mentioned (twenty-eight years), in like manner as if such print had been engraved or drawn

(a) App. iv.

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from the original design of such graver, etcher, or draftsman; and if any person shall engrave, print, and publish, or import for sale, any copy of any such print, contrary to the true intent and meaning of this Act and the said former Act, every such person shall be liable to the penalties contained in the said Act, to be recovered as in the said Acts mentioned (a).

The third Act. The next Act (17 Geo. 3, c. 57)^(b) gave a special action upon the case, in which the proprietor might recover damages.

Provisions of Acts to be strictly complied with.

In order to vest the copyright of an engraving in the designer or engraver of the same, no registration, such as is necessary in the case of literary copyright, is required; the Acts above enumerated have merely to be strictly complied with. In the first place, it is therefore important that engravings should contain the date of publication and name of the publisher, in order to entitle the party to the penalties imposed by the statute Geo. 2. The reason assigned by the court in *Sayer v. Dacey* (c) being, "that any person may know when the proprietor's exclusive right ceases; and when, and against whom, he may be guilty of offending contrary to the statute." Lord Hardwicke, in an early case, doubted whether the clause on this subject in the Act ought to be construed as directory or descriptive, but he was of opinion that the property was vested absolutely in the engraver, although the *day* of publication was not mentioned, and compared it to the clause under the Statute of Anne, which requires entry at Stationers' Hall, upon the construction of which it has been determined that the property vests although the direction has not been complied with (d). However, it has subsequently been taken for granted by the Court of King's Bench that both the name and date should appear; the *date*, Lord Kenyon observed, is of importance, that the public may know the

(a) For the defective working of this Act, see Mr. Corrie's remarks in *Reg. v. Powell*, the 'Times,' November 10, 1862. (b) App. x. (c) 3 Wils. 60.

(d) *Blackwell v. Harper*, 2 Atk. 95; Barn. Ch. Rep. 210. See *Jefferys v. Baldwin*, Amb. 161; *Roworth v. Wilkes*, 1 Camp. 94; *Harrison v. Hogg*, 2 Ves. 323; *Thompson v. Symonds*, 5 T. R. 41.

period of the monopoly; the *name* should appear, in order that those who wish to copy it may know to whom to apply for consent (a). CAP. XII.

In *Harrison v. Hogg* (b) Lord Alvanley differed from Lord Hardwicke, considering the insertion of the name and date essential to the plaintiff's right; and this ruling has been followed in all subsequent cases, though it is not deemed necessary that the designation "proprietor" should be added to the same (c).

The correct date is, moreover, a *sine quâ non*. In *Bonner v. Field* (d) this objection prevailed. It was an action for pirating a print of the seal of the Countess of Talbot. The plaintiff had been employed by Lady Talbot to engrave this plate for her, which he executed on the 1st of June, 1778, when he took off some impressions for her use. On the *following day* she gave the plate to the plaintiff, who engraved on the bottom of it, "Drawn and engraved by J. Bonner; published on the 1st of June, 1778, as the Act directs." The declaration having stated that the plaintiff was the proprietor on the 1st of June, Lord Mansfield nonsuited the plaintiff on the ground that he had no title on the day when he claimed it. As to the date.

These essentials, in order to secure to the artist the copyright in engravings or etchings when published separately, are not requisite where the engravings form part of a book in which there is copyright; for the Copyright Act, 1842, gives a copyright in "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, manuscript, map, plan, or chart, separately published," and this definition, though it would not, of course, extend to prints or designs separately published, yet is sufficiently comprehensive to include prints and designs forming part of a book. The book is not less a book Engravings or etchings when published with letterpress.

(a) *Thompson v. Symonds*, 5 T. R. 41.

(b) 2 Ves. 323; *Newton v. Cowie*, 4 Bing. 234; *Brooks v. Cook*, 3 Ad. & E. 138, 4 N. & M. 652; *Colnaghi v. Ward*, 12 L. J. (Q.B.) 1; 6 Jur. 969; *Bogue v. Houlston*, 5 De G. & Sm. 267; *Avanzo v. Mudie*, 10 Ex. 203; *Graves v. Ashford*, 15 W. R. 495; Kerr on Injunc. 465.

(c) *Newton v. Cowie*, *supra*.

(d) Cited 5 T. R. 41.

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because it contains prints or designs, or other illustrations of the letter-press. A book must include every part of the book; it must include every print, design, or engraving which forms part of the book, as well as the letter-press therein, which is another part of it. A plaintiff published a book containing letter-press, illustrated by wood engravings, printed on the same paper at the same time. The defendants published a similar book with different letter-press, but containing pirated copies of the wood engravings. The plaintiff, upon motion for an injunction, proved that he had complied with the requisitions of the Copyright Act, 1842, but had not complied with the Act for the protection of engravings (8 Geo. 2, c. 13), by printing the date of publication and the name of the proprietor on each copy. Vice-Chancellor Parker considered the plaintiff entitled to an injunction, for upon the construction of the 5 & 6 Vict. c. 45, where there are designs forming part of a book in which a person has copyright, such copyright extends to the illustrations and designs of the book, equally as to the letter-press (a).

Ignorance no
excuse.

It matters not whether the person selling the pirated engravings is aware of their being spurious or genuine; for though the 8 Geo. 2, c. 13 (b), imposed, first, a penalty upon any person who should engrave, copy, or sell, or cause to be copied or sold, in the whole or in part, by varying, adding to, or diminishing from the main design; and, secondly, upon persons selling the same, "*knowing the same to be so printed or reprinted;*" yet in the 17 Geo. 3, c. 57 (c), the words "knowing the same to be so printed or reprinted" are omitted; and it may, therefore, fairly be inferred that the legislature intended to comprehend even those who were not aware that they were selling base copies (d).

The former part of the 17 Geo. 3, c. 57, s. 1, applies

(a) *Bogue v. Houlston*, 5 De G. & Sm. 267; *Woods v. Highley*, 1866, before Vice-Chancellor Wood. (b) App. i. (c) App. x.

(d) *West v. Francis*, 5 Barn. & Ald. 737; 1 D. & R. 400; *Gambart v. Sumner*, 1 L. T. (N.S.) 13; *Clement v. Maddick*, 1 Giff. 98; 5 Jur. (N.S.) 592.

to persons who actually make the copy, and who therefore must know it to be a piracy. But the latter branch applies to all persons who import for sale, or sell, any copy of a piratical print.

What is an infringement is, in many cases, a difficult matter to solve. There can be no reason why a person should not be liable where he sells a copy with a mere collusive variation, for a copy is defined to be that which comes so near to the original as to give to every person seeing it the idea created by the original (a). As to what is an infringement.

Great solicitude is requisite to guard against two extremes equally prejudicial: the one, that men of ability, who have employed their energies for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the community may not be deprived of improvements, nor the progress of the arts retarded. The Act which secures copyright to authors, guards against the piracy of the words and sentiments, but it does not prohibit writing on the same subject. As in the case of histories and dictionaries: in the first, a man may give a relation of the same facts, and in the same order of time; in the latter, an interpretation is given of the identical words. In all these cases the question of fact to come before a jury is, whether the alteration be colourable or not? There must be such a similitude as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a mere transcript. So in the case of prints, no doubt different men may take engravings from the same picture. There is no monopoly of the subject here any more than in the other instances, but upon any question of this nature, the jury will decide whether it be a servile imitation or not (b).

The first engraver does not claim the monopoly of the use of the picture from which the engraving is made; he says, Take the trouble of going to the picture yourself, but

(a) *West v. Francis, supra.* See *Roworth v. Wilkes*, 1 Camp. 94; *Moore v. Clark*, 9 M. & W. 692.

(b) *Sayre v. Moore*, 1 East, 361, n.

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do not avail yourself of my labour, who have been to the picture and have executed the engraving (a).

An engraver is invariably a copyist, and if engravings from drawings were not to be deemed within the intention of the legislature these Acts would afford no protection to that most useful body of men, the engravers. The engraver, although a copyist, produces the resemblance he is desirous of obtaining by means very different from those employed by the painter or draftsman from whom he copies; means which require great labour and talent. The engraver produces his effects by the management of light and shade, or, as the term of his art expresses it, the *chiaro-oscuro*. The due degrees of light and shade are produced by different lines and dots; he who is the engraver must decide on the choice of the different lines or dots for himself, and on his choice depends the success of his print. If he copies from another engraving, he may see how the person who engraved that has produced the desired effect, and so without skill or attention become a successful rival (b).

Engraving
Acts extended
to Ireland.

The Engraving Acts were extended to Ireland in 1837. By the 6 & 7 Will. 4, c. 59 (c), it was enacted that, from and after the passing of that Act, if any engraver, etcher, printseller, or other person should, within the period limited for the protection of copyright in engravings, engrave, etch, or publish, or cause to be engraved, etched, or published, any engraving or print of any description whatsoever, either in whole or in part, which might have been or which should thereafter be published in any part of Great Britain or Ireland, without the express consent of the proprietor or proprietors thereof first had and obtained in writing signed by him, her, or them respectively with his, her, or their own hand or hands in the presence of and attested by two or more credible witnesses, then every such proprietor should and might, by and in a separate

(a) *De Berenger v. Wheble*, 2 Stark. N. P. C. 548.

(b) *Newton v. Cowie*, per Best, C.J., 4 Bing. 246; *Martin v. Wright*, 6 Sim. 297.

(c) App. xx.

action upon the case, to be brought against the person so offending in any court of law in Great Britain or Ireland, recover such damages as a jury on the trial of such action, or on the execution of a writ of inquiry thereon, should give or assess.

The 15 & 16 Vict. c. 12, s. 14, declares that the provisions of this Act and the engraving Acts collectively are intended to include prints taken by lithography or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely, and the said Acts shall be construed accordingly (a).

Engraving Acts to include lithographs.

It is therefore an infringement of the copyright given by the Engraving Acts to copy by photography, or sell a photographic copy of a print in which a copyright has been acquired under these Acts (b). The question arose not long since.

The right in engravings may be infringed by photography.

It was in an action for the infringement by the defendant of the plaintiff's copyright in two engravings, the one from Rosa Bonheur's 'Horse Fair,' the other from Holman Hunt's 'Light of the World.' It was proved that the plaintiff was the proprietor of these two engravings, and that the defendant had copied them on a very reduced scale by means of photography, and sold a great number of copies. The point was argued before the Court of Common Pleas, and it was unanimously decided that all processes for the indefinite multiplication of copies, whether mechanical or otherwise, were within the Acts for the protection of artists and engravers; and that when they declare mechanical processes of multiplying copies to be within them, no doubt they would have also thus declared the multiplication by means of photography, if the art of photography had then been known. If the object of the Acts of Parliament on the subject were, not simply to protect the reputation of the artist or the engraver, but to protect him against the invasion of his substantial

(a) App. lxxx.

(b) *Gambart v. Ball*, 14 C. B. (N.S.) 306; 11 W. R. 699; 32 L. J. (C.P.) 156; *Graves v. Ashford*, 15 W. R. 495; L. R. 2 C. P. 410; 16 L. T. (N.S.) 98; 36 L. J. (C.P.) 139.

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commercial property in the work of his genius or of his industry, it is plain that he sustains an injury by another offering a photographic copy which is capable of exciting in the mind of the beholder the same or somewhat similar pleasurable emotions as would be communicated by a copy of the engraving itself. The value of the artist's property would be sensibly diminished were the multiplication of copies by means of photography held to be lawful. In the case above referred to, Chief Justice Erle, in passing judgment, said: "In the representation of 'The Horse Fair,' we feel the same degree of pleasure in looking at the forms and attitudes of the beautiful animals there portrayed, whether we see them in the size in which they are drawn in the original picture, or in the reduced size of the engraving, or in the still more diminished form in which they appear in the photograph. . . . The object of the statute, to my mind, was, not merely to prevent the reputation of the artist from being lessened in the eyes of the world, but to secure to him the commercial value of his property, to encourage the arts, by securing to the artist a monopoly in the sale of an object of attraction. . . . It seems to me that the making of copies in that way and selling them is within the words as well as the meaning of the Act" (a).

Though the language of the statute includes, as we have seen, copies made by mechanical or chemical process, and capable of being multiplied indefinitely, yet it would seem not to include copies made by hand or designs transferred to an article of manufacture.

What not an infringement.

Nor where the print or engraving differs materially from the original in character, and is dealt with in a different manner, can the former be considered a piracy of the latter within these Acts. Thus in 1821, plaintiff, a celebrated artist, composed and painted from sketches he had designed a picture called 'Belshazzar's Feast,' which he shortly afterwards sold. In 1826 he engraved and published from the sketches a print of the same name,

(a) This judgment was confirmed on appeal by the Court of Exchequer Chamber.

having previously done all necessary acts for securing to himself the copyright of the print. The defendant having purchased one of the prints, had it copied on canvas in colours on a very large scale, with dioramic effect; and he publicly exhibited such dioramic copy at the Queen's Bazaar in Oxford Street for money, describing it, in his handbills and advertisements as "Mr. Martin's grand picture of 'Belshazzar's Feast,' painted with dioramic effect." The plaintiff applied for an injunction, but the Vice-Chancellor refused to grant one, on the ground that exhibiting for profit was in no way analogous to selling a copy of the plaintiff's print, but was dealing with it in a very different manner. The Engraving Acts were not intended to apply to a case where there was no intention to print, sell, or publish, but to exhibit in a certain manner. "If, however," added the Vice-Chancellor, "Martin had exhibited his picture as a diorama, then he might have been entitled to an injunction" (a)

The statutes do not apply to the taking a print unlawfully from a lawful plate. In *Murray v. Heath* (b), where the defendant, an engraver, took a number of impressions from a plate engraved by himself, but which he had undertaken to engrave for the use of the plaintiff, it was decided that no action was maintainable against him under the 17 Geo. 3, c. 57 (c). Of course at common law an action for damages might have been maintained by reason of the breach of contract to deliver to the plaintiff all the impressions.

So, upon a similar principle, it was held in *Mayall v. Higbey* (d) that a person who lends photographs to another for a particular purpose, may prevent him from taking and selling copies, except in pursuance of the purpose for which they were lent, and this, although the photographs have been published and irrespective of the question of copyright. The above was a case in which the plaintiff had lent photographs of eminent persons to Tallis, the

(a) *Martin v. Wright*, 6 Sim. 297; *Page v. Townsend*, 5 Sim 395.

(b) 1 Barn. & Adol. 804.

(c) App. x.

(d) 1 H. & C. 148.

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proprietor of the 'Illustrated News of the World,' for the purpose of engraving them for that newspaper. Tallis became bankrupt, and his assignees sold the photographs to the defendant; and it was held that the plaintiff was not only entitled to the photographs but to the unsold copies, and to an injunction to restrain the further sale. The Court said that there was no question of copyright, and compared it to the case of a valuable statue, which a friend to whom it is lent has no right to get copied.

In what class of engravings no copyright.

No copyright can exist in any obscene, immoral, or libellous engraving (*a*); and were one to destroy such a print or engraving, he would merely be liable at law to pay the value of the paper and print (*b*).

International copyright.

By an Act of Parliament to amend the law relating to international copyright (7 & 8 Vict. c. 12, ss. 2-4) (*c*), Her Majesty is empowered by an order in council to grant the privilege of copyright for such period as shall be defined in such order (not exceeding the term allowed in this country) to the authors, inventors, and makers of books, prints, articles of sculpture, and other works of art, or any particular class of them to be defined in such order, which shall, after a future time to be specified in such order, be first published in any foreign country, to be named in such order. But no such order in council shall have any effect unless it shall be therein stated as the ground for issuing the same that due protection has been secured by the foreign power named in such order in council for the benefit of parties interested in works first published in the dominions of Her Majesty similar to those comprised in such order. And every such order in council is to be published in the 'London Gazette' as soon as may

(*a*) See 5 Geo. 4, c. 83, s. 4; 1 & 2 Vict. c. 38, s. 2; 20 & 21 Vict. c. 83; *Fores v. Johns*, 4 Esp. 97.

(*b*) *Du Bost v. Beresford*, 2 Camp. 511. In *The Emperor of Austria v. Day and Kossuth*, 7 Jur. (N.S.) 641, Ch.; on appeal, 4 L. T. (N.S.) 494, the Lord Chancellor stated that the cases of *Burnett v. Chetwood* (2 Mer. 441, note) and *Du Bost v. Beresford*, *supra*, were wrongly decided. Compare the fact of the liability of the destroyer for the amount of the paper, with the maxim in Moor, 813: "*Inveniens libellum famosum et non corrumpens punitur*," and, if possible, reconcile the two.

(*c*) App. lviii.

be after the making thereof, and from the time of such publication shall have the same effect as if every part thereof were included in the Act. And no copyright is allowed in any work of art first published out of Her Majesty's dominions otherwise than under this Act.

In concluding, we will offer a few remarks on the remedy afforded by a late Act of Parliament for the recovery of the penalties for infringement under the Engraving Acts. The mode of recovery was much simplified by the 8th section of the 25 & 26 Vict. c. 68, commonly known as the Copyright (Works of Art) Act (a). By this clause all pecuniary penalties which shall be incurred, and all such unlawful copies, imitations, and all other effects and things as shall have been forfeited by offenders pursuant to any Act for the protection of copyright engravings, may be recovered by the person empowered to recover the same, and thereafter called the complainant or the complainer, as follows:

Summary proceedings for the recovery of penalties.

In *England and Ireland*, either by action against the party offending, or by summary proceedings before any two justices having jurisdiction where the party offending resides (b);

In England and Ireland.

In *Scotland*, by action before the Court of Session in ordinary form, or by summary action before the sheriff of the county where the offence may be committed or the offender resides, who, upon proof of the offence or offences, either by confession of the party offending or by the oath or affirmation of one or more credible witnesses, shall convict the offender, and find him liable to the penalty or penalties aforesaid, as also in expenses; and it shall be lawful for the sheriff, in pronouncing such judgment for the penalty or penalties and costs, to insert in such judg-

In Scotland.

(a) App. xcii.

(b) A magistrate sitting at a police court within the metropolitan police district, and every stipendiary magistrate appointed or to be appointed for any other city, town, liberty, borough, or place, or the lord mayor, or an alderman of London, sitting at the Mansion House, or Guildhall Justice Rooms, has power, when sitting alone, to exercise the jurisdiction given by this Act to two justices. 2 & 3 Vict. c. 71, s. 14; 11 & 12 Vict. c. 43, ss. 29, 33, 34.

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ment a warrant, in the event of such penalty or penalties and costs not being paid, to levy and recover the amount of the same by pouncing; provided always that it shall be lawful to the sheriff, in the event of his diminishing the action and assoilzieing the defender, to find the complainer liable in expenses; and any judgment so to be pronounced by the sheriff in such summary application shall be final and conclusive, and not subject to review by advocacy, suspension, reduction, or otherwise.

Further, it is declared lawful for the superior courts of record in which any action may be pending, or if the courts be not then sitting, then for a judge of one of such courts, on the application of either the plaintiff or defendant, to make an order for an injunction, inspection, or account, as to such court or judge may seem fit.

Evidence on
behalf of
plaintiff.

The evidence to be adduced at the trial on behalf of the plaintiff is simply that he is the proprietor of the print or engraving pirated; and it is sufficient that he produce one of the prints taken from the original plate. The production of the plate itself is not requisite.

CHAPTER XIII.

COPYRIGHT IN SCULPTURE AND BUSTS.

THE art of sculpture has never been particularly favoured by the English nation. It is an art which ought certainly to be patronised more extensively, for it refines and improves the public mind and taste. The art of sculpture.

The erection of national monuments to the memory of individuals who by their works or their virtues have conferred lasting benefit or honour on mankind in general or their own country in particular, or in order to commemorate important public events, is a means by which the art produces the most influential moral effects.

These mementoes or memorials, though in the present age the unphilosophical and sciolistic spirit of some have led them to regard with contempt this method of honouring the illustrious great, excite a laudable admiration for the service or benefit to which they testify, and are living realities to perpetuate at once the respect entertained by the nation, both for the individual himself and the performance that has entitled him to their gratitude. When efficiently executed, they not only perpetuate the memory of the individual himself and record his good deeds, but appeal continuously to the national mind, and encourage and stimulate all posterity to follow in his footsteps. The person represented seems to be ever present. The deeds commemorated appear still in vivid force, and although we have not the actual presence of the departed, we retain his remembrance and preserve much of his influence.

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“Public monuments, moreover,” says Mr. Harris (a), “give a character to a nation and record the existence of what are in reality its noblest treasure,—the great men who have adorned it. They much influence the genius of a people, and in their turn exhibit the national feeling and genius. Indeed, the moral effect of these erections, both in ancient and modern times, has been made obvious. The essential advantage in regard to civilization arising from the national veneration paid to heroes and great men, results from the stimulus which it excites to emulate their virtues, and to shun all those vices which are opposed to the latter, and by which lustre like theirs would be tarnished. The use of monuments in this respect is two-fold: first, to preserve the memory of those great men to whom they are erected, and of their virtues also; secondly, to testify the regard of the nation for those great men and for the virtues which they displayed. In both these respects, they are extensively and directly conducive to civilization, and are calculated to carry it to its highest point.”

On these social grounds, therefore, it is incumbent upon the legislature to cherish and encourage an art yielding fruit such as this is capable of bearing.

Busts of private individuals are not likely to have much value as copyright, but busts of great men have a general interest and value. The demand for copies is so small that seldom is it that piracy takes place. The only case in which we remember the Sculpture Act being applied, is that of a bust of Fox.

The means of reproduction by a cast is very simple and merely mechanical (at least, after a single copy has been obtained), and this fact accounts for the limited application of the Act. Most of the ornamental casts in request are taken from foreign works of art, or from such as have been dedicated to the public by exposure or become public property; seldom is the licence of the original designer required. There is little skill in the

(a) ‘Civilization considered as a Science.’

preparation of the type-mould, which corresponds to the plate of the engraver, unless, perhaps, where the scale is reduced (a).

The copyright in busts and sculptures mainly depends upon the 54 Geo. 3, c. 56 (b). This Act amended and extended the provisions of the 38 Geo. 3, c. 71, which had been found ineffectual for the purposes thereby intended. So ineffectual had it proved that although avowedly passed for the preventing the piracy of busts and other figures made and published by statuaries, it was decided to be no offence to *sell* a pirated cast of a bust if the piracy had any addition to or diminution from the original; nor was it an offence to *make* a pirated cast if it were a perfect *fac simile* of the original (c). Lord Ellenborough thought the statute had been passed with a view to defeat its own object, and taking advantage of the opportunity of making a joke, which the bar, as a matter of duty, had to imagine exceedingly good, advised artists when they applied to Parliament for further protection, not to *model* the new Act themselves as they appeared to have done the one in question.

Extent and duration of Acts.

The two statutes above referred to are commonly known as the Sculpture Copyright Acts, and the court will, in putting a construction upon any one of them, give effect to the intention of the legislature by construing them collectively (d).

The 54 Geo. 3, c. 56 (18th of May, 1814), enacts that every person or persons who shall make or cause to be made any new and original sculpture, or model, or copy, or cast of the human figure or human figures, or of any bust or busts, or of any part or parts of the human figure, clothed in drapery or otherwise, or of any animal or animals, or any part or parts of any animal, combined with the human figure or otherwise, or of any subject being matter

(a) Turner on 'Copyright in Design.'

(b) App. xii.

(c) *Gahagan v. Cooper*, 3 Camp. 111.

(d) *Newton v. Cowie*, 4 Bing. 245, and *Russell v. Smith*, 17 L. J. (Q.B.) 225, 229; the former with reference to the Engraving Acts, the latter to literary copyright.

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of invention in sculpture, or of any alto or basso-relievo representing any of the matters or things thereinbefore mentioned, or any cast from nature of the human figure, or of any part or parts of the human figure, or of any cast from nature of any animal, or of any part or parts of any animal, or of any such subject containing or representing any of the matters and things thereinbefore mentioned, whether separate or combined, shall have the sole right and property of all and in every such new and original sculpture, model, copy, and cast of the human figure and human figures, and of all and in every such bust or busts, and of all and in every such part or parts of the human figure, clothed in drapery or otherwise, and of all and in every such new and original sculpture, model, copy, and cast, representing any animal or animals, and of all and in every such work representing any part or parts of any animal combined with the human frame or otherwise, and of all and in every such new and original sculpture, model, copy, and cast of any subject being matter of invention in sculpture, and of all and in every such new and original sculpture, model, copy, and cast in alto or basso-relievo, representing any of the matters or things thereafter mentioned, and of every such cast from nature, for the term of fourteen years from first putting forth or publishing the same; provided in all and every case the proprietor or proprietors do cause his, her, or their name or names, with the date, to be put on all and every such new and original sculpture, model, copy, or cast, and on every such cast from nature, before the same shall be put forth or published.

After the expiration of this term of fourteen years the copyright shall return to the person who originally had the copyright, if he be then living, for the further term of fourteen years, excepting in the case where such person shall by sale or otherwise have divested himself of such right (a).

(a) Sect. 6, App. xv. See *Grantham v. Hawley*, Hob. 132, cited *Lunn v. Thornton*, 1 C. B. 379; Vin. Abr. 'Grants,' M., *Carnan v. Bowles*, 2 Bro. C. C. 85.

The conditions under which the copyright is acquired are almost identical with those required to be performed in order to obtain a copyright under the Engraving Acts. When a sculptor models a design for himself, and afterwards executes from such model a finished bust for another in marble or any other material, it is not sufficient for the sculptor, in order to acquire the copyright therein, to affix his name and the year when the finished copy from the model was executed (as is frequently the case); he must conform strictly to the letter of the Acts (a), and therefore engrave on the *model*, as well as on every cast or copy thereof, his name (b), and the day of the month and year when the model is first shewn or otherwise published in his studio, or elsewhere; and such *date must never be altered*.

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Conditions to be complied with in order to effectuate a copyright.

By the 54 Geo. 3, c. 56, it was further provided that no person who should thereafter purchase the right or property of any new and original sculpture, or model, or copy, or cast, or of any cast from nature, of the proprietor, expressed in a deed in writing signed by him in the presence of and attested by two or more witnesses, should be subject to any action for copying, or casting, or vending the same; and that all actions brought for pirating under this Act should be commenced within six calendar months next after the discovery of the offence.

Assignment of the right.

Sculptures and models may now be registered under the Designs Act (13 & 14 Vict. c. 104, s. 6) (c), which provides that the registrar of designs, upon application by or on behalf of the proprietor of any sculpture, model, copy, or cast within the protection of the Sculpture Copyright Acts, and upon being furnished with such copy, drawing, print, or description, in writing or in print, as in the judgment of the said registrar shall be sufficient to identify the particular sculpture, model, copy, or cast in respect of which registration is desired, and the name of the person

Registration.

(a) As under the Designs Act, see *Pierce v. Worth*, 18 L. T. (N.S.) 710.

(b) The name need not necessarily be the baptismal and surname of the proprietor, but such as he or his co-proprietors are commonly known by or trade under.

(c) App. Ixx.

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claiming to be proprietor, together with his place of abode or business, or other place of address, or the name, style, or title of the firm under which he may be trading, shall register such sculpture, model, copy, or cast, in such manner and form as shall from time to time be prescribed or approved by the Board of Trade, for the whole or any part of the term during which copyright in such sculpture, model, copy, or cast may or shall exist under the Sculpture Copyright Acts; and whenever any such registration shall be made, the said registrar shall certify under his hand and seal of office, in such form as the said board shall direct or approve, the fact of such registration and the date of the same, and the name of the registered proprietor, or the style or title of the firm under which such proprietor may be trading, together with his place of abode or business, or other place of address.

The application under this section need not necessarily be made by the author; it is to be made by the proprietor.

Infringement
of the right,
and penalties
attached
thereto.

The 7th section (a) provides that if any person shall, during the continuance of the copyright in any sculpture, model, copy, or cast which shall have been so registered as aforesaid, make, import, or cause to be made, imported, exposed for sale, or otherwise disposed of, any pirated copy or pirated cast of any such sculpture, model, copy, or cast, in such manner and under such circumstances as would entitle the proprietor to a special action on the case under the Sculpture Copyright Acts, the person so offending shall forfeit for every such offence a sum not less than £5 and not exceeding £30, to the proprietor of the sculpture, model, copy, or cast whereof the copyright shall have been infringed; and for the recovery of any such penalty the proprietor of the sculpture, model, copy, or cast which shall have been so pirated shall have and be entitled to the same remedies as are provided for the recovery of penalties incurred under the Designs Act, 1842: provided always, that the proprietor of any sculpture, model, copy, or cast which shall be registered under this Act shall not

(a) App. lxx.

be entitled to the benefit of this Act unless every copy or cast of such sculpture, model, copy, or cast which shall be published by him after such registration, shall be marked with the word "registered" and with the date of registration.

This is a great improvement on the law as it stood prior to the year 1842, but why the provisions for registration should not have been extended to engravings and prints is a matter of surprise.

In conclusion, we must express a hope that protection will before long be afforded to the sculptor against drawings or engravings of any description, which may now be taken from his work with impunity. If the sculpture be a production of any merit and value, if well designed and engraved, it might be profitable to the author in various ways; while, on the contrary, if it be badly or carelessly executed, it may be alike annoying to him and injurious to his reputation and fame.

CHAPTER XIV.

COPYRIGHT IN PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.

The arts of
painting and
drawing.

OF all the branches of the fine arts this was the last recognised as worthy of protection by the legislature. On what ground it is difficult to comprehend. Where is the difference in principle between a picture and a poem?

The claims of the artist to a copyright in his works are quite as valid as those of the literary author in his; and if the principle were once admitted that a man should be protected in the enjoyment of his intellectual productions, and a certain period of exclusive possession allowed to the author for his benefit, before the public were in full and free enjoyment of the work, on what ground could Parliament so long withhold the same privilege from the artist as it had already granted to the author.

It is a strange anomaly that while the law gave a property to that which was, in the ordinary way, the work of a man's hands, and allowed a copyright in inventions and designs, it should have afforded no protection to those productions which were exclusively the creations of the mind. It was thought but an act of justice and right that a copyright should exist in literary productions, but when it was proposed, as late as 1862, to give a similar right in pictures, a cry was raised that it was derogatory on the part of jurisprudence to protect the works of those who contributed by their art to the honour of their country, the elevation of the national taste, and the amusement, instruction, and delight of the community at large.

With respect to the fine arts, two series of Acts had

been passed, giving a copyright of a limited and special nature in sculptures and engravings; hence this unaccountable opposition to the bestowing a copyright in paintings appears the more extraordinary. For while an engraving enjoyed protection, the picture from which it was taken was without. A man might make any number of copies of the best work of the artist—sell them, and there was no remedy. Not unfrequently these copies were sold as originals, and even the name of the original artist forged upon them, but the injured party was without redress.

The evil was almost peculiar to this country. In most European countries the principle of copyright extended through the whole range of the fine arts, and, unlike our law, especially protected the works of painters.

At the present day, if one purchases the copyright of a picture he holds the picture, free from any interference, and with the perfect right of dealing with it as he pleases. If, however, he buys the picture simply as a picture, he will then have the gratification and delight resulting from its contemplation—he cannot make copies or engravings from it, or use it for a different purpose from that for which the artist sold it. The same rule applies to authors. When a person buys a book he can read it, but cannot multiply copies of it unless he purchases the copyright. This appears but fair, especially if we bear in mind that the greater part of the artist's remuneration probably arises from the reproduction of his work.

The existence of copyright in painting is a protection also to the purchaser of a picture. It was formerly well known that after a person had purchased a picture the artist might have made a copy and multiplied it to any extent, although the purchaser might have been under the impression that he had bought a picture as being the single work of the artist. Of course such an action would not have become an honourable man, but still the right remained to the artist to act in such a manner had he thought proper. It is not a desirable thing to have a great work of art multiplied indefinitely, and hawked

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about for sale. It is well known that the frequent repetition of a work of art diminishes the worth of the original; indeed, nothing detracts so much from its commercial value.

At length the wished-for day arrived, and the artists succeeded in obtaining for their protection an Act of Parliament.

Creation of
copyright in
works of art.

The Act (25 & 26 Vict. c. 68) (a) is entitled, 'An Act for amending the Law relating to Copyright in Works of the Fine Arts, and for repressing the commission of Fraud in the Production and Sale of such Works.' It provides that the author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph which shall be or shall have been made, either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of the Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing and the design thereof, or such photograph and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death; provided that when any painting or drawing or the negative of any photograph shall for the first time after the passing of this Act be sold or disposed of, or shall be made or executed for or on behalf of any person for a good or a valuable consideration, the person so selling or disposing of or making or executing the same shall not retain the copyright thereof unless it be expressly reserved to him by agreement in writing, signed at or before the time of such sale or disposition by the vendee or assignee of such painting or drawing or of such negative of a photograph, or by the person for or on whose behalf the same shall be so made or executed, but the copyright shall belong to the vendee or assignee of such painting or drawing or of such negative of a photograph, or to the person for or on whose behalf the same shall have been made or

(a) App. lxxxviii.

executed; nor shall the vendee or assignee thereof be entitled to any such copyright, unless at or before the time of such sale or disposition an agreement in writing, signed by the person so selling or disposing of the same, or by his agent duly authorized, shall have been made to that effect.

It is important that the artist, at the sale or at or before the time of delivery or the completion of the bargain, should obtain the signature of the vendee or assignee, or of the person for whom the work has been executed, to a written reservation of the copyright to himself, if he desires to retain it; or assign in writing the same to the purchaser at or before the completion of the transaction, otherwise the copyright will be irredeemably lost. If the vendee obtains not this assignment in writing, he will be unable to protect himself against piracy or repetition by the artist, as section 6 only protects pictures, &c., in which there is subsisting copyright. The copyright cannot, unless reserved in writing, vest in the vendor; it cannot, if not assigned in writing, vest in the vendee or assignee. It, however, would pass without a written agreement to the person for or on whose behalf a work is expressly executed, *as in commissions*.

By whom it
may be
claimed.

The copyright given by the above section is qualified by the following one, to the extent that nothing shall prejudice the right of any person to copy or use any work in which there is no such copyright, or to represent any scene or object, notwithstanding that there may be copyright in some representation of such scene or object.

This must refer to and include all works of ancient and deceased masters, and all paintings of living artists sold before the passing of this Act, or since, without the statutory provisions having been complied with for the creation and transfer of copyright.

All formalities, such as are required under the Engraving or the Sculpture Copyright Acts, are unnecessary in the assignment and transfer under this Act; for copyright is declared to be personal property, and capable

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Assignment
and registra-
tion.

of being assigned by any note or memorandum in writing, signed by the proprietor of the copyright, or by his agent appointed for that purpose in writing.

By the 4th section (a) it is declared that a book of registry shall be kept at Stationers' Hall, entitled 'The Register of Proprietors of Copyright in Paintings, Drawings, and Photographs,' in which shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and also of every subsequent assignment; and that such memorandum shall contain a statement of the date of the agreement or assignment, and of the name and address of the person in whom such copyright shall be vested, and also of the author of the work, together with a short description of the subject of the work; and if the person registering shall so desire, a sketch, outline, or photograph of the work.

It is not a valid objection that the registration does not give such a description of the work as may enable a person from it alone to ascertain whether he is about to sell the copy of a registered work, for that knowledge may be gained from other sources, and the object of the legislature, as pointed out by the statute, is that there shall be such a description of the picture as to enable a person who has it before him to judge whether or not the registration applies to the one he is about to copy. This was decided in 1868. Mr. Henry Graves, being the proprietor of the copyright in two paintings in oil and in a photograph, entered them under this section, thus: "Painting in oil, 'Ordered on Foreign Service;' painting in oil, 'My First Sermon;' photograph, 'My Second Sermon.'" The first picture represented an officer taking leave of a lady; the second, a young child sitting in a pew, apparently listening with her eyes wide open; the photograph represented the same child asleep in a pew; and it was considered that the nature and subject of the works were sufficiently described under this section. "If we consider it as a question of fact," observed Mr. Justice Blackburn, "there can be no

(a) App. lxxxix.

reasonable doubt that the description of each of the pictures is sufficient. The picture, 'Ordered on Foreign Service,' represents an officer who is ordered abroad, taking leave of a lady, and no one can doubt that is the picture intended. So again 'My First Sermon' describes with sufficient exactness a child, impressed with the novelty of her situation, sitting in a pew, and listening with her eyes open; while the same child, fast asleep in a pew, forms the subject of 'My Second Sermon.' Who can doubt that in each of these cases the description is sufficient? There may be a few instances in which the mere registration of the name of the picture is not sufficient; for instance, Sir E. Landseer's picture of a Newfoundland dog might possibly be insufficiently registered under the description of 'A distinguished Member of the Humane Society.' Similarly, the well-known picture called 'A Piper and a Pair of Nutcrackers,' representing a bullfinch and a pair of squirrels, might not be accurately pointed out by its name. In either of those cases the names would scarcely be sufficient, and it would be advisable for a person proposing to register them to add a sketch or outline of the work. But when the subject is indicated, as it is here, it seems to be merely a question of fact whether the description affords enough information, and I cannot doubt that it does" (a).

It is further enacted by the 4th section that no proprietor of any copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration (b).

No copyright to accrue until after registration.

This section, though it prevents an assignee from suing for penalties, before the assignment to him has been registered, does not render it necessary that all or any previous assignment should also be registered, or that the copyright of the original author should be registered (c).

(a) *Ex parte Beal*, 3 Law Rep. (Q.B.) 387; 37 L. J. (Q.B.) 161; S. C. 18 L. T. (N.S.) 285.

(b) *Vide ante*, p. 72. See App. lxxxix.

(c) *Re Walker & Graves*, 20 L. T. (N.S.) Q.B. 877.

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The enactments of the 5 & 6 Vict. c. 45, in relation to the registry thereby prescribed, are applicable to the registry under the 25 & 26 Vict. c. 68, except that the forms of entry prescribed by the earlier Act may be varied under the latter to meet the circumstances of any case. Consequently, the making of false and fraudulent entries of proprietorship of copyright for any purpose, either to acquire property in such copyright or to improperly restrain the publication or copying of works in which no copyright lawfully exists, is a misdemeanour. And the person aggrieved may apply to the court or a judge to obtain an order for the cancellation or substitution of names so inserted (a).

Infringement
of the right,
and penalties
attached
thereto.

Invasion of the property is guarded against by the 6th section, which provides that if the author, after having sold or disposed of the copyright, or if any other person not being the proprietor for the time being of the copyright, shall repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, any such work or the design thereof, or knowing that any such repetition (b), copy, or other imitation has been unlawfully made, shall import into the United Kingdom, or sell, publish, let to hire, exhibit or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be imported, sold, published, let to hire, distributed or offered for sale, hire, exhibition, or distribution any repetition, copy, or imitation of the said work, or of the design thereof, such person, for every such offence, shall forfeit to the proprietor of the copyright for the time being a sum not exceeding £10; and all such repetitions, copies, and imitations, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright.

(a) *Chappell v. Purday*, 12 M. & W. 303.

(b) *Actus non facit reum, nisi mens sit rea* (*Reg. v. Sleaf*, 8 Cox, C. C. 472; *Reg. v. Cohen*, *ibid.* 41; *Heurne v. Garton*, 28 L. J. (M.C.) 216.

Under this clause, where the subject of a picture is copied, it is of no consequence whether that is done directly from the picture itself or through intervening copies; if, in result, that which is copied be an imitation of the picture, then it is immaterial whether that be arrived at directly or by intermediate steps. A copy, therefore, from an intervening copy is a copy from the original work, and within the prohibitory clauses of the statute. Nor does the copying refer merely to the imitation of a painting by a painting, or drawing by a drawing, or a photograph by a photograph, so that a photograph of a drawing, or a drawing of a painting, protected by the Act, would be a piracy. For, on inspecting the 1st section, which is the key to the whole Act, it gives to the author of every original painting, drawing, or photograph the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing and the design thereof, or such photograph and the negative thereof, by any means and of any size; and the terms used are so extensive that it is plain that a photograph of a painting, of a drawing, or of another photograph made without the consent of the owner, though of a different size, provided it be a reproduction of the design, is an infringement such as would subject the maker to the penalty.

Moreover, the offending individual is liable to the penalty for every copy sold. Thus, where twenty-six copies were disposed of in two parcels of thirteen copies each, it was held that the penalty was properly imposed on every copy sold. "In the case of *Brooke v. Milliken (a)*," says Mr. Justice Blackburn, in *Beal's Case (b)*, to which we have already referred, "the penalty was imposed by 12 Geo. 3, c. 36, for importing for sale any book first published in this kingdom and reprinted in any other place, and it enacted that the offender should forfeit £5. and double the value of every book sold. In that case there could be no doubt that the meaning of the statute was, the penalty should be cumulative, viz., double the

The penalties cumulative.

(a) 3 T. R. 509.

(b) Law Rep. 3 (Q.B.) 395.

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value of each book. In the present case the words are, 'such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding £10.' It is quite clear that this imposes a penalty for every copy sold; a different construction would result in an absurdity, and defeat the intention of the legislature. The penalty is imposed also for importation, and it would be monstrous, that if a man had consigned from abroad a cargo of imitations, the utmost penalty that could be imposed on him would be the sum of £10. "It would be well worth his while to run the risk of paying that small sum, and to import and distribute for sale elsewhere a quantity worth many thousands. The legislature were dealing with an offence which was likely to be committed wholesale, and they have used words meaning that the sale of every copy shall be an offence, and if ten copies be sold at one time, ten offences are committed, and the offender may be punished for each separately."

Provisions for repressing the commission of fraud in the production and sale of works of art.

The 7th section (a) imposes penalties on every person doing or causing to be done any of the following acts:

1st. If he shall fraudulently sign or otherwise affix, or cause to be signed or otherwise affixed, to any painting, drawing, or photograph, or the negative thereof, any name, initial, or monogram.

This clause was rendered necessary by the decision in the case of *The Queen v. Closs* (b). A picture had been painted by Mr. Linnell, who signed and sold it for £180. The prisoner was a picture dealer, and was indicted for fraudulently selling a copy of Linnell's picture as and for the genuine picture which he had painted. Mr. Linnell's name was likewise painted on such copy, which the prisoner sold for £130. The indictment contained three counts: the first charged the prisoner with obtaining money under false pretences, but upon this count he was acquitted; the second count charged him with a *cheat* at common law (c), by means of writing Linnell's name upon the copy; and

(a) App. xci. (b) 27 L. J. (M. C.) 54; 7 Cox, C. C. 494; 6 W. R. 109.

(c) *Albin's Case*, Tremaine, P. C. 109; *Worrall's Case*, *ibid.* 106; 2 East, P. C. 18, cited 2 Russell on 'Crimes,' 282.

the third count charged the prisoner with a *cheat* by means of a forgery of Linnell's name upon the copy. Upon these last two counts the prisoner was convicted; but his counsel objecting, that they disclosed no indictable offence at common law, the judgment was respited in order that the opinion of the Criminal Court of Appeal might be taken upon the objection so raised. The case was afterwards argued before five judges, who formed such court of appeal, and they unanimously held that the conviction was *wrong*; that there was no forgery; that "forgery must be of some document or writing," and Linnell's name in this case must be looked at merely as in the nature of an arbitrary mark made by the master to identify his own work, and was no more than if the painter had put any other arbitrary mark made by him, as a recognition of the picture being his. As to the second count of the indictment, the court held that the conviction could not be sustained, because it did not sufficiently shew that the prisoner sold the copy by *means* of Linnell's signature being forged upon it.

2nd. If he shall fraudulently sell, publish, exhibit, or dispose of the same, or offer it for sale, exhibition or distribution.

3rd. If he shall fraudulently sell any copy or colourable imitation of any painting, drawing, or photograph or negative of a photograph, whether there shall be subsisting copyright therein or not, as having been executed by the author of the original work from which such copy or imitation shall have been made.

4th. If, where the author of any painting, drawing, or photograph, or negative of a photograph, shall have sold such work, any person shall afterwards make any alteration by addition or otherwise during the life of the author, without his consent, and shall knowingly sell (a) or publish such work, or any copies thereof so altered, or of any part thereof, as or for the unaltered work of such author.

(a) Unless the person selling were cognizant of the fact of alteration the Act would be an entirely innocent one. See *Reg. v. Sleep*, 8 Cox, C. C. 472; *Reg. v. Cohen*, *ibid.* 41; *Hearne v. Garton*, 28 L. J. (M.C.) 216.

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This clause is intended to prevent the alterations so frequently made in the works of great artists for fraudulent purposes. Mr. Charles Landseer stated a most glaring case in his evidence before a committee appointed by the Society of Arts. It appears that he painted a picture called the 'Eve of the Battle of Edgehill,' in which he introduced two dogs, which had been touched up by his brother Sir Edwin, and, as he himself admitted, greatly improved. The picture was sold to a dealer, who cut out the figures of the dogs and sold them as the work of Sir Edwin Landseer, and he then filled up the hole in the original picture with two dogs painted by an inferior artist, and sold the whole picture as the work of Mr. Charles Landseer.

Every offender under this section shall forfeit to the person aggrieved a sum not exceeding £10, or not exceeding double the full price at which all such copies or altered works shall have been sold or offered for sale; and they shall be forfeited to the person, or the assigns, or legal representatives of the person whose name, initials, or monogram shall have been fraudulently used; provided such person shall have been living at or within twenty years next before the time when the offence may have been committed.

It would seem that if the double price of the copies be less than £10, yet that amount may still be recovered, and that if the double value exceed £10, then any sum up to such double price may be recovered by the person aggrieved, as an inducement to him to proceed, he having to give up the spurious work to the true artist or his representatives, and receive from the person who has defrauded him the price he has paid and as much more.

The penalties imposed as a punishment for a criminal offence.

Under these penal sections it has been determined that a person sentenced to pay a penalty cannot, by executing a deed of arrangement with his creditors, escape from the imprisonment consequent on a failure to pay (a).

(a) *Graves, Ex parte*, 19 L. T. (N.S.) 241; Law Rep. 3 Ch. 642; 16 W. R. 993; *Bancroft v. Mitchell*, Law Rep. 2 (Q.B.) 549. See, however, *Johnson*,

Mr. Graves, the well-known publisher of engravings, became the proprietor of the copyright in Frith's 'Railway Station' and other paintings, and the designs thereof, and also in the copyright in the engravings of such pictures. Photographic copies of these engravings were then fraudulently made, and sold for about one-twentieth of the price at which the copies of Mr. Graves's prints were sold. Such photographic copies were exact reproductions of the engravings and of a large size. Upon the 16th of May, 1868, a man named William Banks Prince was convicted by a magistrate at Lambeth of having sold no less than nineteen of the fraudulent photographic copies in question. He was adjudged to pay a penalty of £5 in respect of each of the copies sold; and, in default of payment, the magistrate, under powers given him by the Small Penalties Act, 1865, sentenced Prince to fourteen days' imprisonment in respect of each of the nineteen offences he had committed by selling the photographic copies. While the magistrate was giving his judgment Prince executed a deed of composition with his creditors, which contained a release from them. That deed was assented to by certain creditors of Prince, and then registered in due form. Not having paid the penalties in which he was convicted he was taken into custody upon a magistrate's warrant, and imprisoned pursuant to his sentences. Thereupon he applied to the Bankruptcy Court for his discharge from custody, upon the ground that the penalties in which he had been convicted were *debts*, from the payment of which he had been released by the deed of composition executed between him and his creditors. The court held that Prince was entitled to his discharge.

From this decision Mr. Graves appealed to the lords justices, upon the ground that penalties recovered under

Ex parte, In re Johnson, 15 W. R. 160; 15 L. T. (N.S.) 163; *Rex v. Stokes*, Cowp. 136; *Rex v. Wakefield*, 13 East, 190; *Rex v. Myers*, 1 T. R. 265. As to limitation of time of three months for action under the 8 Geo. 2, c. 13, not applying to an action for damages, see *Graves v. Mercer*, 16 W. R. 790.