

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 prohibited the printing of law books without the license 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).

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.

As to the publication of proceedings in courts of justice.

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 of judicature.

(a) Pref. to Dougl. R.

(b) Burr. R. Pref. viii.

CAP. IX.

In *Sayer's Case* (a) the judges of the Court of Queen's Bench directed, and in part revised, a report of the trial. The trial of Lord Melville (b) 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* (c) 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 now only treated as a contempt in those cases in which the report is published in opposition to an order of the court.

When publication during trial prohibited.

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 (d). 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

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

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

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

(d) *Reg. v. Clement*, 4 Barn. & Ald. 218; see also *Tichborne v. Mostyn*, L. R. 7 Eq. 55, note.

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* statement of the proceedings upon a coroner'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).

Publication of
ex parte
statements
upon a
coroner's
inquest.

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).

(a) *Rex v. Fleet*, 1 Barn. & Ald. 379, 384. See *Tichborne v. Tichborne*, 15 W. R. 1072; 17 L. T. (N.S.) 5. As to staying reports of cases as libellous or unfair, see *Brooke v. Evans*, 6 Jur. (N.S.) 1025; *Coleman v. W. Hartlepool Railway*, 8 W. R. 734.

(b) 5 Ves. 709.

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

(d) Phillips on Copy. 196. See *Wheaton v. Peters*, 8 Peters R. (Amer.) 591, 668, and remarks of Story, J., in *Gray v. Russell*, 1 Story, R. (Amer.) 4.

CAP. IX.

It is clear, however, that no individual can claim any copyright in the opinions or judgments of the judges, for though there is no express decision as to copyright in judicial decisions, yet it is obvious that the reporter who merely gives a copy of what he has taken down, probably *verbatim*, from the lips of the judge can claim no exclusive right to such decision.

It seems clear that if *bonâ fide* notes accompany statutes printed by others than those having the patent right, the copyright of the latter is not infringed, but the notes must be *bonâ fide*, and not merely colourable or collusive (a).

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 (b).

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 pronostications 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* (c), for printing 'Gadbury's Almanac,' it was adjudged 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

(a) *Baskett v. Cunningham*, 1 W. Bl. 370.

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

(c) 1 Mod. 25c.

that was printed before the Book of Common Prayer, the additions were regarded as immaterial.

CAP. IX.

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 shew 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 be put to the Court of Common Pleas, whether the king had a right to grant the publication of almanacs, as not

(a) 2 Ch. Ca. 76, 93; 2 Show. 258; *Stationers' Co. v. Wright*, Skin. 234; 4 Burr. 2328.

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

(c) 2 Wm. Bl. 1004.

(d) 13 Ves. 508.

CAP. IX.

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 to 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 privileges of printing and vending almanacs and calendars, and had received an annual sum of £1000 and upwards as a consideration for such privilege, and that the money 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 general 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 power was given by Act of Parliament to certain

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

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).

CAP. IX.

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
universities
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

(a) 4 Burr. 2408.

(b) 15 Geo. 3, c. 53.

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.

CAP. X.

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.

As to their registration and sale.

The register book may be inspected without fee, and the clerk is to give a certificate of any entry on payment of a fee not exceeding sixpence. If the clerk refuse to make entry or give certificates of entries, the university or college which owns the copyright (notice being first given of such refusal by an advertisement in the *Gazette*), is to have the like benefit as if such entry or certificates had been duly made and given, and the clerk who refuses is for every offence to forfeit 20*l.* to the proprietors of the copyright.

Registration.

If any one prints, reprints, or imports, or causes to be printed, reprinted, or imported, any such book or books, or knowing the same to be so printed or reprinted, sells, publishes, or exposes to sale, or causes to be sold, published, or exposed to sale, any such book or books, he is to forfeit the books and every sheet of them, to the proprietor of the copyright, and one penny for every sheet found in his custody either printed, or printing, published, or exposed to sale, contrary to the true intent and meaning of the Act, one half to go to the Crown, the other half to the prosecutor (a).

Piracy.

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

(a) 15 Geo. 3, c. 53, s. 2.

CAP. X.

Copyrights
at present
possessed
by the
universities.

It appears that the University of Oxford possesses six copyrights, and the University of Cambridge has none. "This fact," say the Royal Commissioners in their recent Report on Copyright, "shews that the privilege, which is by no means of recent origin, is of very little real value, and as it is undesirable to continue any special and unusual kinds of copyright, we are of opinion that this exceptional privilege should be omitted from the future law. We do not, however, think it would be right to deprive the institutions above named of the copyrights they already possess, without their consent, but should they be retained, we suggest that the universities and other institutions should be placed upon the same footing as regards protection of their copyrights as other copyright owners, and that the exceptional penalties and remedies given by the Act which was passed in the 15th year of the reign of his late Majesty King George III. should be repealed."

CHAPTER XI.

MUSICAL AND DRAMATIC COPYRIGHT.

MUSICAL 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. Musical compositions within the Literary Copyright Act.

The point whether there could be copyright in a musical composition first came before Lord Mansfield in *Bach v. Longman (a)*. It was a case sent out of Chancery for the opinion of the Court of King's Bench: "Whether, in a composition for the harpischord, 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

(a) Cowp. 623. In *D'Almaine v. Boosey*, 1 Y. & C. Exch. 299, Lord Abinger said: "I spent three or four days at Stationers' Hall in order to ascertain what entries were made under the Act of Parliament, and I found not only that short publications on single sheets of paper were entered as books, but also a great deal of music. There is no doubt, therefore, that printed music, in whatever form it may be published, is to be considered in reference to proceedings of this nature, as a book." Music copyrights are sometimes of great value. At a recent sale of Messrs. Hopwood and Crewe, the copyrights of that firm fetched a total of £15,000—Coote's 'Burlesque Valse,' £175 10s.; the 'Sweetly Pretty Valse,' £245; the 'Cornflower Valse,' £132; and the 'Prince Imperial Galop,' £990, the largest sum ever obtained, it is believed, for a single piece of dance music; Hobson's 'Popular Favourites for the Pianoforte' sold for £412 10s.; Buckley's song, 'Come where the Moonbeams Linger,' £157 10s.; and H. Clifton's 'Very Suspicious,' £330. Mr. Coote purchased his own 'Snowdrift Galop' for £561.

The copyright of some comic songs often fetch high prices. It was given in evidence, in a case which came before the Common Pleas Division of the High Court of Justice a short time since, that they were worth sometimes from £1000 to £2000, the comic music publisher, Henry d'Alcorn, stating that he had sold as many as 90,000 copies of the music of 'Slap Bang! Here We Are Again!' and of another song he had sold 70,000 copies.

CAP. XI.

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.

In *Storace v. Longman (a)*, a "certain musical air, tune, and writing," on one sheet, was protected, and in a later case (*b*) a single sheet of music was held to be a book within the meaning of the statute of Anne. And where copyright was claimed under 54 Geo. 3, c. 156, in a piece of instrumental music, Chief Justice Abbott, in delivering the judgment of the King's Bench, expressed the opinion that "any composition, whether large or small, is a book within the meaning of the Act of Parliament" (*c*).

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."

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

The man who adapts words of his own to an old air, and adds thereto a prelude and accompaniment also his own, acquires a copyright in the combination.

The 20th section of the 5 & 6 Vict. c. 45, secures the sole liberty of performing musical compositions on the same conditions and for the same term as are prescribed in the case of dramatic compositions.

This provision would seem to include and indeed to be

(a) 2 Camp. 27, note a.

(b) *Clementi v. Golding*, 2 Camp. 32.

(c) *White v. Geroch*, 2 Barn. & Ald. 298; see *Clayton v. Stone*, 2 Paine (Amer.) 383.

specially aimed at the right of playing instrumental music, for *dramatic musical* compositions were already protected by the statute of 3 & 4 Will. 4, c. 15, and are included in the definition of dramatic pieces in the statute of Victoria.

Hence the owner of a purely instrumental piece, whether written for the orchestra, organ, piano, or other instrument, has not only the copyright therein, but also the exclusive right to the performance of, or the playing of it in public. And it may be here observed that both in the case of dramatic and musical compositions the right of representation and performance is secured to the authors thereof while yet in manuscript.

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* a play which had been printed and published did not constitute a piracy or an infringement of the copyright (*a*).

In the former case, the plaintiff was the author of a farce called 'Love à la Mode,' consisting of two acts, which was performed, with his permission, several times at the different London theatres in successive years, but was never printed or published by him. When the farce was over, the plaintiff 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, called 'The Court Miscellany, or Gentleman and Lady's 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 act in their next number. An injunction, however, was obtained on the ground that acting a play was not a publication of it (*b*).

Formerly
representation
not equivalent
to publication.

(*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.

CAP. XI.

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 (a).

American law on this subject.

Though the law on this point has been altered as to the English law, the American law would appear to be in accordance with the above decision. In a late case before the Superior Court of New York (b), the facts were as follows. The action was brought to obtain an injunction restraining the printing and publishing by the defendant of a drama or comedy called 'Play,' and the complaint alleged that immediately prior to February, 1868, Mr. Robertson, of London, sold to the plaintiff his exclusive right of performing the drama upon the stage, and printing and publishing the same within and throughout the United States; that the first performance of it was at the Prince of Wales Theatre, in London, but that there had been no *publication* in any other way. The defendant, however, had obtained the words of the play, &c., from persons who had seen it acted in London, and he published it in the United States before the plaintiff. This the defendant justified on the ground that the tickets admitting the spectators to the performance in London contained no notice or prohibition against carrying the comedy away, by memory or otherwise, and using, printing or publishing the same; nor was any notice to that effect posted in any of the theatres in view of the spectators. The question was, whether the performance in London was such a publication as would deprive the owner of his

(a) *Coleman v. Wathen*, 5 T. R. 245. Sheridan's opera of the 'Duenna' (*The Proprietors of Covent Garden v. Vandermere and others*) was also represented on the stage without the permission of the proprietor on similar grounds; see, however, 5 & 6 Vict. c. 45, s. 40.

(b) *Palmer v. Dewell*, 23 L. T. Rep. (N.S.) 823.

common law right of property in it, and the court held that it was not. Mr. Justice Monell, in his judgment, after examining the case of *Keen v. Clark* (a), where it has been decided that it is not unlawful for a spectator to carry away in memory and give to the world an unpublished literary production, the performance of which he had witnessed, or to the recital of which he had listened, saying: "The question of what constitutes publication is not much enlightened by any of the adjudicated cases which have come under my observation. Most of the cases involve considerations arising from copyright laws, and do not undertake to determine when or in what manner an author may be said to surrender his property in his literary work. The case most relied on by the defendant, *Boucicault v. Delafield* (b), arose under the English statute of copyright. That statute provides that one public representation or performance of any dramatic piece shall be deemed sufficient, in the construction of the Act, to be a publication of the work. It was accordingly held, in an action to recover a penalty imposed by the statute, that public performance of the drama in the United States, before taking out a copyright in England, was a publication within the statute. Words used in a statute to define the meaning of particular parts of it, are never extended beyond the statute, and have, therefore, no controlling effect, except in the interpretation of the statute. They define the intent and meaning of the law makers, and are made to extend the statute to cases not otherwise recognised as coming within its purview. But the legislature cannot, by merely expressing the intent of the law in respect to a particular statute, affect the meaning of words used in other statutes, or deprive them of the significance which they receive from settled principles of the common law. The case therefore of *Boucicault v. Delafield* is not an authority upon any question of actual or constructive publication not arising under the English

(a) 5 Robt. (Amer.) 38.

(b) 33 L. J. (N.S.) 38 Ch.; 9 L. T. (N.S.) 709.

CAP. XI.

copyright law. Nor is it entitled to any more weight than the statute itself, which is a mere legislative interpretation of what, for certain purposes, shall be deemed a publication of a dramatic piece." . . . "My conclusions upon the whole case are, that there was no such publication by the plaintiff, or by his assignor, of the play in question as to deprive the plaintiff of his common law right of property in it. That public representations of the play were not a publication of the play so as to take away the common law right. . . . I am, therefore, of opinion that the plaintiff is entitled to a judgment restraining the defendant from further printing or publishing the play, and requiring him to deliver up to be destroyed such as are now in print" (a).

Performing
play in an
abridged
form.

When the play is a fair abridgment or alteration of a former dramatic representation, it is doubtful whether an 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" (b). As, however, in the case cited the plaintiff, apart from the question of abridgment, had no exclusive right, it is difficult to see what stress the court laid upon the fact of the alleged piracy being an abridgment.

Where the similarity between two pieces arises from the fact of their being taken from a source open to all, there is no piracy. As Lord Eldon said, "All human events are equally open to all who wish to add to or improve the materials already collected by others." There can be no plagiarism in dramatizing the same incidents. In *Seman v. Copeland*, where the action was for having caused to be represented the plaintiff's play, or a portion thereof, proof that the plot had been taken from the same source,

(a) 7 Rob. (N.Y.) 530; 2 Sweeny (N.Y.) 530; 47 N. Y. 532, 543.

(b) *Murray v. Elliston*, 5 Barn. & Ald. 657; and S. C. 1 Dowl. & Ryl. 299.

namely, that of a newspaper report of some stirring events which took place during the Indian Mutiny at Delhi, was a good defence. Here the narrative suggested the plot, and most of the characters, alike in the minds of both parties; but when a scene only from the play of another, mixed up with that which is not original, is infringed, the court will protect the author. Copyright, therefore, may be said to exist in the incidents of a play. Thus in *Boucicault v. Egan* an injunction was granted to restrain the representation of the w 'er-cave scene in the plaintiff's drama of 'The Colleen Bawn.' The defendant had represented a play dramatized from Gerald Griffin's novel of 'The Collegians,' the parent of the plaintiff's play also; but the scene in question, of which the defendant's representation was a colourable imitation, was original, and the most important and effective in the plaintiff's piece, and not contained in the novel.

The many defects existing in the law of dramatic copyright led to the passing of the 3 & 4 Will. 4, c. 15 (a), which gave to the author, or his assignee, of any printed and unpublished tragedy, comedy, play, opera, farce, or other dramatic piece or entertainment (b), composed and not printed and published, 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 the sole right of representation from the time of publication, for a period of twenty-eight years, and also 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

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

(a) Commonly called Sir Edward Bulwer Lytton's Act.

(b) In *Lee v. Simpson*, 3 C. B. 871, 4 D. & L. 666, 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.

CAP. XI.

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 Vict. c. 97, s. 2. and the plaintiff can now only recover a full and reasonable indemnity as to all expenses incurred, to be taxed by the proper officer in that behalf.

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

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, which enacts that the sole liberty of representing or performing, or causing (a) 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 (b); 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 (c), 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

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

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

(c) By virtue of this section the 5 & 6 Vict. c. 45, is retrospective as to the exclusive right to the performance of musical compositions published before the passing of the Act: *Ex parte Hutchins and Romer*, W. N. (1879) 114.

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.

The common law right to the exclusive representation of a manuscript play is lost by the public performance of the piece, and since the passing of the statute the only protection the author can claim is that conferred by the statute. This evidently does not attach until the play has been publicly represented. Effect of representation of manuscript play.

It is doubtful whether, supposing a dramatic piece or musical composition in manuscript to have been registered so as to give protection to the right of representing it or performing it, the subsequent printing and publication of such piece or composition, if not followed by the deposit at Stationers' Hall, can be held to take away that right (a).

The Act of 5 & 6 Vict. c. 45, in extending the term of copyright in dramatic pieces, and providing for their registration and assignment, does not deprive the proprietor of the remedies given by the Act of Will. 4. The remedies provided by the Act of Will. 4, not affected by the 5 & 6 Vict. c. 45.

This was seen in a case which came before the Court of Exchequer a few years since. The facts were briefly these: The plaintiff purchased from a Mr. Elton all the property in the copyright in the words of a comic song called 'Come to Peckham Rye,' of which the latter was the author, the sum given being £2. Mr. Clark was in the habit of singing this song at the Oxford Music Hall, and similar places of entertainment. In the course of his performance the song attracted much attention, and he was offered by a certain publisher ten guineas for his property in the composition. The defendant Bishop, who was a publisher in the East end of London, contrived to obtain a copy of the song, which up to this moment remained in manuscript, and published the same with some slight alterations. The plaintiff, feeling himself aggrieved, brought an action for damages against Bishop for the

(a) See *Boosey v. Fairlie*, 7 Ch. Div. 301.

CAP. XI.

infringement of his copyright. The case was tried before the common serjeant in the Lord Mayor's Court, when a verdict was returned against the defendant with £10 damages. A rule to set aside such verdict was, however, obtained on the ground that the plaintiff not having registered his copyright at Stationers' Hall, he had no right to sue for damages in respect of it. The point having been fully argued, the court decided that the 24th section of the Act applied only to books, and had no reference to such productions as that in question: and that the other sections relating to songs and dramatic representations connected with them, did not make it obligatory on the owners to register them in order to preserve them against any infringement of their copyright (a). Consequently it may be taken that 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 the Act 5 & 6 Vict. c. 45, or of the 3 & 4 Will. 4, c. 15.

Omission to register does not affect the copyright or the recovery of penalties.

There are several points which we propose now to consider in the order in which they are enumerated in the sections before us.

There is nothing in the Act to shew when the right in an unpublished play is to begin, and when it is to end.

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 (b).

The plaintiff was a member of the Dramatic Authors' Society, which announced that leave might be obtained from the secretary to represent pieces belonging to the members at certain prices mentioned in a list, and that

(a) *Clark v. Bishop*, Exchequer, Jan. 11th, 1872; 25 L. T. (N.S.) 908.

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

Where the copyright in unpublished work dates from.

As to the consent of the author.

lists would be published from year to year containing the names of the new pieces. In 1849 the secretary of the society gave the defendant leave in writing, signed by himself, to play "dramas belonging to the authors forming the Dramatic Authors' Society, upon his punctual transmission of the monthly bills, and payment of the prices for the performance of such dramas." Three pieces were performed belonging to the society. It was held that the defendant was not liable to penalties; that the documents given by the secretary amounted, under the circumstances, to "a consent in writing of the author."

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 (a).

Where there are several owners of a copyright, consent must be obtained from all, one co-owner cannot grant a license in respect of that which really belongs to two. Thus in an action by the co-owners of a moiety of the copyright of an opera to restrain the defendant, who on the evidence in the case had only a license from the other co-owner, from representing it, and for damages, the Master of the Rolls held that the plaintiffs were entitled to sustain the action and to recover a moiety of the statutory penalty of £2 a night for each representation (b).

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, Performance at a place of dramatic entertainment.

(a) *Per Maule, J., in Moreton v. Copeland*, 16 C. B. 517.

(b) *Powell v. Head*, W. N. (1879) 86.

CAP. XI.

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* (a), 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 entertainment 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 "a place of dramatic entertainment" within the meaning of statute 3 & 4 Will. 4, c. 15, s. 1, referred to by statute 5 & 6 Vict. c. 45, s. 20. 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 being 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 (b).

(a) 12 Q. B. 217.

(b) In the same case Patteson, J., remarked that "the street where 'Punch' is performed is for the time being a place of dramatic entertainment."

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 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.

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 any 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).

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

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

(a) *Russell v. Briant*, 19 L. J. (C.P.) 33; 14 Jur. 201; 8 C. B. 836.

CAP. XI.

represented or performed a musical composition without the author's written consent (a).

This doctrine was followed in *Lyon v. Knowles* (b). 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 were performed which the plaintiff had the sole liberty of representing or causing to be represented; and it was held, in an action to recover 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

(a) *Russell v. Briant*, 19 L. J. (C.P.) 33; 14 Jur. 201; 8 C. B. 836.

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

principal of Dillon, the person who actually directed the representation (a). CAP. XI.

In the case last referred to Mr. Justice Blackburn said: "I do not think that, by furnishing servants to another, a man can be said to do all that is done by those servants while under the command of that other. A familiar example may be found in the case of a man letting a ready-furnished house, leaving an old servant in it. Suppose the tenant gave a dinner, which was cooked by that servant, who also attended on him at it, and for which the plates and furniture of the landlord were used, no one would say that, in any sense of the words, the landlord gave that dinner."

In another case (b) the defendant was the owner and manager of the Grecian Theatre, and for £30 he had let for one night to his son, who was the stage manager, the use of the theatre, company, and all persons employed. The son selected and brought out a play, for which representation the court held the defendant liable. The judgment was based on the fact that the defendant had the control and management of the theatre and the company during that performance. "I think," said Erle, C.J., "the defendant is responsible for that representation. He was the proprietor of the theatre, and had entire control over the establishment and all belonging to it; and what was done by his son was done by his permission. The case of *Lyon v. Knowles* seems to me to recognise that distinction. There the defendant merely let his theatre with the scenery, scene-shifters, bands, lights, &c., to Dillon, who brought his own company to represent pieces of his own selection, the plaintiff having no control whatever over any person employed in the representation. Here, however, the piece is performed by the defendant's own *corps dramatique*, his son being one of them; and the performance takes place for the defendant's profit to the extent

(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) *Marsh v. Conquest*, 17 C. B. (N.S.) 418. See *Parsons v. Chapman*, 5 C. & P. 33.

CAP. XI.

What amounts
to a repre-
sentation.

of £30. I think, therefore, it is impossible to say that the defendant did not cause the piece to be represented."

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 (a).

In *Planché v. Braham*, the defendant sang two or three songs of the plaintiff's libretto to an opera, and one in particular commencing with the words

"Ocean! thou mighty monster!"

And it was held that this was an infringement of the plaintiff's sole right of representation.

So, too, the playing in public the music, though other words than the original be used, would be an infringement.

What is a
dramatic
composition.

The Act of William IV. gives to the authors of "any tragedy, comedy, play, opera, farce, or other dramatic piece or entertainment," the sole liberty of representing it. This right is affirmed by the statute of Victoria, which further declares that "the words 'dramatic piece' shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment."

The above terms are not very distinct, and questions have arisen as to what is, or is not included in the "or other scenic, musical, or dramatic entertainment."

A work not intended for the stage may be in substance a drama, and may be easily adapted for representation. Is it excluded from the operation of the statute, because

(a) *Planché v. Braham*, 1 Jur. 823; 8 C. & P. 68; 4 Bing. (N.C.) 17. Two pounds may be exacted for each song, and if there is a performance in which 1000 people take part, as in a chorus, each would be liable for a separate penalty.

it is not in form and name a drama? Again, if fitness for public performance is the test of a dramatic composition, are songs within the purview of the statute? Though hardly dramatic compositions in the ordinary acceptation of the term, they seem to come within the words "musical entertainment." Whether a production is called a poem, or a tragedy, or novel, or a comedy, a history, or a drama, or whether its author did or did not intend it for public representation, is immaterial in ascertaining whether it is a dramatic composition. This question is determined by the character of the work, and not by what it is called, or the purpose for which the author has intended it. So also it is immaterial whether the words of a drama are spoken or sung; whether they are or are not accompanied with instrumental music. An opera, not less than a play without music, is a drama. The judicial construction given to "dramatic piece," as used and defined in the statute, is broad enough to embrace every composition which is dramatic in character and is suitable to be performed, recited, read, or sung for the entertainment of an audience. Thus it has been decided that 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 the supposed words of the suffering parties, is dramatic, and consequently within the meaning of the statute, even though it be 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. Mathews' representations, or the readings of Shakespeare by Mrs. Siddons or Mr. Charles

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

CAP. XI.

Kemble, were not dramatic. The character of Elijah 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, be referred to, it will be remarked that the 2nd 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 (a).

In a recent case, the court held the song, 'Come to Peckham Rye,' which has little, if any, of the dramatic character, to be a dramatic piece (b). And though there is no express decision to the effect that all songs are entitled to protection, yet there can be little doubt that this is practically the effect of the judicial decisions.

The statute under consideration does not, however, protect a literary production which is not a musical or dramatic composition, and the author has no remedy against any person who publicly reads or recites such production. Of course this applies only to published works, for the unauthorized public reading of any unpublished production, whether a dramatic composition or not, would be a violation of the owner's common law rights in the manuscript.

Copyright in
spectacular
piece.

A spectacular piece is within the protection afforded by the statute. Thus in a case to be hereafter more fully considered, where it appeared that the defendant had

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

(b) *Clark v. Bishop*, 25 L. T. (N.S.) 908.

taken from the plaintiff's play two scenes or situations, consisting more of scenic effects than of dialogue, Mr. Justice Brett said: "Now, it was first said that the subject matter of the action was not the subsequent matter of copyright; that the Act gives a property in words, and not in situations and scenic effects; but I think that these latter are more peculiarly the subject of copyright than the words themselves (a).

Copyright may be secured in the adaptation of a play which is itself common property. Thus in *Hatton v. Kean*, where it appeared that the defendant had designed a dramatic representation, consisting of one of Shakespeare's plays, with certain alterations in the text, original music, scenic effects, and other accessories, the court did not doubt that the production, as a whole, was a proper subject of copyright, although the play itself was, in its original form, common property (b). Adaptation of old play.

A translation of a foreign play not entitled to protection in this country, will receive the same protection as an original drama. Any number of persons may dramatize or translate a work which is common property, or, with the consent of the owner of the copyright, a work wherein copyright exists, and whatever may be the similarity between two dramatizations, adaptations, or translations, each dramatist will have copyright in his own version. Translation of foreign drama.

Though the words in the Act 3 & 4 Will. 4 imposed the penalties there specified upon any who may pirate any protected "production or any part thereof," yet it was not necessarily intended to prevent the copying and reproduction of every and any part without regard to its importance. At the same time it does not follow that either the very language of the original drama, or a very considerable portion of it, must be appropriated in order to bring the case within the statute. Principal decisions on questions of piracy under the Act of Will. IV.

In considering and judging of what amount of copying or imitation would constitute piracy, similar rules to those

(a) *Chatterton v. Cave*, 33 L. T. (N.S.) 256.

(b) 7 C. B. (N.S.) 268.

CAP. XI.

already laid down with reference to copyright in books may be applied to the authors and owners of dramatic productions, for it would seem to be a proper rule to apply the same principle of construction to statutes which aim at objects substantially the same. The question of materiality must depend upon a consideration of the quantity and value of the portion taken or use made, and must vary indefinitely in various circumstances. As Lord Chancellor Cottenham said in *Bramwell v. Halcomb* (a): "It is useless to refer to any particular cases as to quantity." The quantity taken may be great or small, but if it comprise a material portion of the book, it is taken illegally. The question is as to the substance of the thing, and if there be no abstraction of that which may be substantially appreciated, no penalty is incurred. In all cases, the matter is dealt with as one of degree. In all, quantity and value are both the subjects of consideration, and in none of them has an infringement been established without satisfactory evidence of an appropriation, possibly involving a substantial loss to one person, and a substantial gain to another.

The question in every case must be a question of fact, and therefore one for a jury.

The two principal cases under the 3 & 4 Will. 4, c. 15, are the cases of *Planché v. Braham* (b), and *Chatterton v. Cave* (c). In the first of these cases the defendant used the words of two or three songs of the plaintiff's as the vehicle of some airs in an English version of Weber's opera of 'Oberon,' and the action was brought under the above Act. The rest of the version had been written by another person. There was no question as to appropriation of the music; and Lord Chief Justice Tindal left it to the jury to say whether there had been a representation of a part of the plaintiff's dramatic production. The jury found that there had been; and gave a verdict accordingly for the statutory penalty. Serjeant Wilde moved to set aside the verdict on the ground that as there had been

(a) 3 My. & Cr. 738.

(b) 4 Bing. N. C. 17.

(c) L. R. 10 C. P. 572; 2 C. P. D. 42; 3 App. Cas. 483.

no representation of a part of the plaintiff's piece,—the words of the songs adapted to the music being immaterial to the development of the drama,—the defendant was entitled to a judgment. But the court affirmed the the verdict, holding that the question before it must in all cases be determined by a jury. "It is difficult," said the Chief Justice, "to say what is or is not a representation of a part of a dramatic production, . . . and it must be left to a jury to determine the fact."

The second case was an action against the defendant in respect of his having committed an infringement of the copyright of the plaintiffs in a drama founded on the novel by Eugène Sue called 'The Wandering Jew.' There had been a drama in French founded on the same novel, and the version claimed by the plaintiffs, prepared by Mr. Lewis and assigned by him to them, was an adaptation from the French. The defendant had since brought out another adaptation, which it was alleged was, in part, an imitation of the former, and had thereby committed an infringement of the plaintiffs' copyright. When the case came on for trial, it was agreed to discharge the jury, Lord Coleridge undertaking to read the plays, to receive such evidence as he might deem material, and to find whether there had been any copying so as to bring the case within the statute. He found there had been two "scenes or points" of the plaintiffs' drama taken by the defendant without recourse either to the French novel or to the drama constructed from it, and he directed the verdict to be entered for the defendant. The finding was as follows:—"I find in' this case that two scenes or points of the drama of the defendant have been taken direct from the drama of which Mr. Lewis was the author and the plaintiffs the assignees, without recourse to either the French novel or the French drama, originals common to the dramas of both the plaintiffs and defendant. I find this, first, in respect of the final scene of the defendant's drama; and secondly, of the appearance of the Wandering Jew, and the stage

CAP. XI.

business connected with that appearance, which are to be found in the second scene of the second act of the defendant's drama, and in the fourth scene of the first act of the plaintiffs' drama. I find that the drama of the defendant is not, except in these respects, a copy from or a colourable imitation of, the drama of the plaintiffs'. I direct the verdict to be entered for the defendant. I assess the damages at 40s. if upon argument, as provided by the terms agreed to at the trial, the court should be of opinion that the verdict ought to be entered for the plaintiffs." The case was argued upon a rule obtained to enter the verdict for the plaintiffs. This rule was discharged (a), and on appeal this decision was affirmed (b). The plaintiffs appealed to the House of Lords, and it was argued that the scenes, or points, as they were called, were material, valuable, and striking points, and affected considerably the attractiveness of the drama, and no one doubted that they had been copied from the plaintiffs' production, but the House affirmed the decisions of the courts below, Lord Hatherley saying: "There is indeed one obvious difference between the copyright in books and that in dramatic performances. Books are published with an expectation, if not a desire, that they will be criticised in reviews, and if deemed valuable, that parts of them will be used as affording illustrations by way of quotation or the like, and if the quantity taken be neither substantial nor material, if, as it had been expressed by some Judges, 'a fair use' only be made of the publication, no wrong is done and no action can be brought. It is not, perhaps, exactly the same with dramatic performances. They are not intended to be repeated by others, or to be used in such a way as a book may be used, but still the principle *de minimis non curat lex* applies to a supposed wrong in taking a part of dramatic works, as well as in reproducing a part of a book. The minimum of damages, to be awarded when the fact of damage and the right to damages have been once established, was no doubt fixed because of the difficulty of

(a) L. R. 10 C. P. 572.

(b) 2 C. P. D. 42.

proving with definiteness what amount of actual damage had been sustained, by perhaps a single performance at a provincial theatre of a work belonging to a plaintiff, whilst at the same time his work might be seriously depreciated if he did not establish his right as against all those who infringed upon it. . . . I think, my lords, regard being had to the whole of the case, to the finding of the Lord Chief Justice that the parts which were so taken were neither substantial nor material parts, and the impossibility of damage being held to have accrued to the plaintiff from such taking, and the concurrence of the other Judges before whom the case was brought, that this appeal should be dismissed, and dismissed with costs" (a).

It is worthy of note here that when the question was raised in the Common Pleas, Lord Coleridge set out fully the reasons which had dictated his direction, and it then appeared that though the finding had no explicit allegation as to the character of the "scenes" or "points" which it finds to have been taken, their immateriality was meant to be conveyed. "These points so copied," said he, "were not parts of the dialogue or composition of the plaintiffs' drama, but were in the nature of dramatic situations or scenic effects. It appeared to me that, looking to the general character of the two dramas respectively, the extent to which the one was taken from the other was so slight, and the effect upon the total composition was so small, that there was no substantial and material taking of any one portion of the defendant's drama from any portion of the plaintiffs'. Therefore, though I felt bound to find that there was a taking of these two small points, I decided to enter the verdict for the defendant."

The court will not protect any person in the exclusive right of representing an immoral play (b).

The proprietor of a drama whether published or un-

(a) 3 App. Cas. 483, 492, 493.

(b) The Lord Chamberlain recently ('The Happy Land' at the Court Theatre) interposed to prevent certain high personages being represented in ludicrous positions upon the stage; see the powers of the Lord Chamberlain, 6 & 7 Vict. c. 68, Appendix.

CAP. XI.

published, may license one or more persons to perform it anywhere, without giving to any one the exclusive right of representation. But in such case the owner of the copyright only could maintain an action in respect of unlicensed performances. The owner may grant the exclusive right of representation for any named part of the country, or any town, city, or county, and within such limits, no one without the consent of the licensee has the right to perform the play.

Assignment
of the right
of representa-
tion

By the 22nd section of the 5 & 6 Vict. c. 45, 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 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 the parties that such right should pass by such assignment. Under an assignment of "all present and future vested and contingent copyright in a musical composition," together with "all property" therein, the exclusive right of performance passes (*b*).

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, notwithstanding the assignment is not made by deed, or registered under 5 & 6 Vict. c. 45 (*c*).

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; but it was held that the plaintiff might maintain an action for penalties under statute 3 & 4 Will. 4, c. 15, against the defendant, for

(*a*) *Ante*, p. 135.

(*b*) *Ex parte Hutchins and Romer*, W. N. (1879) 114.

(*c*) *Marsh v. Conquest*, 17 C. B. (N.S.) 418; 10 L. T. (N.S.) 717.

representing the piece without his license 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.

That section in terms applies only to the effect of an assignment of the copyright, limiting its operation as such, 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, the Court of Queen's Bench in *Cumberland v. Planché* (a) had held that 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 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 express 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 vitiatur*. 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 (b).

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

Assignment of the right of representation need not be registered.

(a) 1 Ad. & E. 580.

(b) Per Cockburn, C.J., in *Lacy v. Rhys*, 4 B. & S. 873, 883; 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.

CAP. XI.

the 22nd section; nor indeed need it be in writing according to some authorities. The provision of this section applies only to cases where the copyright in a dramatic or musical composition is assigned without any mention of the right of representation, and where consequently it may be doubtful whether the latter right was intended to be passed (*a*).

The legal assignment must be in writing.

The legal assignment either of the right to represent a dramatic piece or perform a musical composition must be in writing (*b*), but need not be attested (*c*) or sealed (*d*). This was decided in *Shepherd v. Conquest* (*e*), 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 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

(*a*) See *Wood v. Boosey*, 7 B. & S. 869; L. R. 10 Q. B. 347.

(*b*) See *ante*, pp. 164, 165, as to what is an assignment, see *Leader v. Purday*, 7 C. B. 4; *Lacy v. Toole*, 15 L. T. (N.S.) 512.

(*c*) *Cumberland v. Copeland*, 1 Hurl. & C. 194.

(*d*) *Marsh v. Conquest*, 17 C. B. (N.S.) 418; 10 L. T. (N.S.) 717.

(*e*) 17 C. B. 427; 25 L. J. (C.P.) 127. When A. agrees with B. to "let B. have" a particular drama in discharge of £10 due from A. to B. this is a complete assignment of A.'s whole property in the drama: *Lacy v. Toole*, *supra*.

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 belonged to it, flowed 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 was upon the author, in the first instance, that the right was conferred by the statute which created it. Literary property stood 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 could only be effectuated by holding that the actual composer of the work was the author and proprietor of the copyright, and that no relation existing between him and an employer, who himself took no intellectual part in the production of the work, could, without an assignment in writing, vest the proprietorship of it in the latter (a).

This case must be distinguished from those in which one person forms the original and general design of a

(a) *Ante*, pp. 126-130.

No assignment necessary where work executed for another.

CAP. XI.

piece, and another merely carries out that design, as in *Hatton v. Kean*, already referred to (a), where the defendant verbally employed the plaintiff to compose music as part of the representation of one of Shakespeare's plays, adapted to the stage by the defendant, with the aid of scenery, dresses, music, and other accompaniments, the general design of which was formed by the defendant. There it was held that, as between the parties, the defendant had the sole liberty of performance without assignment or consent in writing from the plaintiff. Nor is there any conflict with the principle laid down by Sir John Leach in *Barfield v. Nicholson* (b): "That 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 literal expression, at least within the equitable meaning of the statute of Anne, which, being a remedial law, is to be construed liberally."

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 shew that the position and rights of an author within 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

(a) 29 L. J. (C.P.) 20.

(b) 2 Sim. & Stu. 1.

statutes relating to copyright (a). In *Morris v. Kelly* (b) 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 making mere alterations, additions, or improvements, whether with or without the consent of the author, does not constitute a joint authorship. In the late case of *Levy v. Rutley* (c), the plaintiff, Mr. L. Levy, proprietor of the Victoria Theatre, employed a Mr. Wilks to write for him a piece called 'The King's Wager, or the Camp, the Cottage, and the Court,' and himself suggested the subject. Mr. Wilks having completed the play, the plaintiff and some members of his company introduced various alterations in the incidents and in the dialogue, to make it the more attractive, and one of them wrote an additional scene. Under these circumstances it was held that there was no joint authorship. It was admitted that it was not necessary that each should contribute the same amount of labour, yet to constitute joint authorship there must be a joint labouring in furtherance of a common design. "All that the plaintiff has done," said Mr. Justice Keating in giving judgment, "is this: Wilks having written a dramatic piece complete, the plaintiff thinks it might be made more attractive, and accordingly he, without any co-operation with Wilks, introduces a new scene, and makes various alterations and additions to the dialogue. Could the additions so made, constitute him a joint author with Wilks of the whole piece? There may, no doubt, be a plurality of authors: the statute, in s. 1, dealing with the duration of copyright, speaks of 'the author or authors, or the survivor of the authors.' But I fail to discover any evidence that there was any co-operation of the two in the design of this piece, or in its

What constitutes joint authorship.

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

(b) 1 Jac. & W. 481.

(c) Law Rep. 6 C. P. 523; *Shelley v. Ross*, L. R. 6 C. P. 531, note (1).

CAP. XI.

execution, or in any improvements either in the plot or the general structure. All the plaintiff claims to have done is to vary some of the dialogue, so as to make it more suitable for his company or for his audience. If the plaintiff and the author had agreed together to re-arrange the plot, and so to produce a more attractive piece out of the original materials, possibly that might have made them joint authors of the whole. So, if two persons undertake jointly to write a play, agreeing in the general outline and design, and sharing the labour of working it out, each would be contributing to the whole production, and they might be said to be joint authors of it. But to constitute joint authorship, there must be a joint common design. Nothing of the sort appears here. The plaintiff made mere additions to a complete piece, which did not in themselves amount to a dramatic piece, but were intended only to make the play more attractive to the audience."

The composer's interest is not affected by shewing 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 (*a*).

The right of representation in MS. plays.

It will be observed that copyright is secured in manuscript dramatic compositions, the right of exclusive representation is under certain conditions vested in the author, while at the same time copyright is conferred in dramatic works printed and published, and the right of exclusive representation is likewise conferred on the author.

It is obvious that here many questions of difficulty may arise.

Some of the general principles seem clear, but there are very nice distinctions on which little light is obtainable from the reported cases. When the right of representation has once been secured, it will be unaffected by any subsequent representation of the piece. There-

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

fore, if first published in Great Britain and the copyright in the piece duly secured, the first representation of the play afterwards in a foreign country would not affect the copyright.

But a previous publication of the play in print in a foreign country would defeat the claim to copyright in this, and the right of representation could not be secured in this country, even though the first representation of the play were to take place here.

It is said that the duration of the copyright is governed not by the representation, but by the publication, and that as the copyright dates from publication, it cannot be defeated or affected by any public performance of the play, no matter when or where made.

But this must be accepted with caution, for it would make the right of representation begin with and depend upon the first publication in print. And if such were the case a dramatist might have enjoyed the exclusive right of representing a manuscript play under the 2nd section of the Copyright Act for nearly forty-two years, and then publish it in print and secure the copyright in the publication for another period of forty-two years. For the copyright in the piece itself would commence to run from the date of publication in print, but in such case it is doubtful whether the author would have the exclusive right of representation during this second period also. For, it must be remembered that the 20th section expressly provides that the sole right of representation is to be secured to the author of a dramatic piece in manuscript by entering on the register, amongst other things, "the time and place of the first representation or performance;" and that "the first public representation or performance of any dramatic piece shall be deemed equivalent in the construction of the Act to the first publication of any book."

It therefore seems more likely that, should the question arise, it would be held that the right of exclusive representation would run from the date of the

CAP. XI.

first representation of the play in manuscript, and not from the date of the publication of the same play in print. No limit is fixed for the duration of the exclusive right of representation of the play while yet in manuscript; and therefore if not perpetual, the right would seem to last for 42 years or for the life of the author, and seven years after his death, whichever may be the longer period.

Where the right to the exclusive representation of a piece in manuscript has been lost by first representing the same in a foreign country, it cannot be recovered afterwards by printing and publishing the piece; for though the copyright in the printed piece might be thus secured, the right of representation having become common property, could not thus be regained.

It has been thought that the right of representation, secured by registration in accordance with the Act, of a piece in manuscript may be lost by such a publication in print as will amount to an abandonment of the copyright. It is argued that the right of representing a manuscript play rests on the condition that the composition is not published in print,—after it has been so published it passes from the class of manuscript to that of printed plays, and becomes subject to the conditions on which the right of exclusive representation will vest in published plays:—that this right then becomes subordinate to the copyright, and the validity of the former is dependent on that of the latter right; that an abandonment of the copyright, which is the greater right, involves an abandonment of the lesser right of representation; and that when the title to copyright is forfeited, the work becomes public property as far as printing copies is concerned; and this would make it public property as far as representing it is concerned (*a*).

In this view, however, we are unable entirely to concur.

(*a*) Drone's 'Law of Copyright and Playright,' (Amer.) 607. The point was raised, but not decided, in the recent case of *Boosey v. Fairlie*, 7 Ch. Div. 316.

As to dramatic pieces and musical compositions, the Royal Commissioners in their recent report said: "While in books there is only one copyright, in musical and dramatic works there are two, namely, the right of printed publication and the right of public performance.

CAP. XI.
 Suggestions
 of the Copy-
 right Com-
 missioners as
 to musical and
 dramatic
 copyright.

"These rights are essentially different and distinct, and we find that many plays and musical pieces are publicly performed without being published in the form of books, and thus the acting or dramatic copyright is in force, while as to literary copyright, such plays and pieces retain the character of unpublished manuscripts. Music printed and published becomes a book for the purpose of the literary copyright, and so, we presume, does a play; but it is a question what becomes of the performing copyright on the publication of the work as a book; and there is a further question, whether the performing copyright can be gained at all, if the piece is printed and published as a book before being publicly performed.

"With regard to the duration of copyright in dramatic pieces and musical compositions, we recommend that both the performing right and the literary right should be the same as for books.

"We further propose, in order to avoid the disunion between the literary and the performing rights in musical compositions and dramatic pieces, that the printed publication of such works should give dramatic or performing rights, and that public performance should give literary copyright. For a similar reason it would be desirable that the author of the words of songs, as distinguished from the music, should have no copyright in representation or publication with the music, except by special agreement (a)."

In order that the performance be an infringement of the rights of the proprietors, it is necessary that it takes place in public, a strictly private performance not being within the prohibition of the statute.

But a representation may be regarded as a public one,

(a) Par. 72-75.

CAP. XI.

though the privilege of admission be denied to the general public and be extended only to certain persons. And though the fact that no charge is made for admission is no doubt one ingredient in determining whether the performance be public or private, yet it cannot in all cases be taken as conclusive. For as the object of the law is to protect the proprietor of the copyright from injury, a performance nominally private, but in reality public, whether a charge be made for admission or not, would be restrained, on the ground that it might be as injurious to the proprietor as if the representation had been public. "Private theatricals" are sometimes given by amateur performers in a place of public amusement to which a charge is made for admission. This undoubtedly would be regarded as a representation in public, although only invited persons or members of a certain society were privileged to buy tickets of admission.

So too if amateurs forming a society or a club subscribe among themselves to get up a dramatic entertainment, they are liable to pay the fees for the authorship as if they received money at the doors.

What is piracy of a dramatic piece.

In considering what amounts to an infringement of the right of exclusive representation, the same general principles that govern infringement of copyright generally are applicable. An unauthorized performance of parts—such parts being material parts of a dramatic composition—will amount to piracy; and it is a question of fact and common sense whether the parts taken are of such a substance and value, or used in such a way, as to amount to an infringement (*a*). Unless a material part has been taken there is no infringement, but substantial identity is sufficient to constitute piracy (*b*).

As to what amounts to substantial identity is well

(*a*) See *Planché v. Braham*, 8 C. & P. 68; on app. 4 Bing. N. C. 17; *Reade v. Conquest*, 11 C. B. (N.S.) 479; *Boosey v. Fairlie*, 7 Ch. D. 301; *Chatterton v. Cave*, L. R. 10 C. P. 572; on app. 2 C. P. D. 42; 3 App. Cas. 483.

(*b*) *Reade v. Conquest*, *supra*; *Boosey v. Fairlie*, *supra*.

illustrated by a recent American case (a). The matter CAP. XI.
 alleged to have been pirated was the "railroad scene" in What amounts
 Daly's play 'Under the Gaslight.' In this scene is to substantial
 represented a surface railroad and a signal-station shed, identity.
 in which a woman, at her own request, is locked by the
 signalman, who then disappears. Next are seen two
 men, one of whom binds the other with a rope, fastens
 him to the railroad track, and leaves him to be killed
 by an expected train. From a window in the shed
 the woman sees what is done, hears the noise of the
 approaching train, breaks open the door with an axe,
 and frees the intended victim an instant before the train
 rushes by.

This scene was reproduced, but with variations, by
 Mr. Boucicault in his drama entitled 'After Dark.' In
 that play he makes one of the characters, from a wine
 vault where he had been thrown, see, through a door into
 an adjoining vault, two persons pass through a hole in the
 wall the body of a man who had been made unconscious
 by drugs. With an iron bar he enlarges an orifice in
 the wall of the vault, which opens on an underground
 railway, and sees lying insensible on the track the
 person whose body had just been put there by the two
 men in the adjoining vault. Hearing the noise of a
 coming locomotive, he quickly makes his way through
 the opening in the wall and moves the body from the
 track, just in time to prevent it from being run over by
 the passing train.

In Daly's drama this incident occupies the third scene
 of the fourth act, and during its progress, there is con-
 siderable conversation between the several characters on
 the stage. In Boucicault's drama, it is represented in
 three scenes of the third act, chiefly by action, but partly
 by monologue spoken by one of the characters after he
 has seen the body on the track. In laying down the law
 applicable to these facts, Mr. Justice Blatchford said:—

(a) *Daly v. Palmer*, 6 Blatch. (Amer.) 256; see *Boucicault v. Wood*,
 2 Biss. (Amer.) 34; *Martinetti v. Maguire*, 1 Dearly (Amer.) 216.

CAP. XI.

“The series of events so represented, and communicated by movement and gesture alone to the intelligence of the spectator, according to the directions contained in parentheses, in the two plays in question here, embraces the confinement of A. in a receptacle from which there seems to be no feasible means of egress: a railroad track, with the body of B. placed across it in such a manner as to involve the apparent certain destruction of his life by a passing train; the appearance of A. at an opening in the receptacle, from which A. can see the body of B., audible indications that the train is approaching, successful efforts by A. from within the receptacle, by means of an implement found within it, to obtain egress from it upon the track; and the moving of the body of B. by A., from the impending danger, a moment before the train rushes by. In both of the plays the idea is conveyed that B. is placed intentionally on the track, with the purpose of having him killed. Such idea is, in the plaintiff's play, conveyed by the joint medium of language uttered, and of movements which are the result of prescribed directions, while in Boucicault's play it is conveyed solely by language uttered. The action, the narrative, the dramatic effect and impression, and the series of events in the two scenes, are identical. Both are dramatic compositions, designed or suited for public representation. It is true that in one A. is a woman, and in the other A. is a man; that in one A. is confined in a surface railroad station-shed, and in the other A. is confined in a cellar abutting on the track; that in one A. uses an axe, and in the other A. uses an iron bar; that in one A. breaks down a door, and in the other A. enlarges a circular hole; that in one B. is conscious, and is fastened to the rails by a rope, and in the other B. is insensible, and is not fastened; and that in one there is a good deal of dialogue during the scene, and in the other only a soliloquy by A. and no dialogue. But the two scenes are identical in substance, as written dramatic compositions, in the particulars in which the plaintiff alleges that what he has

invented, and set in order, in the scene, has been appropriated by Boucicault. CAP. XI.

“All that is substantial and material in the plaintiff’s railroad scene has been used by Boucicault, in the same order and sequence of events, and in a manner to convey the same sensations and impressions to those who see it represented, as in the plaintiff’s play. Boucicault has, indeed, adapted the plaintiff’s series of events to the story of his play, and, in doing so, has evinced skill and art; but the same use is made in both plays of the same series of events, to excite, by representation, the same emotions, in the same sequence. There is no new use, in the sense of the law, in Boucicault’s play, of what is found in the plaintiff’s railroad scene. The railroad scene in Boucicault’s play contains everything which makes the railroad scene in the plaintiff’s play attractive as a representation on the stage. As, in the case of the musical composition, the air is the invention of the author, and a piracy is committed if that in which the whole meritorious part of the invention consists is incorporated in another work, without any material alteration in sequence of bars; so in the case of the dramatic composition, designed or suited for representation, the series of events directed in writing by the author, in any particular scene, is his invention, and a piracy is committed if that in which the whole merit of the scene consists is incorporated in another work, without any material alteration in the constituent parts of the series of events, or in the sequence of the events in the series.

“The adaptation of such series of events to different characters who use different language from the characters and language in the first play is like the adaptation of the musical air to a different instrument, or the addition to it of variations or of an accompaniment. The original subject of invention, that which required genius to construct it and set it in order, remains the same in the adaptation. A mere mechanic in dramatic composition can make such adaptation, and it is a piracy, if the appropriated series of

CAP. XI.

events, when represented on the stage, although performed by new and different characters using different language, is recognised by the spectator, through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in the mind, in the same sequence or order. Tested by these principles, the railroad scene in Boucicault's play is, undoubtedly, when acted, performed, or represented on a stage or public place, an invasion and infringement of the copyright of the plaintiff in the railroad scene in his play."

Infringement
of the copy-
right in a
musical
composition.

As to what amounts to an infringement of the copyright in a musical composition (a), it has been decided that to publish, in the form of quadrilles and waltzes, the airs of an opera in which there exists an exclusive copyright, amounts to such. In *D'Almaine v. Boosey* (b), 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

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

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

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 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.”

The author of a dramatic work which has been first represented in a foreign country (such country not being a country with which a convention has been entered into) is not entitled to any exclusive right of representation in this country, the representation of a dramatic work being a publication of it within the meaning of the statute 7 Vict. c. 12, s. 19. This section provides that no author or composer of any dramatic piece or musical composition

Representation first in a foreign country precludes exclusive right of representation being obtained here.

CAP. XI.

which shall, after the passing of the Act, be first published out of Her Majesty's dominions, shall have any copyright therein, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under that Act.

The only question which seems to have arisen upon this section has been as to the meaning to be attached to the word "published." In 1863 the point came before Vice-Chancellor Wood with reference to the piece known as 'The Colleen Bawn.' Mr. Boucicault filed his bill against Mr. Delafield, the proprietor of a theatre in the provinces, to restrain his performing this play. It appeared that 'The Colleen Bawn' had been performed in New York, and the Vice-Chancellor decided that the public performance in New York was a publication, and that having published it in that way, Mr. Boucicault was, under the 19th section of the 7 Vict. c. 12, absolutely deprived of the exclusive right in this country (a). After referring to the 19th section the Vice-Chancellor says: "If Mr. Boucicault had first represented his piece in this country, he would have been entitled to the copyright given by the earlier statutes. So, also, if he had given his first representation in any country with which a convention had been made under the International Copyright Act, he would have been entitled under that Act to all the same privileges. But in no case is a person to enjoy any rights conferred by the old Acts concurrently with those created by the International Copyright Act. This is the effect of the 19th section. . . . The plain purpose of the statute is to secure for this country the benefit of the first publication of new works, and certain conditions are made without which works first published abroad are not to be entitled to copyright. These conditions have not been complied with. The plaintiff, therefore, fails in his demand, and the bill must be dismissed."

The point was again raised by the same plaintiff in a subsequent case (b).

(a) *Boucicault v. Delafield*, 1 H. & M. 597.

(b) *Boucicault v. Chatterton*, 5 Ch. Div. 267.

Mr. Boucicault applied for an injunction to restrain Mr. Chatterton, who was the lessee of the Adelphi Theatre, from representing the drama called 'The Shaughraun,' the copyright in, and the sole right of representing or performing which, he claimed. 'The Shaughraun' was written by the plaintiff in 1874, and was first performed in New York in November of that year. It was registered at Stationers' Hall in 1874, as a book under the Copyright Act, 1842, but there being an inaccuracy in the form of the registration, the drama was again registered in November, 1876, in the name of Mr. Boucicault as the proprietor of the copyright. In September, 1875, the play was produced at Drury Lane under an arrangement between the plaintiff and defendant, and it was there performed till the month of December, after which it was transferred to the Adelphi, and played till January, 1876. Mr. Boucicault then went to America, where he had been naturalized. After this a correspondence took place between the plaintiff and the defendant, in which the defendant expressed his desire to reproduce the drama at the Adelphi Theatre, but the plaintiff declined the defendant's proposals, and refused to permit the performance. The defendant thereupon advertised the performance, and the plaintiff commenced an action. He claimed under the Act 3 & 4 Will. 4, c. 15, and contended that his rights under this Act were unaffected by the 7 Vict. c. 12. It was argued that the play had not been published abroad, as representation did not amount to publication; that the statute 7 Vict. c. 12, only took away the right conferred by the 3 & 4 Will. 4, c. 15, and preserved by the 5 & 6 Vict. c. 45, as far as regards plays *published abroad* by printing. Vice-Chancellor Malins considered himself bound by the decision in *Boucicault v. Delafield*, and held that the acting of the play in New York was a publication within the meaning of 7 Vict. c. 12, s. 19, and that by that publication Mr. Boucicault had lost his exclusive right of performance.

On appeal this view was confirmed, Lord Justice James

CAP. XI.

saying: "The 19th section of the International Copyright Act has a limited purpose only, expressed in terms shewing the meaning of the word 'published,' which must express something that can be predicated of a book, of a dramatic piece, of a musical composition, of a print or article of sculpture, or any other work of art; that is to say, its being made public by those means which are appropriated to the particular thing. A book is published by being printed and issued to the public, a dramatic piece or a musical composition is published by being publicly performed, a piece of sculpture or other work of art by being multiplied by casts or other copies. That, as it appears to me, is the natural meaning of the word 'published' in that section, and that is the meaning attributed to it by the Vice-Chancellor." And Brett, J.A., saying: "A dramatic composition differs from many compositions in this, that it can be made use of in two different ways. It may be made use of by printing it, and distributing it as a written composition or a book. It may also be used by having it acted on the stage of a theatre. If the author be an Englishman, no doubt he has certain rights given to him by the statute 3 & 4 Will. 4, c. 15, but a foreign author has no rights at all under that statute. If, therefore, a foreign author's play was first acted abroad, he could not afterwards claim any protection in England. He would by acting it abroad have made it *publici juris* in England, and, therefore, anybody in England might act it here. It is said that an English author, although he allows his compositions to be acted abroad, does not come under the same difficulty, because he is protected by the statute of 3 & 4 Will. 4, c. 15. That may be, and although I have some doubts whether the limitation of the meaning of the word 'published' which has been contended for applies even to that statute, I will assume that it does, and that an Englishman, although his piece was first acted abroad, could claim the protection given by the statute of 3 & 4 Will. 4, c. 15. A foreigner, however, certainly could not claim that protection. Then, if

that be the state of things before the statute 7 Vict. c. 12, we have two sets of people to deal with as regards dramatic compositions, that is, foreign authors who had no protection in England, and English authors who might first of all have their pieces acted abroad, and yet have protection under 3 & 4 Will. 4, c. 15. The statute of Victoria begins by giving the Queen power to give protection to foreign authors and dramatic composers, and that is done under section 5, which has regard to their protection against performances. Their protection against publication by printing is given to them under other sections. The 5th section provides that where the authors of dramatic pieces have first publicly represented or performed them in any foreign country, the Queen shall have the power of giving them sole liberty of representing or performing the same in any part of Her Majesty's dominions. The statute is dealing with several kinds of things to be protected, which may be published in different ways, and with different persons, with foreigners, and, as we shall presently see, with Englishmen. Then the 19th section provides in perfectly general words, 'That the author of no dramatic piece or musical composition which shall after the passing of this Act be first published out of Her Majesty's dominions shall have any copyright therein respectively, or any exclusive right to the representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act. Now, it is said that the word 'published' ought to be restricted to the meaning which is said to have been affixed to it in the statute 3 & 4 Will. 4, c. 15. If so, the word 'published,' when applied to English authors, must have one meaning, and another when applied to foreign authors under precisely similar circumstances. That seems to me to be contrary to the common canon of the construction of statutes, for it requires us to introduce into the statute the proviso that in the case of English authors representation out of Her Majesty's dominions shall not be considered a publication. That would be to introduce

CAP. XI.

words which we have no right to introduce, unless there be something in the nature of the case which makes it obvious that such must have been the object of the legislature. It is endeavoured to make out this to have been the object by saying that it is unjust to take away the right of an English author. I see nothing contrary to reason or justice in saying that if an English author chooses to go abroad and there represent, or allow to be represented, his composition for the first time, he shall be in the same position as a foreigner who has done the same thing. If that be so, the word 'published' must have its natural construction, whether it is applied to the compositions of Englishmen or foreigners. That ordinary meaning is 'made public,' and a dramatic composition is made public the moment it is represented or acted. If Englishmen have their plays first represented abroad, they are by this statute placed on the same footing as foreigners; if they have them first represented in England they do not come under this statute at all; but their rights will be governed by 3 & 4 Will. 4, c. 15, and 5 & 6 Vict. c. 45."

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

(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.*

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 was of opinion that the defendant was right (a).

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 (b), 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* (c). A bill was filed by the publishers and owners of the copyright in two novels, called 'Aurora

(a) In a French case cited in Le Blanc on 'Piracy,' p. 233, under the name of *Lefranc 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 it 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 it mulcted the defendant in damages and costs.

(b) *Reade v. Conquest*, 31 L. J. (C.P.) 153; 8 Jur. (N.S.) 764; 11 C. B. (N.S.) 479.

(c) 32 L. J. (Ch.) 535; 11 W. R. 876; 1 Hem. & Mill. 747.

CAP. XI.

'Floyd' and 'Lady Audley's Secret,' written by Miss Bradon. 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 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

(a) 11 Sim. 31; 11 L. J. (N.S.) Ch. 166; 6 Jur. 186.

among others, six short poems, and extracts from larger poems written by the plaintiff. The defence was, that the poems were *bonâ 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., while the plaintiff's entire works were published at 2s. 6d.; and that the plaintiff would be rather benefited than injured by the defendants' 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 representations he could not be interfered with; but when he printed his plays he brought himself within the letter of the law."

The author of a play who makes use of its plot and dialogue in the composition of a novel, does not thereby forfeit his right to restrain infringement of his copyright in the play, although such infringement takes place through the medium of the novel, by a person who was ignorant of the existence of the original play. The indirect appropriation, then, of any portion of the novel taken from the play, is an infringement of the copyright in the play. The plaintiff in *Reade v. Lacy* (a), wrote a play called 'Gold,' which he afterwards adapted as a novel, embodied a portion of the dialogue, and called it, 'Never too Late to Mend.' The novel was dramatized by

Author may protect his novel by dramatizing before publication.

(a) 1 J. & H. 524.

CAP. XI. another person, and, in doing so, portions of the original play were copied word for word, and in that form published by the defendant. It was held that ignorance would not justify the infringement of a right in one case more than in another, and that the publication of the play was an infringement of the copyright in 'Gold,' although the existence of that play was not known to the author, who took his materials from the novel (a).

Author cannot protect his novel by dramatizing it after publication.

But, according to the authority of *Toole v. Young* (b), an author cannot protect his novel from dramatization by dramatizing it after its publication, it must be effected before publication of the novel. In the case referred to John Hollingshead had published in 1863, in the magazine called 'Good Words,' a story entitled 'Not Above his Business,' which he had written in dramatic form, that it might, with slight alterations, be performed on the stage. Soon after, the author adapted the piece for representation and called the play 'Shop,' which was substantially the same as the published story. In 1865, the play was bought from the author by the comedian Toole; and, when the action was brought, it had not been published or acted. In 1870, Grattan dramatized the story, which had appeared in 'Good Words,' and afterwards sold the play to the defendant, by whom it was repeatedly performed on the stage under the name of 'Glory.' It was admitted that the plays were substantially the same, and that the defendant's had been obtained from the story, and not from the plaintiff's 'Shop.' The judgment of the court was that no rights, either in the work dramatized or in the plaintiff's play, had been invaded by the defendant's dramatization; but, by first publishing his composition as a book, an author forfeits the exclusive right to dramatize and to represent it on the stage; and though he should

(a) So in *Lee v. Simpson*, 3 C. B. 871; 4 D. & L. 666, where the defendant had purchased the piece which he represented and believed he had a right to, but on proof by the plaintiff that he, the plaintiff, had the right, the judgment was against the defendant. If the plaintiff had been bound to shew the defendant's knowledge, the protection conceded by the statute would be illusory.

(b) L. R. 9 Q. B. 523.

afterwards dramatize his own published composition, he cannot thereby bar others from exercising the same privilege.

It seems doubtful how far the distinction drawn by the court between the publication of the novelist's drama preceding the novel and succeeding the same is sound.

The only way, therefore, according to the authorities, 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, before publishing the novel and thus bring himself within the scope of the dramatic copyright clauses (a).

(a) As to the dramatization of novels, the Royal Commissioners on Copyright in their recent report say: "With reference to the drama, our attention has been directed to a practice, now very common, of taking a novel and turning its contents into a play for stage purposes, without the consent of the author or owner of the copyright. The same thing may be done with works of other kinds if adapted for the purpose, but inasmuch as novels are more suitable for this practice than other works, the practice has acquired the designation of dramatization of novels. The extent to which novels may be used for this purpose varies. Stories have been written in a form adapted to stage representation almost without change. Sometimes certain parts and passages of novels are put bodily into the play, while the bulk of the play is original matter; and at other times the plot of the novel is taken as the basis of a play, the dialogue being altogether original.

"Whatever may be the precise form of the dramatization, the practice has given rise to much complaint, and considerable loss, both in money and reputation, is alleged to have been inflicted upon novelists. The author's pecuniary injury consists in his failing to obtain the profit he might receive if dramatization could not take place without his consent. He may be injured in reputation if an erroneous impression is given of his book.

"In addition to these complaints, it has been pressed upon us that it is only just that an author should be entitled to the full amount of profit which he can derive from his own creation; that the product of a man's brain ought to be his own for all purposes; and that it is unjust, when he has expended his invention and labour in the composition of a story, that another man should be able to reap part of the harvest.

"On the other hand, it has been argued that the principle of copyright does not prevent the free use of the ideas contained in the original work, though it protects the special form in which those ideas are embodied; that a change in the existing law would lead to endless litigation; and that it would work to the disadvantage both of the author and the public. Upon these grounds, or some of them, a bill introduced by Lord Lyttleton in 1866 and supported by Lord Stanhope was defeated.

"We have fully considered all these points, and have come to the conclusion that the right of dramatizing a novel or other work should be reserved to the author. This change would assimilate our law to that of France and the United States, where the author's right in this respect is fully protected.

"Were this recommendation adopted, a further question would arise

CAP. XI.

Not only an original composition, but any substantially new arrangement or adaptation of an old piece of music is a proper subject of copyright (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; and as such is entitled to protection, provided the arranger had a right so to use the original. 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.*"

And in deciding the point in the last cited case Sir A.

as to the time during which this right should be vested in the author, and, in the event of his not choosing to dramatize his novel, whether other persons should be debarred from making use of the story he has given to the world. We are disposed to think that the right of dramatization should be co-extensive with the copyright. It has been suggested in the interest of the public, that a term, say of three or five years, or even more, should be allowed to the author, within which he should have the sole right to dramatize his novel, and that it should be then open to any one to dramatize it. The benefit, however, to the public in having a story represented on the stage does not appear to us to be sufficient to outweigh the convenience of making the right of dramatizing uniform in its incidents with other copyright." Par. 76-81.

(a) So also the arrangement for the piano of quadrilles, waltzes, etc., selected from an opera, is entitled to protection: *Atwill v. Ferrett*, 2 Blatch. (Amer.) 39. So copyright has been held to vest in a song consisting of new words and a new accompaniment written to an old air: *Leader v. Purday*, 7 C. B. 4.

(b) *Wood v. Boosey*, L. R. 2 Q. B. 340; 7 B. & S. 869; 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; *Boosey v. Fairlie*, 7 Ch. Div. 301.

Cockburn, C.J., said: "It seems impossible to believe that any musician, however great his talent, whether as a composer or an executant, from the mere circumstance of having the opera in its entirety before him, that is to say, with all the score for all the instruments, which neither eye nor mind could take in at the same time, could be able to play the accompaniment while singing the music of the opera at the piano. It requires time, reflection, skill, and mind so to condense the opera score as to compose the pianoforte accompaniment. . . . I cannot, therefore, bring myself to think that the pianoforte arrangement of the music of an opera, which originally consisted of vocal music and instrumentation to be executed by some half-hundred instruments, can be said to be anything else than a specific, separate, and distinct work from the opera itself. And it seems to me to hold otherwise would lead to very serious consequences. Operas are very frequently arranged, sometimes by the composer of the opera himself, sometimes by other persons, with the consent or without the consent of the original composer. It may be, if the arrangement be made without the consent of the composer of the opera, such an adaptation would be an infringement of his copyright, which would subject the adapter to an action. It is not necessary to decide that. But it may be that, after the copyright has expired, an arrangement for the pianoforte may be made in the first instance, or some musical composer, thinking that an arrangement that already existed of some well-known and popular opera is not as good as it can be made, might apply his hand to the work and make a new arrangement. Can it be said that such an arrangement, useful as regards the musical world, shall not be the subject of protection under the Copyright Acts?"

And on appeal Sir Fitzroy Kelly, C.B. (a), in affirming the decision of the Queen's Bench, clearly pointed out the difference between the pianoforte score and the original score, and the fact that each might be the subject of copy-

(a) L. R. 3 Q. B. 223, 229; 15 L. T. (N.S.) 530.

CAP. XI.

right. "The opera" said he, "is composed and is published in score, and contains in each line of what is called the entire score, the music for some one particular instrument, these instruments being some twenty in number. Now let us come to what the arrangement is for the pianoforte. Undoubtedly there are portions of it which are identical, as in the case before the Exchequer, and might subject, as I have already observed, the author of the adaptation to an action if it had been published without the authority of the author of the opera. But what is the pianoforte arrangement? It is an arrangement of the whole of the music of this opera for the pianoforte, a part of which is the ordinary pianoforte accompaniment, the bass and the treble, played with both hands, and which is independent of the melody. There may be, as it appears, the line of music for one voice, or two or three voices, as the case may be; and there are separate and distinct lines for the accompaniment for the pianoforte; and no doubt, here and there throughout this accompaniment, and by going line by line through the score of the original opera, there may be found the same notes; but there are other parts of the accompaniment which are merely the pianoforte accompaniment, the notes forming which are nowhere to be found in the score at all. The accompaniment for the pianoforte is a work of greater or less skill. In some cases, perhaps in many cases—it may be in this for aught I know—the operation of adaptation is little more than mechanical, and what any one acquainted with the science of music, any composer of experience, might have been able to do without difficulty; but it may be, and often is, as in the case of the six operas of Mozart's, by Mazzinghi, a work—I would hardly use the term of great genius, but a work—of great merit and skill of that eminent composer and pianist, Mazzinghi. If such a work be published as the adaptation to the pianoforte by a composer, other than the composer of the original opera, no doubt it is a piracy of the opera, and the composer may maintain an action against the adapter

or the publisher of the adaptation; but, whenever the copyright in the original opera has expired, if after that, and for the first time, another composer composes another adaptation of that opera to the pianoforte, it is a new substantive work, in respect of which he is just as much entitled to the benefit of the copyright in this country, as the original composer of the opera; and if any one had by an adaptation pirated that arrangement, he would be liable to an action for that piracy. I consider that an infallible test to shew the difference between the one work and the other—between the original opera and the arrangement of it for the pianoforte. It is perfectly clear, therefore, that in point of fact—for it is rather a matter of fact than anything else—the adaptation to the pianoforte, or the arrangement for the pianoforte, of an opera already published, is itself a new and separate work, and is not one and the same with the original opera (a).”

So also with reference to a piece of music called ‘Pestal,’ which had been played by the military bands in the style of a Russian Polonaise. The plaintiff, in an action for infringement, had got possession of the score, it did not transpire how—set it to words, concocted a thrilling introductory anecdote, and sold the copyright to a music-seller who published it with success. Other publishers arranged new versions of song and verses, for which the proprietor recovered damages. The coincidence between the harmonies and accompaniments in such a case, must be relied on as forming the part alone in which copyright exists. The original composition, if not claimed by any one, becomes public property; and one person has as much right to publish it as another (b).

(a) In this same case Bramwell, B., said: “It has been said that there is nothing inventive on the part of the person who makes the arrangement. In one sense, there is not—that is to say, he neither invents the tune nor the harmony; but there is invention in another sense, or rather there is composition in the adaptation to the particular instrument. Of that, the adapter is the author, and it is perfectly certain that the man who wanted to arrange this opera for a pianoforte would find it a great deal easier to copy what Brissler had done than to take the score and do it over again.”

(b) *Leader v. Purday*, 7 C. B. 4.

CAP. XI.

The adaptation of words and accompaniment to an old air.

In *Leader v. Cocks*, it was held that one who adapts words to an old air, and procures a friend to compose an accompaniment thereto, acquires a copyright in both words and accompaniment, and his assignee in declaring for an infringement, may describe himself proprietor of the copyright in the whole composition. So in *Chappell v. Sheard (a)*, where new words had been adapted to an old American melody known as 'Lillie Dale,' in which there was no copyright, to which was added a symphony and accompaniments, and a cadence at the close, and entitled, 'Minnie,' with a portrait of Madame Anna Thillon; and the defendant published a song to the same air, and called it 'Minnie Dale,' with a similar portrait, but different words, and represented it as having been sung by the same lady, whereas in truth this song had never been sung by her, it was held that the plaintiff had obtained a right of property in the name and description of his song, which a Court of Equity, as in the case of dramatic representations and literature, would restrain any person from infringing; and that the publication of the defendant's song was a palpable attempt to induce the public to believe that the song so published was the same as that of the first publisher. In another suit (*b*), where the facts were nearly similar, and the title 'Minnie, dear Minnie,' it was held to be an obvious attempt to pass off the defendant's publication for that of the plaintiff which had obtained the public favour. Neither could the defendant escape his liability by cautioning his shopmen to explain to purchasers that his song was not the same as the plaintiff's; because he could not secure that retail dealers purchasing from him would give the same information to their customers (*c*). But the court refused to extend the injunction to restrain the piracy of two bars of music which had been added by the plaintiff to the original air, until the fact had been established by a trial at law. The principle here expressed appears to be that where a

(a) 2 K. & J. 117.

(b) 2 K. & J. 123.

(c) See *Sykes v. Sykes*, 3 B. & C. 441.

great resemblance exists between a spurious article and the genuine, although the articles may not be exactly alike, yet if there be that which conveys the idea that the article is genuine, whereby the public is deceived, it is a colourable representation of the original, and a piracy of the author's copyright.

As each of two or more independent dramas from a common original is entitled to protection, one is not a piracy of another, unless there has been unlawful copying.

The 3 & 4 Will 4, c. 15, secures no other right and prohibits no other act than that of representation. The right secured by this statute is re-affirmed, its duration enlarged, and its application extended to musical compositions by the 20th section of the Act of 1842; but the remedies prescribed by the latter statute for the unlawful publication of a book do not apply, and are not extended to the unlicensed representation of a play. For the latter wrong, the penalties given by the statute of William are re-enacted by the 21st section of the 5 & 6 Vict. c. 45. This section 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 damages. 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.

Remedy in cases of infringements.

CAP. XI.

When the part taken is material, the plaintiff is not bound to prove actual damage (a). "The positive enactment," said Tindal, C.J., in the last cited case, "that every offender shall be liable to an amount not less than 40s., or to the full amount of the benefit derived or loss sustained, shews that damage to the plaintiff is not the test of the defendant's liability, but that 40s. is to be paid, even if there be no actual damage." In a recent case (b), however, Lord Hatherley seems to have thought it necessary to prove damage in order to subject the defendant to the statutory penalty. "The minimum of damages," said he, "to be awarded when the fact of damage and the right to damages have been once established, was no doubt fixed because of the difficulty of proving with definiteness what amount of actual damage had been sustained, by perhaps a single performance at a provincial theatre of a work belonging to a plaintiff, whilst at the same time his work might be seriously depreciated if he did not establish his right as against all those who infringed upon it."

The Copyright Commissioners' suggestions.

The Royal Commissioners in their recent report on Copyright say (c):—"This provision for the 40s. penalty has lately been much abused, Copyright in favourite songs from operas and in other works has been bought, and powers of attorney have been obtained to act apparently for the owners of the copyright in such works, and to claim immediate payment of £2 for the performance of each song. These songs are frequently selected by ladies and others for singing at penny readings and village or charitable entertainments, and they sing them, not for their own gain, but for benevolent objects. In such cases there is manifestly no intention to infringe the rights of any person; the performers are unconscious that they are infringing such rights, and no injury whatever can be inflicted on the proprietors of the copyrights. In many cases of this kind, and under a threat of legal proceedings,

(a) *Planché v. Braham*, 4 Bing. N. C. 19; and see *Chatterton v. Cave*, 3 App. Cas. 498.

(b) *Chatterton v. Cave*, 3 App. Cas. 492.

(c) Pars. 169, 171, 172.

in default of payment, the penalty has been demanded, and we have reason to believe that the money so demanded has been generally paid. Many instances of this proceeding have been brought to our notice from various parts of the country. . . . The amendment in the law which we propose as most likely to preserve control for the composers, and at the same time to check the existing abuse, is that every musical composition should bear on its title-page a note stating whether the right of public performance is reserved, and the name and address of the person to whom application for permission to perform is to be made. The owner of such composition should only be entitled to recover damages for public performance when such a statement has been made; and instead of the minimum penalty of not less than 40s. at present recoverable for any infringement of musical copyright by representation, the court should have power to award compensation according to the damage sustained."

It did not seem to them that the abuse above referred to had arisen in the case of dramatic copyright, nor did it seem to them likely to arise so long as the present law of licensing places of dramatic performance exists, and therefore they did not suggest any alteration in the law so far as it applies to that copyright.

The third section of the 3 & 4 Will. 4, c. 15, provides that all proceedings for any offence or injury under 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. This limitation seems to apply only to proceedings for penalties under the Act and not to actions for damages or in equity.

Actions to be brought within twelve months.

It is sufficient in an action upon this statute to describe the offence in the words of the Act; and it is not necessary, in order to constitute the offence, to shew that the defendant knowingly invaded the plaintiff's right (a). The object of the legislature was to protect authors

(a) *Lee v. Simpson*, 4 D. & L. 666; 3 C. B. 871; *Reade v. Lacy*, 1 J. & H. 524.

CAP. XI.

against the piratical invasion of their rights, and in construing the law the Judges have given it the fullest interpretation. Therefore in an action of debt to recover penalties under the 3 & 4 Will. 4, c. 15, s. 2, for representing a pantomime, of which the plaintiff was the author, without his license, at a place of dramatic entertainment, upon *nil debet* by statute pleaded, it was held that the plaintiff's undertaking to give material evidence in Middlesex was fulfilled by proof of an offer to sell the pantomime in Middlesex by the plaintiff's agent, acting under his direction (a).

Where the plaintiff, as the author of a dramatic work, assigned the "London right" of it to A., the judge at the trial having found that "London right" meant the whole right of representation in London, and that the assignment was to A. and his assigns, it was held that the plaintiff could not bring an action for penalties under the 3 & 4 Will. 4, c. 15, in respect of representations in London, except as trustee for A. and his assigns (b).

(a) *Lee v. Simpson*, 4 D. & L. 666; 3 C. B. 871.

(b) *Taylor v. Neville*, 47 L. J. Q. B. 254; 26 W. R. 299; 38 L. T. 50.

CHAPTER XII.

COPYRIGHT IN ENGRAVINGS, PRINTS, AND LITHOGRAPHS.

STRANGE yet true it is, that an art of so much importance Nature and origin of the right.
 —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 con-

CAP. XII.

solidated. 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 become law, if at all, is a matter difficult to determine.

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 guarded against; and on the other hand, security in the possession of the money value of the creation of his own mind.

Fine arts
encouraged by
the Stuarts.

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 perhaps, fewer could 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 the 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).

(a) Turner on 'Copyright in Designs,' p. 13.

The first Act recognising engraving as an art, and extending towards its professors the protection they so unquestionably deserved, was that of the 8 Geo. 2, c. 13, 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 (a) 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

(a) See *Graves v. Ashford*, L. R. 2 C. P. 419

CAP. XII.

person complaining of the piracy of a drawing or design 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" (a).

In *Blackwell v. Harper* (b) it was held that this Act was not confined to works of invention only, but included the designing or engraving anything already in nature, and that a print published of any building, house or garden fell within its scope.

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 second
Act.

The 7 Geo. 3, c. 38, 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 limitation thereafter

(a) *Jefferys v. Baldwin*, Ambl. 164; see *Pierpont v. Fowle*, 2 Wood. & Min. (Amer.) 46; *Binns v. Woodruff*, 4 Wash. (Amer.) 53.

(b) 2 Atk. 93.

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 graven or drawn 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).

By the next statute of 17 Geo. 3, c. 57, it was enacted, The third Act. that if any person should within the times limited by the aforesaid Acts or either of them, engrave, etch, or work, or cause, or procure to be engraved, etched, or worked in mezzotinto, or chiaro-oscuro or otherwise, or in any other manner copy in the whole or in part, by varying, adding to, or diminishing from the main design, any copy or copies of any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, which had been, or should be engraved, etched, drawn, or designed in any part of Great Britain, without the express consent of the proprietor or proprietors thereof, the proprietor should, by a special action on the case, recover damages against the person so offending.

The inventor of the subject of an artistic design, although himself unable to draw, may nevertheless have a copyright in the design in question, if he has employed another person to make the drawings for him, and communicated his ideas to that person (b). But the design must be the production of the party claiming the copyright, and

(a) For the defective working of this Act, see Mr. Corrie's remarks in *Reg. v. Powell*, the 'Times,' November 10, 1862.

(b) *Stannard v. Harrison*, 19 W. R. 811.

CAP. XII.

difficulties may occasionally arise as to what constitutes a design within the meaning of the statute. "If," says Mr. Curtis (*a*), "the party personally engraves the subject of his conceptions, then he is both the inventor and designer; since he has not only conceived the subject of the picture, but has represented it in a visible form. But if the engraving is made by another under his direction, it must be made from his 'design;' and the question is, whether this term means only the intellectual conception, or work of the imagination, before it is reduced to some visible form, or whether it implies a drawing or other visible representation of the invention, by the hand of its author. Under the American Act of 29 April, 1802, ch. 36, which contained a similar provision, it was held by Mr. Justice Washington, that the party must not only have invented but he must have designed or represented the subject in some visible form, from which the engraver who executes it must have taken the picture (*b*). The term 'design,' therefore, means the visible form given to the conception of the mind, and must be done by the inventor himself."

In the case of *Stannard v. Harrison* (*c*) an engraver was examined. He proved that the plaintiff had brought to him his rough sketch or draft, a drawing of the same size as the stone upon which it was to be engraved, pointing out a rough sketch of the forts and towns to give the engraver an idea; he furnished him also with a large French map, and some maps published in the 'Times' and 'Daily Telegraph,' he also gave him notice daily of the earth-works that were made, and produced besides a picture published in the 'Illustrated London News.' The plaintiff could not draw himself—and the Vice-Chancellor said: "That the plaintiff cannot draw himself is a

(*a*) Copy. 145.

(*b*) *Binns v. Woodruff*, 4 Washington Rep. (Amer.) 48. The Act of 1802 was in these words: "Any person being a citizen of the United States, or a resident within the same, who shall invent and design, engrave, etch, or work, or from his own works and inventions shall cause to be designed and engraved, etched, or worked, any historical or other print, shall have the sole right," &c. *Ib.*

(*c*) 24 L. T. (N.S.) 570.

matter wholly unimportant if he has caused other persons to draw for him. He invents the subject of the design beyond all question. He prescribes the proportions and the contents of the design; he furnishes a part of the materials from which the drawing has to be made in the first instance, and afterwards collects daily from the proper sources, and even, if it be necessary to say so, from official sources, the decrees, the reports, the bulletins, and accounts contained in the newspapers of the different phases of the war, and especially of the places in which earth-works are thrown up. These he communicates to the man whom he has employed to make a drawing for him. . . . Can there be anything more plainly within the words of the Act of Parliament than that Mr. Stannard did himself invent, that he did procure another person to design and draw for him, and do that which he himself could not do?"

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. Dickey* (a) 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

Provisions of Acts to be strictly complied with.

(a) 3 Wils. 60.

CAP. XII.

complied with (a). 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 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 (b).

As to the date. So in *Harrison v. Hogg* (c) Lord Alvanley differed from Lord Hardwicke, considering the insertion of the name and date essential to the plaintiff's right; that the correct date is a *sine qua non* was expressly decided in *Bonner v. Field* (d). 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.

The cases were fully reviewed and commented on in the leading case on the subject of *Newton v. Cowie* (e), and it was held that the proprietor's name and the date of publication must appear on the original print, but that it was not necessary that the designation "proprietor" should be

(a) *Blackwell v. Harper*, 2 Atk. 95; Barn. Ch. Rep 210. See *Jefferys v. Baldwin*, Amb. 164; *Roworth v. Wilkes*, 1 Camp. 94; *Harrison v. Hogg*, 2 Ves. Jun. 323; *Thompson v. Symonds*, 5 T. R. 41.

(b) *Thompson v. Symonds*, *supra*; *Mackmurdo v. Smith*, 7 T. R. 518; *Harrison v. Hogg*, *supra*.

(c) 2 Ves. Jun. 323; *Newton v. Cowie*, 4 Bing. 234; *Brooks v. Cock*, 3 Ad. & E. 138, 4 N. & M. 652; *Colnaghi v. Ward*, 12 L. J. (N.S.) (Q.B.) 1; 6 Jur. 969; *Bogue v. Houlston*, 5 De G. & Sm. 267; *Graves v. Ashford*, 15 W. R. 495; Kerr on Injunc. 465; *Hock v. Lazarus*, L. R. 15 Eq. 104; 27 L. T. (N.S.) 744. So the proprietor of a foreign print must print his name and the date of publication on the plate as required by 8 Geo. 2, c. 13, in order to claim copyright under the International Copyright Acts: *Avanzo v. Mudie*, 10 Exch. 205.

(d) Cited 5 T. R. 41.

(e) 4 Bing. 234

added to the name; and that the words on the print “*Newton del., 1st May, 1826, Gladwin sculp.*,” was a sufficient compliance with the provisions of the 8 Geo. 2, c. 13. Best, C.J., on the occasion saying: “Looking at the subject-matter of the law, at the language employed by the legislature, and the practice which has uniformly been followed by engravers, we cannot hesitate to determine that the proprietors of these prints are entitled to the protection which is afforded by the statutes; a decision we have come to with satisfaction, seeing that they exercise a branch of art eminently useful and which in no slight degree *emollit mores, nec sinit esse feros*. They contribute also by the same means to the circulation of a knowledge of mechanics so necessary to our manufactures, and so useful to the best interests of the country.”

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 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 requisi-

Engravings or etchings when published with letter-press.

CAP. XII.

tions 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*).

Maps.

In regard to copyright in maps, there are two concurrent Acts relating to the same thing, the Literary Copyright Act, 1842 (5 & 6 Vict. c. 45), and the series of Acts, viz.: 8 Geo. 2, c. 13; 7 Geo. 3, c. 38; and 17 Geo. 3, c. 57.

Maps published together or in connection with letter-press, obviously come within the head "book," and as such are included in the former Act.

Maps, charts, or plans, separately published, are within the above Engraving Acts, as also within the 3rd section of the Literary Copyright Act. Viewed in the light of literary efforts they are entitled to copyright under the latter Act during the life of the author, and for seven years after his death, or for the term of forty-two years, as the case may be. Regarded as artistic works under the former statutes they are entitled to protection for an absolute term of twenty-eight years. Yet no action or suit in respect of an infringement of such copyright can be maintained under the 5 & 6 Vict. c. 45, until the author shall have previously registered in the manner prescribed by section 13 of the Act (*b*); nor under the Acts of Geo. 2 and Geo. 3, unless the proprietor shall have printed his name and the day of publication on every copy (*c*).

This appears to be the law on the subject, notwithstanding the impression receivable from the unguarded decision in *Stannard v. Lee*; and the inference from that case to be

(*a*) *Bogue v. Houlston*, 5 De G. & Sm. 267; *Woods v. Highley*, 1866, before Vice-Chancellor Wood.

(*b*) *Stannard v. Lee*, 19 W. R. 615; L. R. 6 Eq. 316.

(*c*) *Bogue v. Houlston*, 5 De Gex & Sm. 267.

drawn would seem to be that if the proprietor wishes to sue in respect of an infringement without having registered, he must allege that it is an engraving, or otherwise bring it within the Acts of Geo. 2 and Geo. 3, which do not require registration, for in the event of his alleging he has printed and published "a map," the plea that the map has not been registered will meet the case; and this under the rule that every allegation is to be taken most strongly against the pleader, and therefore the defendant is entitled to say that the thing which the plaintiff alleged to be a map, was a map within 5 & 6 Vict. c. 45, and consequently required to be registered (a).

In *Stannard v. Lee* (b), where the plaintiffs printed and published on the 21st of July, 1870, a map described as 'No. 1, Stannard & Son's Panoramic Bird's-eye View of France and Prussia, and the surrounding countries likely to be involved in the war, with the railways and strategic positions of each army, and the great fortresses of the Rhine provinces,' and filed affidavits alleging in substance that they had formed a design of publishing maps illustrating the seat of war, and had "designed a map," and on the date above mentioned had "in accordance with the Acts of Parliament in that behalf," printed and published the said map by the above description, and that they were proprietors of the map; it was held, that notwithstanding that on the map itself it appeared that Messrs. Packer and Griffin were the delineators and lithographers of the map, there was a sufficient proof under the requirements of the Acts of the plaintiffs' proprietorship, and a motion to dismiss an *ex parte* injunction obtained against the defendant to restrain the infringement of the copyright claimed by the plaintiffs, on the ground, "first, that the plaintiffs were not registered as proprietors under the Act of 5 & 6 Vict. c. 45; and, secondly, that it had not appeared on the map that they were the proprietors of the copyright, was refused. "The Acts of Geo. 2 and Geo. 3,"

(a) See *Stannard v. Harrison*, 19 W. R. 811.

(b) 23 L. T. (N.S.) 306.

CAP. XII.

said Vice-Chancellor Bacon, "are not mentioned in the Act of 5 & 6 Vict. c. 45, and I do not construe that Act as interfering in any way with the previous Acts, and 15 Vict. c. 12, and the rights conferred thereby." The Lords Justices, however (a), were of opinion that the earlier Acts are virtually repealed by the 5 & 6 Vict. c. 45, and that registration is, therefore, a necessary preliminary to a suit for an infringement of copyright in the case of a map separately published. Lord Justice James said: "In this case, if the argument of Mr. Cotton were to prevail, it would lead at once to one of these two results; either there would be two kinds of maps,—maps published separately and maps forming part of a book, with respect to which there would be two distinct laws of copyright,—or else as to all maps there would be two distinct laws of copyright, one giving a conditional right of property with an unconditional right of action or suit, the other giving an unconditional right of property with a conditional right of action or suit. Either of these states of the law would be strangely inconvenient.

"Thus 5 & 6 Vict. c. 45, s. 2, says that a book shall mean and include every map, chart, or plan separately published; and in the 24th section it proceeds to say that no proprietor of copyright in any book, that is of a map, chart, or plan separately published, according to the definition given of a book, shall maintain an action or suit in respect of any infringement of such copyright unless he shall have previously registered such map, chart, or plan, in the way prescribed by the Act. No very heavy *onus* on the proprietor—no very difficult step to take before he commences his suit. The words are plain and simple, and there is no reason for saying that the intention of the legislature was different from that which is expressed by the words. The object of the enactment is very clear. Formerly maps have been considered artistic works: now they were to be brought into their proper place as literary works. And rightly so, in my opinion, for maps are

(a) *Stannard v. Lee*, 19 W. R. 615; L. R. 6 Ch. 346.

intended to give information in the same way as a book CAP. XII. does. A chart, for instance, gives similar information to sailing rules; maps give instruction as to statistics and history of the country portrayed; they point out the amount of population, the places where battles were fought, the dates when provinces were annexed, as in maps of India, and give other geographical and historical details. It was quite reasonable, therefore, to take them out of the law of artistic works, and to give them greater protection by bringing them under the law of copyright of literary works. There is no inconvenience in giving the natural meaning to the words of the statute, and there would be great inconvenience in the contrary construction. I think, therefore, the plea was well pleaded, and the plaintiffs are not entitled to maintain their suit until they have registered their maps."

Vice-Chancellor Bacon, however, evidently adhered to his original decision, or rather to the exposition of the law there given, and in the case of *Stannard v. Harrison (a)*, which was decided after the Lords Justices had reversed his decision in *Stannard v. Lee*, he explained that they held the map in question not to be protected "because the plaintiff had alleged in his bill that he had invented a design," and published a "map," and the defendants there pleaded, relying on the large interpretation of the word "book" in the last Act, that the statute prohibited the institution of any suit before registration had been performed. But in the case then before him the facts were different. The plaintiffs carried on the business of lithographers and publishers, and had acquired a reputation as publishers of maps and lithographic views in the nature of maps during the American War, giving bird's-eye views in apparent relief of the seat of war. During the war between France and Germany the plaintiffs published a series of bird's-eye views or plans illustrating the seat of war, of which they sold a great number of copies. On the 1st of September, 1870, the plaintiffs published a bird's-eye view

(a) 19 W. R. 811; 24 L. T. (N.S.) 570.

CAP. XII.

of Paris and its fortifications under the following description: "No. 8, Stannard & Son's Perspective View of Paris and its Environs, shewing all the fortifications and redoubts, together with the lines of defence recently thrown up, and the roads, rivers, and railways communicating with the interior, compiled from the latest official sources by Alfred Concanen." The plaintiffs alleged that this view was duly designed, or caused to be designed and lithographed, and was duly printed and published by them in accordance with the provisions of the several Acts of Parliament made in that behalf, and that the lithographed copies of this view were prints within the meaning of these Acts. The defendants were the proprietors of a weekly periodical called the 'Gentleman's Journal and Youth's Miscellany,' and with the number of that journal of the 1st of November, 1870, they published a bird's-eye view of Paris and its fortifications, which the plaintiffs alleged was an imitation of their view and an infringement of their copyright. The plaintiffs accordingly filed their bill, and on the 19th of November, 1870, a decree was made by consent, by which a perpetual injunction was granted restraining the defendants from printing, publishing, or selling these views, directing an inquiry as to damages, and ordering the defendants to pay the plaintiffs' costs.

The defendants petitioned for a rehearing of the suit, or for leave to file a bill of review on the grounds, amongst others, that the plaintiffs had not registered their alleged proprietorship of copyright in the bird's-eye view in question at Stationers' Hall, pursuant to the 5 & 6 Vict. c. 45, s. 13; that the facts in the case were substantially the same as those in *Stannard v. Lee*; that on the authority of that decision, as the plaintiffs had not before the commencement of the suit registered their alleged proprietorship of the copyright, they were debarred by the 5 & 6 Vict. c. 45, from maintaining the suit, and that that statute precluded the Vice-Chancellor from making the decree, even with consent.

Bacon, V.C., dismissed the petition, refusing to re-open the question, and in the course of his judgment said:—
“The case was formerly argued before me upon these different statutes (the statutes of Geo. 2 and Geo. 3), and Mr. Fooks in his argument insisted that the 5 & 6 Vict. c. 45, containing that prohibition against commencing any action or suit until registration had taken place, and there being no evidence that that registration had been made, he was entitled to use that as an objection to the continuation of the injunction which had been granted. I considered the point at the time. I have considered it since, and more especially have I considered the judgment of the Lords Justices, and I am of opinion that that statute has nothing in the world to do with it. That there is no prohibition in the first two statutes I have mentioned is unquestionable; and although in the case of *Stannard v. Lee* before the Lords Justices it was held that the design there was not protected for want of registration, that was because the plaintiff had alleged in his bill that he had invented a design and published a map, and the defendant there pleads, relying on the large interpretation of the word ‘book’ in the last Act, that the statute prohibited the institution of any suit before registration had been performed. Both the Lords Justices were of that opinion, but the Lords Justices have said nothing in any part of their judgment about the other two statutes except this: The plaintiff’s counsel, desiring to save himself by reference to the earlier statutes, they said ‘You cannot do that now you are here; the plea has been filed to your bill, and the plea meets everything that you allege in your bill; the plea must be either allowed or overruled.’ The statutes were the thing relied upon. Every word of the Lords Justices’ judgment proceeds upon that ground, and they never considered anything but that. The judgment of Mellish, L.J., puts that in the plainest light. He, as it were, congratulates them on having, by a mere trick, or accident, the good fortune of placing a technical difficulty in the plaintiff’s way so as to

CAP. XII.

get the plea allowed; but there is not a word about any meritorious elements in the case on the part of the defendant; there is not any doubt expressed that the plaintiff's claim in morals and in truth was a perfectly good and just claim. That this was so is seen in another part of the judgment, where the Lord Justice, answering Mr. Cotton, who desired to amend his bill so as to raise that question as to its being an historical engraving, says: 'You ought to file a new bill; you have yourself put it in the category of maps.' Nothing could be further from my wish and desire, as nothing could be more opposed to the proper discharge of my duty, than to call in question, or to express any doubt, of the correctness of the judgment of the Lords Justices, or to decline to follow it. I am bound by whatever judgment they pronounce.

“ Upon the question of the prohibition contained in the statute, I can see no application to this case, because there is no prohibition in the two statutes upon which alone the plaintiffs can rely. An argument was addressed to me upon the Shipping Acts; it is not necessary to pause long upon that in order to see that there is no kind of resemblance between the two things. It is for the public benefit, for the actual defence of the realm among other things, that certain restrictions should be placed upon dealings in ships, and therefore the legislature has thought fit to lay down certain conditions with respect to which there can be no doubt, and without which having been fulfilled there is no validity in any contract entered into. The court is bound to take notice of all those things there stated which are applicable to the matter. But there are many other statutes; there are statutes, for example, which require notice to be given before an action shall be brought against a magistrate. There has been a very notorious statute in force for a long time, I mean the Statute of Frauds, but unless the objection is raised, the court never pays any attention to it. The court does not attend to the Statute of Frauds unless it is pleaded in some way or other. That is a prohibition

of the same kind and degree as that which is contained in the Act of the 5 & 6 Vict. c. 45, and that is done in order that every man who is dealing with this kind of property, who is the owner of it, should have a place to resort to, to satisfy any inquiries that he may choose to make. There is nothing to induce us to call it a prohibition beyond what the necessities of the case require. The new matter which has been discovered consists of the judgment of the Lords Justices, and of facts which have been extracted from Mr. Concanen in his examination, which I do not think maintain the defendant's contention in the slightest degree. All those things now before the court, in my opinion, furnish no reason for a rehearing of this case" (a).

As to Christmas cards, the mode in which the copyright should be secured depends to a certain extent on their nature and general character. Some are of such a nature as that protection may be found under the Engravings Acts of Geo. 2 and Geo. 3; or the 25 & 26 Vict. c. 68, if in the nature of a painting, drawing, or photograph; others again may be registered under the Ornamental Designs Act, 1842.

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, 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, the words "*knowing the same to be 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 (b).

(a) *Stannard v. Harrison*, 24 L. T. (N.S.) 570.

(b) *West v. Francis*, 5 Barn. & Ald. 737; 1 D. & R. 400; *Gambart v. Sumner*, 1 L. T. (N.S.) 13; 5 Hurl. & Nor. 5; *Clement v. Maddick*, 1 Giff. 98; 5 Jur. (N.S.) 592.

CAP. XII.

The former part of the 17 Geo. 3, c. 57, s. 1, applies 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.

As to what is an infringement.

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).

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 have to 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

(a) *West v. Francis*, 5 Barn. & Ald. 737. See *Roworth v. Wilkes*, 1 Camp. 94; *Moore v. Clark*, 9 M. & W. 692.

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

says, 'Take the trouble of going to the picture yourself, but do not avail yourself of my labour, who have been to the picture and have executed an engraving (a).

Where an engraving is made of an object in nature, as of a particular flower or plant, the artist cannot restrain any one from executing a similar print of the same flower or plant; but no one is allowed to copy from the work of another person, each must draw from nature. When it was contended before Lord Hardwicke (b) that some engravings of plants could not be protected, because every herbal-book had prints of those plants in them, he observed: "The defendant, to make out the case he aims at, must shew me that these prints of medicinal plants are in any book or herbal whatsoever, in the *same manner and form* as they are represented here; for they are represented in all their several gradations, the flower, the flower-cup, the seed-vessel and the seed."

An engraver has no monopoly in the subject.

So on the same principle if two persons should *bonâ fide* make engravings from a perusal of the same text, although there might, and probably would be, a similarity between them, yet each would acquire a copyright in the engraving which he has made.

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

(a) *De Berenger v. Wheble*, 2 Stark. N. P. C. 548.

(b) *Blackwell v. Harper*, 2 Atk. 94; S. C. Barn. 210.

CAP. XII.

of his print. If he were to copy from another engraving, he might see how the person who engraved that had produced the desired effect, and so without skill or attention become a successful rival (a).

Engraving
Acts extended
to Ireland.

The Engraving Acts were extended to Ireland in 1837. By the 6 & 7 Will. 4, c. 59, 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 might, by and in a separate 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.

Engravings
Acts to
include
lithographs.

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.

The right in
engravings
may be
infringed by
photography.

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.

(a) *Newton v. Cowie*, per Best, C.J., 4 Bing. 246; *Martin v. Wright*, 6 Sim. 297.

(b) *Gambart v. Ball*, 14 C. B. (N.S.) 306; 9 Jur. (N.S.) 1059; 11 W. R. 699; 32 L. J. (C.P.) 166; *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.

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 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

CAP. XII.

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 has been doubted whether it would include copies made by hand or designs transferred to an article of manufacture.

At the date of the first edition of this work it had not been decided whether the words of the statute would include designs transferred to an article of manufacture (b).

The point however arose in the recent case of *Dicks v. Brooks* (c). Plaintiffs were the publishers and proprietors of a weekly periodical called 'Bow Bells.' Defendants were the proprietors by assignment of the copyright of a print called 'The Huguenot,' engraved from Millais' picture, and of a photograph taken from the print. The plaintiffs had published for their Christmas number of 1877 a chromo-printed pattern for wool-work, called 'The Huguenot,' taken, as they stated, from a Berlin wool pattern which had been imported by a German warehouse. The leading incident of Millais' picture, the farewell of two lovers of different creeds on the eve of the massacre of St. Bartholomew, was to be found in the Berlin wool pattern, but a different background had been introduced, and the colours were not the same as those of the picture. In December, 1877, the defendants issued a circular containing a warning against the sale of any copy of the subject, 'The Huguenot,' without the stamp or imprint of their firm, in whom the sole subsisting copyright existed, and that all such unstamped copies were imitations and unlawfully made. The plaintiffs, alleging that the publication of this circular was a false and malicious libel on

(a) This judgment was confirmed on appeal by the Court of Exchequer Chamber.

(b) See remarks of Byles, J., in *Gambart v. Ball*, 32 L. J. (N.S.) (C.P.) 166, 168.

(c) 15 Ch. Div. 22.

their print and pattern, which was not an imitation of any picture to the copyright of which the defendants were entitled; and that their sale of the publication had been greatly damaged by such circular, brought an action to restrain, and obtain damages for, this alleged libel and slander of title. The defendants by their statement of defence and counterclaim asserted their title to the engraving, averring that the plaintiffs had unlawfully copied it in whole or in part, and greatly damaged the defendants' property therein; and they claimed an injunction and the penalty of 5s. under the Act 8 Geo. 2, c. 13, for every copy sold by the plaintiffs, and damages.

Vice-Chancellor Bacon held that the defendants had the exclusive right of publishing the subject delineated in the print taken from Millais' picture. He considered that the plaintiffs' pattern was to all intents and purposes a direct copy of that print. Were they then entitled, said he, to despoil the defendants of their property, and foist upon the public a very coarse imitation of a very celebrated picture. Being mere pirates, they complained that their title was being slandered, and that they were injured by the circular issued by the defendants for the protection of their property. It was the old story of the wolf and the lamb. There was no pretence for the first action, which he accordingly dismissed with costs; and as the defendants had established the right set up by their counterclaim to restrain this piratical publication by the plaintiffs, he decided that they were entitled to the statutory penalty of 5s. for every copy sold by the plaintiffs. The court, however, on appeal held that a pattern for Berlin wool-work could not be regarded as a copy of an engraving within the meaning of the statutes, inasmuch as though there was a reproduction of the design, there was no reproduction of anything which constituted the work of the engraver. And they accordingly reversed the judgment of the Vice-Chancellor (a).

(a) 15 Ch. Div. 22. The judgment of the Lords Justices in this important case will be found in the Appendix.

CAP. XII.
 What not an
 infringement.

And where the print or engraving differs materially from the original in character, and is dealt with in a different manner, the former cannot 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, 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 Engravings 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 sale of prints taken from the original plate with the consent of the proprietor. In *Murray v. Heath* (b) where the defendant, an engraver, took a number of impressions from a plate engraved by himself, but for the use of the plaintiff, he being permitted to retain certain copies, but not to sell them; afterwards defendant became bankrupt, and his assignees advertised the copies retained for sale. In an action for damages, in which the assignees were co-defendants, the defence was set up that the copies had not been unlawfully

(a) *Martin v. Wright*, 6 Sim. 297; *Page v. Townsend*, 5 Sim. 395.

(b) 1 Barn. & Adol. 804.

printed or imported, and therefore their sale was not piracy. The court held that the sale complained of, though a breach of contract, was not a violation of copyright, and consequently that no action was maintainable under the 17 Geo. 3, c. 57.

So, upon a similar principle, it was held in *Mayall v. Higbey* (a) 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 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 had no right to get copied.

No copyright can exist in any obscene, immoral, or libellous engraving (b); 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 (c).

In what class of engravings no copyright.

An assignee may maintain an action for the piracy of an engraving, although the statute does not expressly give him that right (d): also it has been held in Scotland necessary to allege where the piracy has been committed (e).

(a) 1 H. & C. 148.

(b) 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.

(c) *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.

(d) *Thompson v. Symonds*, 5 T. R. 41.

(e) *Graves v. Logan*, 7 Sc. Sess. Cas. 3rd Ser. 204.

CAP. XII.
International
copyright.

By an Act of Parliament to amend the law relating to international copyright (7 & 8 Vict. c. 12, ss. 2-4), 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 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.

Penalty for
piracy.

The penalty incurred by a pirate under the Engravings Acts is the forfeiture of the plates on which the prints are copied, and every sheet on which the engraving has been printed, to the proprietor of the original print, who must forthwith destroy or damage them; and he must also forfeit the sum of five shillings for every print found in his custody. The same penalties attach to one who has published, exposed to sale, or disposed of, any pirated engravings: one moiety passing to the Sovereign, and the other being given to the informer.

Special action
on the case.

By the 17 Geo. 3, c. 57, it is enacted that a special action on the case may be brought against the person offending, to recover such damages as a jury on the trial of such action, or on the execution of a writ of inquiry,

may give; and though all actions under the 8 Geo. 2, c. 13, must have been brought within three months, and under the 7 Geo 3, c. 38, within six calendar months after the offence, no limitation is mentioned in the 17 Geo. 3, c. 57, as to the time in which this special action on the case is to be brought (a).

CAP. XII.

Limitation of time as to actions.

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 Engravings 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. 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

In Scotland.

(a) See *Graves v. Mercer*, 16 W. R. 790.

(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; see also 21 & 22 Vict. c. 73.

CAP. XII.

the penalty or penalties and costs, to insert in such judgment 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 pounding; provided always that it shall be lawful to the sheriff, in the event of his dismissing 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.

It will be observed here that though the procedure of the 25 & 26 Vict. c. 68, is extended to the Engravings Acts, yet the penalties recoverable are only those given by the Engravings Acts.

Orders for
inspection or
account.

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.

As pirated copies are made very much to resemble the original in particular parts, and to be totally distinct in other parts, care must be taken to draw the statement so as to charge the defendant with *copying part*, as well as with copying the whole (a).

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.

It seems the best way to continue the name of the first proprietor on the print: for it is doubtful whether a plate with name of the assignee (although the date be correct) is good evidence (b).

(a) 5 Barn. & Ald. 737; and 1 Dowl. & Ry. 400, cited Godson on Patents, &c. 301.

(b) In *Bonner v. Field*, cited 5 T. R. 44, Lord Mansfield nonsuited a plaintiff under similar circumstances, cited Godson on Patents, &c. 301.

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.

CAP. XIII.

“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). CAP. XIII.

The copyright in busts and sculptures mainly depends upon the 54 Geo. 3, c. 56. 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 the 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 (b). 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 either of them, give effect to the intention of the legislature by construing them collectively (c).

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) *Gahagan v. Cooper*, 3 Camp. 111.

(c) *Newton v. Cowie*, 4 Bing. 245, and *Russell v. Smith*, 17 L. J. (Q.B.) 225, 229; the former with reference to the Engravings Acts, the latter to literary copyright.

CAP. XIII.

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 thereinbefore 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).

The copyright is to run from the "first putting forth

(a) Sect. 6. 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.

or publishing the same." The property secured by the Act seems to be comprehensive enough to embrace the right of public exhibition. The opinion has been judicially expressed that, within the meaning of the statute, a work may be published by being publicly exhibited (a). In *Turner v. Robinson*, Lord Chancellor Brady said: "In the statutes bestowing protection upon works of sculpture, the terminus *a quo* from which the protection commences is the publication of the work, that is, from the moment the eye of the public is allowed to rest upon it. Many large works in this branch of art, which decorate public squares and other places, are of course so published, but there are others not designed for such purposes which could never be published in any other way than in exhibitions; therefore I apprehend that these works of sculpture must be considered as published by exhibition at such places as the Royal Academy and Manchester, so as to entitle them to the protection of the statutes from the date of publication" (b).

CAP. XIII

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 Engravings 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 (c), and therefore engrave on the *model*, as well as on every cast or copy thereof, his name (d), and the day of the month

Conditions to be complied with in order to effectuate a copyright.

(a) *Turner v. Robinson*, 10 Ir. Ch. 516.

(b) The Royal Commissioners proposed that the term of copyright in all works of fine art other than photographs should be the same as for books, music, and the drama, namely, the life of the artist, and thirty years after his death; par. 95.

(c) As under the Designs Act, see *Pierce v. Worth*, 18 L. T. (N.S.) 710.

(d) 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.

CAP. XIII. and year when the model is first shewn or otherwise published in his studio, or elsewhere; and such *date must never be altered.*

Assignment of the right.

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 (a).

Registration.

Sculptures and models may now be registered under the Designs Act (12 & 14 Vict. c. 104, s. 6), 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 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

(a) See form of assignment, Crabb's Prec.

may be trading, together with his place of abode or business, or other place of address. CAP. XIII.

The application under this section need not necessarily be made by the author; it is to be made by the proprietor.

The 54 Geo. 3, c. 56, s. 3, gives an action for damages against any person who shall make or import or cause to be made or imported or exposed to sale or otherwise disposed of any pirated copy or pirated cast, whether it be produced by moulding or copying from or imitating in any way the original.

The 7th section of the 13 & 14 Vict. c. 104, 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 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.

Infringement
of the right,
and penalties
attached
thereto.

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, prints and photographs is a matter of surprise.

CAP. XIII.

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.

On this subject the Royal Commissioners in their report on Copyright, 1876, say:—"Upon the whole we are disposed to think that every form of copy, whether by sculpture, modelling, photography, drawing, engraving, or otherwise, should be included in the protection of copyright. It might be provided that the copying of a scene in which a piece of sculpture happened to form an object should not be deemed an infringement unless the sculpture should be the principal object, or unless the chief purpose of the picture should be to exhibit the sculpture.

"It was also suggested that copyists of antique works ought to be protected by copyright so far as their own copies are concerned. Many persons spend months in copying ancient statues, and the copies become as valuable to the sculptors as if they were original works. It may be doubted whether the case does not already fall within the Sculpture Act, but we recommend that such doubts should be removed, and that sculptors who copy from statues in which no copyright exists should have copyright in their own copies. Such copyright should not, of course, extend to prevent other persons making copies of the original work" (a).

(a) Pars. 99, 100.

CHAPTER XIV.

COPYRIGHT IN PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.

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 arts of painting and drawing.

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 more 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 unaccount-

CAP. XIV.

able 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 work 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 (*a*). 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 (*b*).

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

(*a*) Of course the purchaser of the picture is not bound to lend it to the artist or any other person for the purpose of engraving, and this is only here mentioned as there seems to be some such extraordinary idea prevalent among engravers.

(*b*) The painting of 'The Roll Call,' by Miss Thompson, was sold for £100, the right of engraving fetched £1200, see *post*, p. 397

thought proper. It is not a desirable thing to have a CAP. XIV. great work of art multiplied indefinitely, and hawked 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.

The Act (25 & 26 Vict. c. 68) 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 (a), 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

(a) An architectural design is protected under this word.

CAP. XIV.

for or on whose behalf the same shall have been made or executed; nor shall the vendor 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.

By whom it
may be
claimed.

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 (a). If the vendee obtains not this agreement 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 (b)*.

(a) Forms of various kinds of agreements under this Act will be found in the Appendix. Agreements under the Act require a sixpenny stamp.

(b) The Royal Commissioners in their recent report on Copyright, were of opinion that it was clearly undesirable that copyrights, which are in many cases of great value, should be in this way left free to piracy, and that the law therefore should distinctly define to whom, in the absence of an agreement, the copyright should belong.

They also referred to the expediency of making a distinction between pictures painted on commission and others. They experienced a difficulty in defining what a commission was, and, looking to the evidence before them upon the point, they arrived at the conclusion that no distinction could practically be made.

The majority of the Commissioners came to the conclusion that in the absence of a written agreement to the contrary, the copyright in a picture should belong to the purchaser, or the person for whom it is painted, and follow the ownership of the picture. They mentioned that the final proviso in the 1st section of the Act of 1862 was apparently added to the Bill without sufficient consideration during its progress through Parliament.

As to whether an artist who has sold a picture should be at liberty without the consent of the owner to make replicas of it, or whether a distinction should be made between replicas made by the artist, and copies made by others than the artist, the Commissioners reported that they were not inclined to recognise any distinction.

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 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.

Where S., the proprietor of a periodical called 'Good Words,' agreed verbally with G. to purchase the right to engrave certain photographs to illustrate 'Good Words,' G. reserving the right to use them in any other publication, and subsequently signed a receipt for "the use of photographs in 'Good Words' reserving all rights to issue the same in any other publication," and afterwards S. commenced publishing in a separate volume these articles, illustrated by engravings from the same photographs, and G. brought an action under the 25 & 26 Vict. c. 68, for damages and for a writ of injunction; and S. filed a bill for a declaration that under the verbal agreement he was entitled to republish the engravings taken from G.'s photographs, for specific performance of an alleged verbal agreement to grant a licence to use the photographs for the purpose of engraving and publishing in 'Good Words,' or in any republication of the articles which they illustrated, and that the action at law might be restrained; Vice-Chancellor Malins held, that the verbal agreement

Assignment
and registra-
tion.

CAP. XIV. extended to the use of the photographs in 'Good Words' only, that there was no part performance by G. of a contract or licence by G. to publish in a separate form, and that S. had no equity, inasmuch as by the 25 & 26 Vict. c. 68, s. 3, every leave or licence for the publication of photographs must be in writing, and dismissed the bill with costs (a).

Assignment of the copyright when limited in effect.

And an assignment in terms of the copyright in a picture may be qualified by the obvious intention of the parties to a licence to copy it, or to an assignment for the limited purpose of producing an engraving or photograph.

Thus in a very recent case (b), an action was brought to restrain an alleged infringement by the defendant of the plaintiff's copyright in an oil painting called 'Going to Work,' and in an engraving made from it. The picture was painted by the artist for a Mr. Halford, who, on the 9th of November, 1870, wrote the following memorandum addressed to the plaintiff: "I assign to you for the purpose of producing an engraving of one size, the copyright of the picture painted by Mr. Eddis, entitled 'Going to Work,' and being a portrait of my daughter." The picture represented a little girl in a sea-side costume with bare feet walking on the sea-shore, carrying in one hand a spade over her shoulder, and in the other hand a bucket. The plaintiff, on the 12th November, 1870, registered himself under the 25 & 26 Vict. c. 68, as the proprietor of the copyright of the picture, and in July, 1871, he published an engraving of the picture his name being engraved on the plate as the proprietor.

In 1879 the defendant published a chromo-lithograph which the plaintiff alleged to be an infringement of his copyright. This picture was called 'Holiday Time,' and it also represented a girl on the sea-shore, with bare feet, with a spade in one hand over her shoulder, and a bucket in the other hand. But her dress was different from that

(a) *Strahan v. Graham*, 16 L. T. (N.S.) 87; 17 L. T. (N.S.) 57; 15 W. R. 487.

(b) *Lucas v. Cooke*, 13 Ch. Div. 872.

of the girl in the picture, and she was standing still instead of walking. The evidence shewed that the chromo-lithograph was derived from a photograph published in New York, and that neither the defendant nor the artist whom he employed to produce the chromo-lithograph had, before its production, seen either the picture or the engraving. There was no evidence to shew how the photograph was produced, or whether the photographer had, before he produced it, seen either the picture or the engraving. The photograph was evidently taken from life. CAP. XIV.

Mr. Justice Fry held that the letter of the 9th November, 1870, amounted only to an assignment of the copyright of the picture or a licence to copy it, for the limited purpose of producing an engraving of one size, and that the right of producing copies in other ways and of other sizes remained in Halford, and could be assigned by him to any one else. And by sect. 11 of the 5 & 6 Vict. c. 45, the registration gave only a *prima facie* title which could be rebutted, and here the assignment itself rebutted the *prima facie* title. The result was that the plaintiff was only the proprietor of the engraving. It was very possible that the photograph might have been in substance copied from either the picture or the engraving, but there was no evidence on which the court was entitled to assume that it was copied from either. But, even if it was copied from one or the other, it might have been copied from the picture, in which the plaintiff had no right, just as well as from the engraving, and the court could not assume without evidence that it was copied from the latter. Before the plaintiff could succeed, he must shew that the photograph had been taken from the engraving, and this he had not done.

By the 4th section 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

CAP. XIV. 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 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).

This section, though it prevents an assignee from suing for penalties, before the assignment to him has been registered (c), 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 (d). Registration of the proprietorship of the copyright is only *primâ facie* evidence of title, and may be rebutted by the terms of the assignment of the copyright to the person who has made the registration (e).

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

(a) *Ex parte Beal*, Law Rep. 3 Q. B. 387; 37 L. J. (Q.B.) 161; S. C. 18 L. T. (N.S.) 285.

(b) *Vide ante*, p. 146.

(c) *Dupuy v. Dilkes*, W. N. (1879) 145. 'The Young Cricketer.'

(d) *Re Walker & Graves*, 20 L. T. (N.S.) Q. B. 877; L. R. 4 Q. B. 715.

(e) *Lucas v. Cooke*, 13 Ch. Div. 872. 'Going to Work.'

Benefit of Act
cannot be
claimed
until after
registration.

CAP. XIV.

forms of entry prescribed by the earlier Act may be varied under the latter to meet the circumstances of any case (a). 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 (b).

Aggrieved
person.

A person who has been convicted of infringing the copyright in certain paintings and photographs of the registered proprietor, but who sets up no title in himself or adduces any evidence to rebut the *prima facie* evidence of proprietorship afforded by the book of registry, is not a person "aggrieved" within the meaning of this or the 14th section of the 5 & 6 Vict. c. 45.

"A person," said Hannen, J. (c), "to be 'aggrieved' within the meaning of the statute must shew that the entry is inconsistent with some right that he sets up in himself or in some other person, or that the entry would really interfere with some intended action on the part of the person making the application."

"It seems," said Blackburn, J., in the same case, "that to make a person aggrieved within the meaning of the statute, the applicant must have some substantial objection, and one going to the merits of the registered

(a) The Royal Commissioners in their recent report on Copyright recommended that registration of paintings and drawings should not be insisted on as long as the property in the picture and the copyright were vested in the same person, but that if the copyright were separated by agreement from the property in the picture, there should be compulsory registration, and that the register should shew—

- (a) The date of the agreement.
- (b) The names of the parties thereto.
- (c) The names and places of abode of the artist, and of the person in whom the copyright is vested.
- (d) A short description of the nature and subject of the work, and, if the person registering so desires, a sketch, outline, or photograph of the work in addition thereto.

As to engravings, prints, and photographs, however, they thought registration should be compulsory.

(b) *Chappell v. Purday*, 12 M. & W. 303.

(c) *Graves's case*, L. R. 4 Q. B. 724; 20 L. T. (N.S.) 877.

proprietor's title ; then the court may direct an issue, or, CAP. XIV.
 have the question otherwise disposed of, or, if they think
 this the proper course, may set aside or expunge the
 entry. But I do not think it is enough to entitle a
 person to say that he is aggrieved, and that the entry
 ought to be expunged, that, although the registered pro-
 prietor has a complete title in equity and in good sense,
 yet there is some slip either in the signing of the memo-
 randum or in the spelling of a name ; this would be my
 view if it were necessary to decide this question."

An application under the 14th section was made to the Expunging
entry in
register.
 High Court of Justice, Queen's Bench Division, in
 February, 1876, for an order to expunge from the register
 the entry of the copyright of the well-known picture called
 'The Roll Call,' painted by Miss Elizabeth Thompson, who,
 by an agreement dated 11th of May, 1874, had sold the
 copyright to Messrs. Dickinson & Co. for the sum of £1200.
 It appeared that the copyright was not, in fact, vested in
 Miss Thompson, and she had no right to assign it. She
 had painted the picture on commission for a gentleman
 named Galloway, who had paid her £100 in advance.
 There was no contest as to the ownership of the copy-
 right ; it was conceded that Mr. Galloway held it. He
 had parted with the picture to the Queen for the same
 price he himself had paid for it, but as this did not carry
 the copyright, it still remained in Mr. Galloway. Mr.
 Galloway did not oppose the application, and an order to
 expunge the entries so as not to affect the rights to the
 copyright was made.

Invasion of the property is guarded against by the 6th Infringement
of the right,
and penalties
attached
thereto.
 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 copy-
 right, 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

CAP. XIV. repetition (a), 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.

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 produced 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,

(a) *Actus non facit reum, nisi mens sit rea* (*Reg. v. Sleaf*, 8 Cox, C. C. 472; *Reg. v. Cohen*, *ibid.* 41; *Hearne v. Garton*, 28 L. J. (M.C.) 216); as to the licence required to copy photographs, see *Strahan v. Graham*, 16 L. T. (N.S.) 87; 17 L. T. (N.S.) 457.

provided it be a reproduction of the design, is an infringement such as would subject the maker to the penalty.

Before the existence of statutory copyright in paintings, it was held by the Irish Chancery Court, that the owner's common law rights in a painting were not prejudiced by his public exhibition of it. The case referred to is *Turner v. Robinson (a)*. The defendant was charged with piracy in having made for sale copies of a painting representing the death of Chatterton. He denied direct copying, but admitted that he had seen the original while on exhibition, and said that he had made his photograph from an arrangement of figures, objects, and scenery which he had prepared in his own gallery. He further admitted that he had made the arrangement from his recollection of the painting, and with a view of presenting a stereoscopic photograph of the same representation as that given by the painting. The court declared this to be an unlawful use of the plaintiff's property.

“If there was no statute protecting copyright in literary works,” said the Master of the Rolls, “and Sir Walter Scott had read out ‘Waverley’ to a large party of friends, it is idle to say that such would have amounted to a publication, so as to have deprived him of his common law right; and the painter or the owner of a painting who exhibits it at such exhibitions as those of London, Dublin, and Manchester, and, having regard to the object of such exhibitions, should be considered as allowing it to be viewed by the public on a tacit understanding that an improper advantage would not be taken of the privilege thus granted; and I am disposed to think, without reference to the letters I have read, that such an exhibition would not be a publication so as to deprive a painter or the owner of a painting of his common law right.” And upon the other point, upon appeal, the Lord Justice of Appeal said: “The stereoscopic slides are not photographs taken directly from the picture, in the ordinary mode of copying; but they are photographic pictures of a model

(a) 10 Ir. Ch. 121, 510.

CAP. XIV.

itself copied from, and accurately imitating in its design and outline, the petitioner's painting. It is through this medium that the photograph has been made a perfect representation of the painting. Thus the object contrived and achieved, and the consequent injury, are the very same as if the copy had, in breach of confidence, been made on the view, and by the eye; and no court of justice can admit that an act illegal in itself can be justified by a novel or circuitous mode of effecting it. If it is illegal, so must the contrivance be by means of which it was effected."

In a recent case (a) it was contended that a photograph of an engraving was not an original production within the meaning of the Act. In overruling this objection, Mr. Justice Blackburn said: "The distinction between an original painting and its copy is well understood, but it is difficult to say what is meant by an original photograph. All photographs are copies of some object, such as a painting or a statue, and it seems to me that a photograph taken from a picture is an original photograph, in so far that to copy it is an infringement of this statute. As I have already pointed out, by section 2, although it is unlawful to copy a photograph or the negative, it is permitted to copy the subject-matter of the photograph by taking another photograph."

The penalties
cumulative.

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* (b)," says Mr. Justice Blackburn, in *Beal's Case* (c), 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

(a) *Graves's Case*, L. R. 4 Q. B. 723.

(b) 3 T. R. 509.

(c) Law Rep. 3 Q. B. 395.

there could be no doubt that the meaning of the statute was, the penalty should be cumulative, viz., double the 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."

The provision as to forfeiture of piratical copies is almost nugatory, as the Act gives no power to enter a house and search for copies. One case was brought before the Royal Commissioners appointed to report on the subject of Copyright in 1876, where a conviction for selling piratical copies having been obtained, the magistrate had made an order that the copies should be delivered up, but it was found that the order could not be enforced.

Provisions as to forfeiture of piratical copies.

The bill recently introduced into Parliament provides by the 64th section that where any copy of a subject of copyright is under the Act forfeited to the proprietor of the copyright, then, without prejudice to any other remedy, a court of summary jurisdiction may order any such copy to be delivered to the proprietor of the copyright. This bill also proposes to give power to seize piratical copies where they are seen, and when they might be taken, it being proved by experience that the power to proceed by summons is generally ineffectual where persons

CAP. XIV.

selling copies go round from house to house, and refuse to give either a name or address, and are altogether lost sight of before a summons could be procured. It therefore provides that if any person in any street or highway, or elsewhere than at his own house, shop, or place of business, hawks or offers or keeps for sale, hire, or distribution any such copy it may be seized by any constable under the orders of the proprietor of the copyright, or of any person authorized by him, and forthwith taken before a court of summary jurisdiction with a view of obtaining an order for its delivery to the proprietor of the copyright.

The Commissioners further suggested that these provisions should be extended to sculpture and other works of fine art.

Provisions for repressing the commission of fraud in the production and sale of works of art.

The 7th section 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 (a)*. 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 (*b*), by means of writing Linnell's name upon the copy ; and 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

(a) 27 L. J. (M. C.) 54 ; 7 Cox, C. C. 494 ; 6 W. R. 109.

(b) *Albin's Case*, Tremaine, P. C. 109 ; *Worrall's Case*, *ibid.* 106 ; 2 East, P. C. 18, cited 2 Russell on Crimes, 282.

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.

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

(*a*) Unless the person selling were cognizant of the fact of alteration the Act would be an entirely innocent one. See *Reg. v. Sleaf*, 8 Cox, C. C 472; *Reg. v. Cohen*, *ibid.* 41; *Hearne v. Garton*, 28 L. J. (M.C.) 216.

CAP. XIV.

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). Mr. Graves, the well-known publisher of engravings,

(a) *Graves, Ex parte, In re Prince*, 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, 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 on the case brought under 17 Geo. 3, c. 57, see *Graves v. Mercer*, 16 W. R. 790.

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 the Copyright (Works of Art) Act, 1862, were in the nature of a punishment, and consequently were not released by the composition deed which had been executed between Prince and his creditors. On the contrary, it was argued for the respondent that, inasmuch as under the Copyright (Works of Art) Act the penalties were payable to Mr.

CAP. XIV.

Graves, they amounted in the aggregate to nothing more than a debt, which would have been provable under bankruptcy, and was therefore released by the deed. But Lord Justice Page Wood held that what Prince had done in selling the photographic copies was throughout the Copyright (Works of Art) Act treated as an offence, as a *fraudulent* act, for which a punishment was to be inflicted. The penalty provided by the Act was not meant to be the measure of damage sustained by the proprietor of the copyright work which had been pirated, because he was expressly permitted to recover damages by action (in addition to the penalties) under the 11th section of the Act. The object of the Small Penalties Act was merely to provide a simple method of enforcing the payment of penalties not exceeding £5. The penalty given by the Copyright (Works of Art) Act was, in his Lordship's opinion, a punishment for what was in the nature of a criminal offence, and the debtor was therefore not entitled to his discharge from custody unless the penalties were paid. The Lord Justice Selwyn was also of opinion that whether the words or the spirit of the Copyright (Works of Art) Act, under which the penalties had been incurred, were looked at, the order in bankruptcy was wrong, and must therefore be dismissed with costs.

By section 10 of the Act, the importing of piratical copies is expressly prohibited, and by the 11th section, besides the penalties and forfeitures to which we have already referred, a remedy by action for damages is given to the injured owner of the copyright; no limitation as to time within which actions are to be brought is prescribed by the Act.

The provisions of the International Copyright Act, 7 & 8 Vict. c. 12, are extended to paintings, drawings and photographs, by section 12 of the Copyright (Works of Art) Act, 1862.

The Royal Commissioners in their Copyright report, 1876, felt some difficulty on the subject of photographs. They doubted whether the copyright should be assim-

lated to that in paintings and pass to a purchaser, or whether it should remain with the photographer. "When photographs," said they, "are taken with a view to copies being sold in large numbers, it is practically impossible that the copyright in the negative should pass to each purchaser of a copy, and it must remain with the photographer, or cease to exist. On the other hand, the same reasons exist for vesting the copyright of portraits in the purchaser or person for whom they are taken, as in the case of a painting.

"Indeed, considering the facility of multiplying copies, and the tendency among photographers to exhibit the portraits of distinguished persons in shop windows, it may be thought that there is even greater reason for giving the persons whose portraits are taken the control over the multiplication of copies than there is in the case of a painting. It therefore becomes a question whether it is not necessary to make that distinction between photographs that are portraits and those that are not, and between photographs taken on commission and those taken otherwise, which we have deprecated in the case of paintings. We suggest that the copyright in a photograph should belong to the proprietor of the negative, but in the case of photographs taken on commission, we recommend that no copies be sold or exhibited without the sanction of the person who ordered them."

The Commissioners further thought that the same questions arose in respect of engravings, lithographs, prints, and similar works, and were of opinion that, so far as regards the transfer and vesting of the copyright, these arts should be placed upon the same basis as photographs.

In concluding their general report upon the fine arts they referred to a matter as to which artists say the law is disadvantageous to them. Before the artist paints a picture, he frequently finds it necessary to make a number of sketches or studies, which, grouped together, make up the picture in its finished state. These works may be studies expressly made for the picture about to be painted, or

Artists' studies and sketches.

CAP. XIV.

they may be sketches which have been made at various times, and kept as materials for future pictures. If after a picture is so composed, the copyright is sold, the artists are afraid that they are prevented from again using or selling the same studies and sketches, as they have been advised that such user or sale would be an infringement of the copyright they have sold (*a*).

The Commissioners doubted whether this fear was well-founded, but as the use of such studies and sketches as they had described could not, in their opinion, result in any real injury to the copyright owner, who has copies of them in his picture in a more or less altered shape, and combined with other independent work, they thought the doubt should be removed, and that the author of any work of fine art, even though he may have parted with the copyright therein, should be allowed to sell or use again his *bonâ fide* sketches and studies for such works and compositions, provided that he does not repeat or colourably imitate the design of the original work (*b*).

Replicas.

Where an artist has painted a picture on commission, as the copyright is in the commissioner, he may not paint a *replica*, but where this is not the case, and there is no agreement as to the copyright within the 25 & 26 Vict. c. 68, the artist is at liberty so to do.

Copyright in
photographs
and property
in negatives.

As to photographs, the copyright in non-commissioned works belongs to the photographer, if reserved in writing, and in commissioned works the negative and the glass on which it is, is usually considered to belong to the photographer, while the copyright belongs to the person who gives the commission.

(*a*) The doubt exists by reason of the terms of the 6th section of the 25 & 26 Vict. c. 68.

(*b*) Par. 118-124.

CHAPTER XV.

COPYRIGHT IN DESIGNS.

CALICO-PRINTING, the art of dyeing woven fabrics of cotton with variegated figures and colours more or less permanent, has been practised from time immemorial in India. The art was known to the ancient Hindus and Egyptians. Pliny describes it with sufficient precision. "Robes and white veils are painted in Egypt," says he, "in a wonderful way; being first imbued, not with dyes, but with dye-absorbing drugs, by which they appear to be unaltered, but when plunged for a little in a cauldron of the boiling dye-stuff they are found to be painted. Since there is only one colour in the cauldron, it is marvellous to see many colours imparted to the robe in consequence of the modifying agency of the excipient drug. Nor can the dye be washed out. Thus the cauldron, which would of itself undoubtedly confuse the colours of cloths previously dyed, is made to impart several dyes from a single one, painting while it boils" (a). Copyright in designs.

Anderson, in his 'History of Commerce,' places the origin of English calico-printing as far back as the year 1676; but Mr. Thomson, a better authority, assigns the year 1696 as the date of the commencement of the practice of this art in England, when a small print-ground was established on the banks of the Thames, at Richmond, by a Frenchman.

Linen was long ago, and silks and woollen fabrics also have recently been, made the subject of topical dyeing,

(a) Pliny, 'Natural History,' lib. xxxv. c. 2.

CAP. XV.

upon principles analogous to those of calico-printing, but with certain peculiarities arising from the nature of their textile materials.

The first Act for protection of designs.

The first Act granting protection to the inventor of designs was passed in 1787 (the 27 Geo. 3, c. 38). This Act was followed by the 29 Geo. 3, c. 19, and the 34 Geo. 3, c. 23. But these Acts did not extend to Ireland, nor to fabrics other than linen and cotton, and did not afford any protection to designs on fabrics composed of animal products, as wool, silk, or hair, or mixtures of those materials with flax and cotton. The printing on fabrics of animal and vegetable substances, and on mixed fabrics, having subsequently grown up into an important branch of manufacture, an Act of Parliament was introduced in 1839 (2 Vict. c. 13), by which the same protection was given to designs printed on fabrics of animal substances, or a mixture of animal and vegetable substances, as was afforded to designs printed on fabrics of vegetable substances; and the provisions of the existing Acts were extended to Ireland.

We followed the French in establishing any design rights at all; and it would be well if we adopted their simple, sensible arrangement for securing them.

In the early part of the last century the French entertained more correct notions of the rights of property in designs than the British, and so convinced were they that great benefits would flow from rejecting the claim of the copyist to reap the original designer's profits, that, in 1737 and 1744, laws established a property in designs for the manufacturers of Lyons, and in 1787 the benefits of legal protection were fully established. The basis of the pre-eminence of the French, and the means by which they have attained their unrivalled position in *taste*, is *efficient protection*, and it is certainly singular that this fundamental element and primary cause of superiority should have been so long overlooked in this country.

Division of the right.

We have in England two distinct rights, founded upon different Acts of Parliament, in the application of designs

—copyright in the application of designs for ornamental purposes, and copyright in the application of designs for the shape and configuration of articles of utility. CAP XV.

The former, of which we shall first treat, is regulated by the 5 & 6 Vict. c. 100, amended by 6 & 7 Vict. c. 65, 13 & 14 Vict. c. 104, 21 & 22 Vict. c. 70, and 24 & 25 Vict. c. 73.

The 5 & 6 Vict. c. 100, repeals all the previous Designs Acts, and enacts that the proprietor of every new and original design not previously published (a), whether such design be applicable to the ornamenting of any article of manufacture, or of any substance, artificial or natural, or partly artificial and partly natural, and whether such design be so applicable for the pattern or for the shape or configuration, or for the ornament, or for any two or more of such purposes, or by whatever means such design may be so applicable, whether by printing or by painting or by embroidery, or by weaving, or by sewing, or by modelling, or by casting, or by embossing, or by engraving, or by staining, or by any other means whatsoever, natural, mechanical, or chemical, separate or combined, shall have the sole right of applying the same to any article of manufacture or to any such substance as aforesaid during the respective terms thereinafter mentioned. Copyright in designs for ornamental purposes.

The statute does not mention “any article of manufacture” being a design, but considers the design to be protected as applicable to the ornamenting of any article of manufacture. The design is always considered different from the “article of manufacture, or the substance to which it is to be applied.”

(a) As to what amounts to publication, see *Cornish v. Keene*, Webst. Pat. Ca. 501, 508. See *Anon.* 1 Chitt. 24; *Carpenter v. Smith*, 9 M. & W. 300; *S. C. Webst. Pat. Ca.* 530, 536; *Jones v. Berger*, *ibid.* 550; *The Househill Co. v. Neilson*, *ibid.* 718, n.; *Stead v. Williams*, 7 Man. & Gran. 818. See *Prince Albert v. Strange*, 1 H. & Tw. 1; *Dalglisch v. Jarvie*, 14 Jur. 945; *S. C.* 2 Mac. & G. 231; 2 H. & Tw. 437. In the last cited case it was queried whether the nine months' copyright given by the Act in any designs for ornamenting articles of manufacture dates from the publication of the manufacture or from the publication of the design.

CAP. XV.
Duration of
the right.

The terms are to be computed from the time of the design being registered.

Class	
I. Articles of manufacture composed wholly or chiefly of any metal or mixed metals.	} Five years.
II. Articles of manufacture composed wholly or chiefly of wood.	
III. Articles of manufacture composed wholly or chiefly of glass.	
IV. Articles of manufacture composed wholly or chiefly of earthenware, bone, papier-mache, and other solid substances.	
" Articles of ivory not comprised above (a).	
V. Paper-hangings.	
VI. Carpets.	
" Oil-cloths (b).	
VIII. Shawls to which the design is not applied solely by printing, or by any other process by which colours are or may be produced upon tissue or textile fabrics (c).	} The period of three years.
XI. Woven fabrics composed of linen, cotton, wool, silk, or hair, or of any two or more of such materials, if the design be applied by printing, or by any other process by which the colours are or may hereafter be produced upon tissue or textile fabrics, such woven fabrics being or coming within the description technically called furnitures, and the repeat of the design whereof shall be more than twelve inches by eight inches.	
VII. Shawls, if the design be applied solely by printing, or by any other process by which colours are or may hereafter be produced upon tissue or textile fabrics.	} The period of nine months.
IX. Yarn, thread, or warp, if the design be applied by printing, or by any other process by which colours are or may hereafter be produced.	
X. Woven fabrics composed of linen, cotton, wool, silk, or hair, or of any two or more of such materials, if the design be applied by printing, or by any other process by which colours are or may hereafter be produced upon tissue or textile fabrics, excepting the woven fabrics enumerated above (d).	} The period of three years.
XII. Woven fabrics not comprised above (e).	
XIII. Lace, and any article of manufacture or substance not comprised above.	} The period of twelve calendar months.

(a) By the 13 & 14 Vict. c. 104, s. 8.

(b) By the 6 & 7 Vict. c. 65, s. 5.

(c) *Norton v. Nicholls*, 5 Jur. (N.S.) 1203; 7 W. R. 420.

(d) *Vide Lowndes v. Browne*, 12 Ir. Law Rep. 293; time of protection extended by 21 & 22 Vict. c. 70.

(e) *Harrison v. Taylor*, 4 H. & N. 815; 5 Jur. (N.S.) 1219; 29 L. J. (Ex.) 3. Copyright in designs for damasks after the 5th of November, 1850, under the power conferred on the Board of Trade (now the Commissioners of Patents), by the 9th section for the period of two years, in addition to the term of one year given by the Act.

By the 13 & 14 Vict. c. 104, s. 9, as amended by the 38 & 39 Vict. c. 93, the Commissioners of Patents are empowered from time to time to order that the copyright of any class of designs or any particular design registered or which may be registered under the Designs Act, 1842, shall be extended for such term, not exceeding the additional term of three years, as the said Commissioners may think fit; and the said Commissioners have power to revoke or alter any order as may from time to time appear necessary. Whenever any order is made by the said Commissioners under this provision it must be registered in the office for the registration of designs; and during the extended term the protection and benefits conferred by the said Designs Acts are to continue as fully as if the original term had not expired.

CAP. XV.

The Commissioners of Patents empowered to extend time.

No person is entitled to the benefit of the Act unless the design in respect of which he seeks protection has, previous to publication (a), been registered in accordance with the Act, and unless at the time of such registration such design has been registered in respect of the application thereof to some or one of the articles of manufacture or substances comprised in the above-mentioned classes, by specifying the number of the class in respect of which such registration is made, and unless the name of such person shall be registered according to the Act as the proprietor of such design (b), and unless after publication of such design every such article or substance to which the design is applied has thereon, at the end or edge

Registration of designs for ornamental purposes.

(a) In *Dalglish v. Jarrie*, 1 Sim. (N.S.) 336, it is *queried* whether the term "publication" here used is limited to publication after the design has been embodied and introduced into some fabric.

(b) The author of any new and original design is to be considered its proprietor, unless he has executed the work for another person for a good or a valuable consideration, in which case such person is to be considered the proprietor, and is entitled to be registered in place of the author. Every person acquiring for a good or a valuable consideration a new and original design or the right to apply the same to the above-mentioned articles or substances, either exclusively of any one else or otherwise, and every person upon whom the property in a design or the right to its application may devolve, shall be considered the proprietor of the design in the respect in and to the extent to which such property may have been acquired, but not otherwise (5 & 6 Vict. c. 100, s. 5).

CAP. XV.

thereof (a) or other convenient place, the letters "Rd.," together with such number or letter, and in such form as shall correspond with the date of the registration of such design according to the registry in that behalf; and such marks may be put on any such article or substance, either by making the same in or on the material itself, or by attaching thereto a label containing such marks.

What sufficient registration.

It was formerly held not sufficient registration under the 17th section, of an article comprised in class 8 of section 3, to leave with the registrar an article manufactured according to the combinations relied upon, with an intimation that it was to be applied to class 8, though it might be sufficient as regards articles comprised in class 5.

Thus, in a case where the plaintiff had registered a shawl, the component parts of the composition of which were all old, but the combination itself new, by leaving with the registrar one of his shawls, Lord Campbell said: "Take the example of paper-hangings, class 5. A section of the paper having the design impressed upon it would clearly disclose the claim of the inventor, and would fully put the registrar in possession of all the information he ought to have to enable him to perform the duties imposed upon him. But the plaintiff, by leaving one of his shawls with the registrar, gives no information of the nature of his claim, and cannot, we think, be said to have registered his 'design'" (b).

When the question came before Sir W. P. Wood (c) in the previous year he was of opinion that the registration was valid and that the provisions of the Act had been sufficiently complied with, but in referring to this judgment in *Norton v. Nicholls* (d), Lord Campbell, C.J., said: "If the facts before his Honour had been the same as those which were proved at the trial, and upon which we have to

(a) *Heywood v. Potter*, 1 E. & B. 439; 22 L. J. (N.S.) Q. B. 133. And see 21 & 22 Vict. c. 70, s. 4.

(b) *Norton v. Nicholls* 28 L. J. (Q.B.) 225, 227; 5 Jur. (N.S.) 1203; 7 W. R. 420. But see 21 & 22 Vict. c. 70, s. 5.

(c) In *Norton v. Nicholls*, 4 K. & J. 475; *Norton v. Ford*, cited *Norton v. Nicholls*, 5 Jur. (N.S.) 1203, 1205. (d) 5 Jur. (N.S.) 1203, 1205.

adjudicate, we should have considered ourselves bound by his decision. But before him the five points seem to have been treated as all new, each being considered a design, which might be applied to the shawl, the shawl being an article of manufacture. On this supposition there might probably be a design within the Act of Parliament; the deposit of the shawl with the registrar might possibly be a due registration; but when it appears that all the supposed designs to be applied to the article of manufacture were old, and that the old design contended for is a combination of all the parts of a manifold, complicated, and highly ornamental garment contrived to assume many different shapes; we felt bound, on all the questions submitted to us, to give judgment for the defendants."

With respect to copyright of design, no specification is required, as in the case of patents for inventions; but section 17 of the 5 & 6 Vict. c. 100, after empowering all the world to inspect the registered designs when the copyright has expired, gives a right under certain circumstances, before the copyright has expired, to an inspection of the registration, and requires the registrar, on the application of certain persons, to give to such persons "a certificate stating whether there be any copyright existing of particular designs, and if there be, in respect of what particular article of manufacture or substance such copyright exists." It is therefore essential that the registrar be provided with particulars sufficiently definite for him to be able to designate the individual parts in which protection is claimed.

Copies of a registered design published in a book for sale need no registration mark, nor is such publication a licence to the purchaser of the book to apply the designs to articles for sale (a).

A design may be registered in respect of one or more of the classes, according as it is intended to be employed in one or more species of manufacture, but a separate

(a) *Riego de la Brachardière v. Elvery*, 18 L. J. (Ex.) 381; 4 Ex. 380.

CAP. XV. fee must be paid on account of each separate class, and all such registrations must be made at the same time.

The periods and prices of the classes vary, and it is the ultimate result that is looked to in selecting among them; thus in *Lowndes v. Browne* (a), a pattern first *printed* on the ground and then *worked* with a needle, was held to be well registered under class 10.

In *West's Case* a Mr. Barfourd had registered a design under class 2, for the application of an ornamental border of the Brazilian pine leaf to straw hats, which the defendant having, as the plaintiff alleged, pirated, he laid an information before justices against him, whereupon the defendant was convicted. It was subsequently contended that the conviction was bad, inasmuch as there had been no legal registration of the design, it being registered under a wrong class, namely, under class 2, and not 13, and there being a much shorter term of protection for the latter than for the former. The question, however, was not decided.

It might sometimes be worth while to register an ornamental design in more than one class to prevent vulgarization, such as the printing on calico a design registered for silks (b); but as publication in one class would be so in all, this must be done, as before mentioned, at the same time, or at least before any form of the pattern be in circulation.

By the 14th section of the 5 & 6 Vict. c. 100, as amended by the 38 & 39 Vict. c. 93, for the purpose of registering designs under that Act, the Commissioners of Patents were empowered to appoint a registrar, and if necessary a deputy-registrar, clerks, and other officers and servants, and, subject to the provision of the Act, were authorized to make rules for regulating the execution of the duties of the office.

(a) 12 Ir. L. R. 293.

(b) A registered pattern for a paper-hanging it will be competent for a carpet manufacturer to apply to carpets, unless the paper-stainer register for class 3, as well as class 5.

Accordingly, directions for registering and for facilitating searches have been issued (a). CAP. XV.

Persons proposing to register a design for ornamenting an article of manufacture must deliver at the Designs Office: two exactly similar copies, drawings (or tracings), photographs, or prints thereof, with the proper fees: the name and address of the proprietor or proprietors, or the title of the firm under which he or they may be trading, together with their place of abode or place of carrying on business, distinctly written or printed; and the number of the class in respect of which such registration is intended to be made, except it be for sculpture. Mode of registration.

By the 21 & 22 Vict. c. 70 (a), it was declared that the registration of any *pattern* or *portion* of an article of manufacture to which a design is applied, instead or in lieu of a copy, drawing, print, specification, or description in writing, should be as valid and effectual to all intents and purposes as if such copy, drawing, print, specification, or description in writing had been furnished to the registrar under "The Copyright of Designs Acts." Permissible to register by pattern.

The advisability of registering under this section by sample, or following the former mode of registration, will of course depend upon the nature of the design to be protected. There is a risk either way. There is a risk on the one hand of misdescription of the claim, for though the same nicety is not required in registering patterns or designs, as in describing inventions sought to be protected under the patent laws, yet it is necessary that the party should properly explain the nature of the design he is desirous of protecting, and on the other hand, where the party exercises the option of silence, and merely produces the pattern of his invention, he is exposed to this:— that as by the registration of the sample he has claimed protection in respect of the entirety of what is exhibited on the face of that pattern; if only a part is used in a When advisable to do so.

(a) These will be found in the Appendix.

CAP. XV.

When not
advisable.

different combination, he is without the protection which he would otherwise have had (a).

When a piece of manufacture with a design impressed upon it is registered without any explanation or addition in writing, and that design consists of several parts not necessarily united in configuration, but capable of being severed into independent integral parts, then the design registered is the entire thing, exactly as it is described in the pattern furnished to the registrar; and such registration is therefore not open to the objection of uncertainty, but is valid according to the foregoing provision. The designer, however, is, as we have already pointed out, under this disadvantage, that when he registers a pattern of material, there is no infringement unless it is exactly copied. If the designer be content with putting a design, which is composed of several parts placed together, but capable of being severed and used in a separate form, upon the register without limitation and without explanation, he claims simply to be the inventor of the entire thing, exactly as it is described in the drawing or pattern which he has exhibited, and all that he can claim to protect against imitation is, that thing in its exact form and relative position and proportions as they appear upon his pattern. Anything, therefore, which is a *fac-simile* of that drawing, any other pattern which is a reproduction of that in its integrity, becomes an infringement. But that which is different in shape and form, or in the relative positions of its several parts, which is not a reproduction of it, as a *replica* or copy of a picture, would not be an infringement of the thing specified (b).

When a sample
of article
registered,
design not
infringed by
article pro-
duced on same
principle, if
different in
style.

Thus where a sample of an article had been registered under the 21 & 22 Vict. c. 79, s. 5, Vice-Chancellor Wickens was of opinion that the design so registered would not be infringed by an article produced upon the same principle, if different in style. In the case referred to (c), two patterns, in respect of which the infringement was

(a) *Holdsworth v. M'Crea*, Law Rep. 2 H. L. 390.

(b) *Per Lord Westbury in Holdsworth v. M'Crea*, L. R. 2 H. L. 388.

(c) *Thom v. Syddall*, 20 W. R. 291.

claimed, were registered by the plaintiff by the registration of samples in accordance with the above provision, without any written description or specification. These patterns, similar in character, but differing slightly in the water-figure, or *moire*, consisted of a species of *moire* or water-pattern, formed by the intersection of two series of bands of lines, which left interstices in a constantly varying manner, through which the white calico was seen, which patterns could be printed in one colour, or in two colours, or in different shades of the same colour. By the crossing or intersection of the two series of bands variable white spaces were left, which formed a *moire*, or water-figure; whilst the dark lines of which the bands were composed on crossing one another formed another dark *moire*, or water-figure, and the whole formed a complete and constantly recurring pattern.

The designs of the defendants, the subject of the motion then before the court, which was for an injunction, were formed in a similar manner by the interlacing or intersection of two series of bands of lines, leaving in places the white calico to be seen through, and by means of the interstices and of the darker parts of the bands, the double *moire* or water-pattern was produced, exactly in the same manner as in the plaintiff's patterns. The general appearance of the patterns of the plaintiff and defendants were similar as respects the method in which the white and dark spaces were left; but while the configuration of the water-figure in the designs of the plaintiff was wavy, the water-figure in the defendants' designs represented a succession of chevrons, or vandykes, thus forming a visible distinction.

For the defendants it was objected that, as the plaintiff had registered his patterns by sample only, without claiming by specification novelty for any particular part, the use of the same principle, producing a different style of design, was no infringement. The Vice-Chancellor thought that the registration of a pattern by registering a sample could not in any degree whatever give the person registering it a monopoly of the mode of producing a

CAP. XV.

certain effect, and that plaintiff might have been in a different position if he had specified that the intersection of the bands of lines was the gist of his invention. After referring to the case of *McCrea v. Holdsworth* he continued: "The precise question which was determined after so much litigation, was that a design, however complex, might become private property by the registration of a sample. It was strongly urged that if a design consisting of various parts, new and old, is registered by sample, without anything to disclaim what is old and point out what is new, future designers are put to a most unfair and unreasonable disadvantage, since they cannot tell what is sought to be protected, and have thus the unfair onus thrown upon them of finding out what is really claimed, and avoiding that in future designs. To this all the courts successively seem to have given the same answer: 'It is not thrown upon you to find out what is or is not claimed; all is claimed, not the separate parts, of which nine-tenths may be new or not, but the whole as one thing.' No exclusive right is claimed to any design which is not as one design substantially connected with that shewn by the sample registered. It seems to me, I confess, that the difficulties raised about the registration of a complex design could have been solved in no other way. After the application, which was to enter a verdict for the defendant, on the ground that the registration of such a complex design was bad in point of law, had failed before three courts, it was discovered that a very minute difference existed between the designs. What was claimed was the particular collocation of the shaded and bordered stars upon the ornamental chain surface. In the defendant's design the star was shifted or moved round, but so that the outward appearance remained exactly the same, and the two things were, for the purpose for which they were manufactured, identical. That the defendant's design was an infringement had been found by the jury without objection, or indeed contest, and the objection that there was no infringement in consequence of

a small variation between the designs, was never raised till an equity suit, which had stood over to await the result of the proceedings at law, was brought to a hearing. It was then argued, but surely not hopefully, that the defence never insisted upon before through the very long proceedings to try the right, was to be treated at the very last stage as shewing that the plaintiff had no case from the beginning. Lord Justice James, then Vice-Chancellor, disregarded this, as might have been expected; and the Lord Chancellor on appeal took the same view without hesitation.

“But the Lord Chancellor in giving judgment proceeded to point out the futility of the contention if it had been then raiseable. He stated that the words of some of the noble lords who addressed the House on the appeal were to be taken with due reference to the question before them, not in the most literal strictness; but nothing whatever was said by him to throw doubt on the general proposition, common alike to the judgments of the Exchequer Chamber, and to the speeches of Lord Chelmsford and Lord Westbury in the House of Lords, that the whole design is claimed when the registration is by sample, and that when there is no reproduction of the whole design there is no infringement; but that there may be a reproduction of the whole design, notwithstanding small variations in particular parts of it.

“Supposing a design in stars, arranged in a complicated series of interlacing and recurring curves, so as to produce a striking and pleasing effect to the eye, and the design to be registered by a sample shewing the design in five pointed blue stars on a white ground, a design with six pointed stars in the same arrangement would probably be an infringement, a design with black stars instead of blue might perhaps be an infringement, but a design of rose-buds in the very same arrangement, or of mere circular rings in the very same arrangement, would, I am inclined to think, be no infringement (a).

(a) Compare the words in *italics* of the Lord Chancellor, pp. 424, 425.

CAP. XV.

“The proprietor of the registered design might say, ‘The real merit, attraction, and novelty in my design is in the series of curves in which the elements of the design, whatever they may be, are arranged; everything else in my design is well known, obvious, and unattractive.’ The answer would be: ‘If you had claimed that you might possibly have protected it. But you have claimed a great deal more, and you cannot now disclaim the rest of it for the purpose of putting a subsequent design in the wrong.’ I am now dealing with the motion only, and express no final or conclusive opinion, but I am bound to say that the designs complained of seem to me different as wholes from those of the plaintiff, substantially and not colourably different; so different, indeed, that I can fancy an unbiassed person considering them as very much prettier and more attractive than those of the plaintiff. It is said that the principle on which the defendants’ effects are produced is precisely the same as that on which the plaintiff’s are produced; that when the plaintiff’s design was once known it required taste only, and not inventiveness or original power of design, to develop it into the defendants’; that, in fact, the defendants finding the plaintiff’s design attractive determined to work on it, as a thing from which a design different but having analogous attractions, might be developed. Whether these contentions are or are not well-founded, I express no opinion, but I may take the fact almost as admitted, I mean to say by the defendants, with reference to their working on the plaintiff’s design, but still they constitute in my opinion no case to shew that the plaintiff’s patterns registered by sample only have been infringed by the defendants. The motion therefore fails, and but for the unfortunate and inconvenient rule (derived from another state of practice) that the plaintiff must make such a motion if he intends to ask a perpetual injunction at the hearing, I should dismiss it: as it is, I can only order it to stand to the hearing.”

Great care must be taken not to be misled by the above opinion expressed by the learned Vice-Chancellor. The

latter part expresses more correctly the true ground of his decision, namely, that the designs complained of were different as wholes from those of the plaintiff, substantially and not colourably different; some expressions in the former part of the judgment apparently go beyond that which is warranted by the opinions of the law lords in *M'Creagh v. Holdsworth*, and it is somewhat to be regretted that they even went so far. The true test of the infringement of a design registered by sample is stated by perhaps the highest living authority in the appeal from the decree of Vice-Chancellor James in *M'Creagh v. Holdsworth* (a). "It is said that because you register a design of this kind for some useful purpose or other in connection with furniture, or whatever it may be, and instead of describing your design in words you choose to place your design, for which you seek protection, upon the register in the shape of a part of the article designed, that then you are tied down to that identical article so exhibited, and to the design so exhibited, and are not at liberty to complain of any person making a thing which shall be to all outward appearance exactly the same, and which shall for all purposes for which the thing is manufactured be identical, if the person who has determined to exhibit a design for all practical purposes identical with yours is astute enough to turn a star, or what is called a star in this case, of exactly the same number of foliages or points, in the opposite direction. On the other fabric it is apparently of exactly the same dimensions and effect to the eye, but if looked at by a microscope—which is not the way in which people regard furniture generally—or if looked at with a pair of spectacles very carefully, or looked at closely, not for the purpose of ascertaining its general effect, but so as to see how far a person might escape who was said to have pirated the design, it will be found that he has merely altered the position of the star by two hairs'-breadths. The thing seems to me to be perfectly idle, and it seemed to me once or twice during the course

(a) 23 L. T. (N.S.) 445.

CAP. XV.

of the argument, that Mr. Ince put the case as it ought to be put, although he did not apparently do so for that purpose. He said, twice or thrice, that it cannot be said to be the same or to the same effect. 'The same effect' is a very proper mode of describing it. . . . With the unerring judgment of their own eyes, the judge held and the jury held that these two articles were manufactured of the same stuff, manufactured of the same cloth, manufactured with the star and the chain, in exactly the same situation, as distinguished from position; that they were placed in the same part of the pattern, between the two links of the chain, as it were, the only difference being that the star was a little turned round, so that the point of the link would come between the intervals in the one case and would come upon the spur or projecting part in the other. That being the only difference, and that not being in the least a difference of effect in what was intended to be produced and used for the particular purposes for which it was used, the two things were identical, and I do not imagine that anything that was said by their lordships in the House of Lords means that if a person simply makes a thing which shall to the outward eye, and for every purpose for which it is usable, be identical with the other, that can possibly be protected. What was said, and very reasonably said, if I may be allowed to say so with respect, in the judgment of the House of Lords, was this: If you choose to protect your chain and star, and the other things which you have here, you must protect them just as they are represented, and you can only protect your pattern as representing exactly what is exhibited, and if there is the least difference of effect in that which is produced by your putting the star in a different situation, or putting it at a wider distance, or the like, which may easily be done with the identical pattern so as to produce an entirely different effect, all that will be left to the jury, and the jury will have to say whether or not the two things are the same. *I do not think it was intended by their Lordships to say that you shall do that which shall have to every*

eye exactly the same effect as that produced in the one case by the plaintiff which may be produced by the defendant, as long as he can shew you by a very minute examination, such as is never usual nor desirable, nor in any way likely to be had with reference to those who are purchasing the articles, that you produce by an infinitesimal variation of that kind a difference of pattern which will allow you to escape from doing that which it is just and right to do, namely, assuming the pattern which has been exhibited to be another pattern. This seems to me simply an attempt to stretch these observations, thrown out as they were by Lord Chief Justice Erle in the first instance, and afterwards by several noble lords in the House of Lords, to a purpose totally and entirely distinct from any possible purpose to which they were meant to be applied. It seems to me all that was meant was, you are not bound, as you are in patent cases, to distinguish the new from the old. In this particular case you have part of the pattern, namely the chain, which is altogether old; you have another part of it which is found by the jury, in combination with this chain pattern, to be new; and you are allowed to have this new pattern without distinguishing what is new and what is old; but if you choose to put it in that way and present it to the public without distinguishing what is new and what is old, you cannot expect to be protected as against the public in case they choose to use the portion you use in any manner substantially differing from your use of it. If they are used in exactly the same manner, as I hold they are in this case, and have the same effect, or nearly the same effect, then of course the shifting or turning round the spurs of the stars in this particular case cannot be allowed to protect the defendant from the consequences of the piracy."

The appointment and duties of the registrar are set forth in the 5 & 6 Vict. c. 100, ss. 14, 15, and the 6 & 7 Vict. c. 65, ss. 7-9. Under this last section a discretionary power is conferred upon him of refusing to register under the latter Act if it should appear to him that the

The appointment and duties of the registrar.

CAP. XV.

design brought to him for that purpose would more properly be registered under the former ; and further, he is at liberty to exercise his discretion in refusing to register any design which is not intended to be applied to any article of manufacture, but only to some label, wrapper, or other covering in which such article might be exposed for sale, or any design which is contrary to public morality or order ; subject, however, to an appeal to the Privy Council.

Power to dispense with drawings, &c., in certain cases.

If in any case in which the registration of a design is required to be made under either of the Designs Acts, it appears to the registrar that copies, drawings, or prints, as required by those Acts, cannot be printed, or that it is unreasonable or unnecessary to require them, he may dispense with such copies, drawings, or prints, and may allow in lieu thereof such specification or description, in writing or in print, as may be sufficient to identify and render intelligible the design in respect of which registration is desired. Whenever registration shall be so made in the absence of such copies, drawings, or prints, the registration is to be valid and effectual to all intents and purposes as if such copies, drawings, or prints had been furnished (a).

After the design has been registered, one of the two copies, drawings (or tracings), or prints, will be filed at the office, and the other returned to the proprietor with a certificate annexed, on which will appear the *mark to be placed* on each article of manufacture to which the design shall have been applied (b).

Certificate of registration.

This certificate, in the absence of evidence to the contrary, shall be sufficient proof of the design, and of the name of the proprietor therein mentioned, having been duly registered ; of the commencement of the period of registry ; of the person named therein as proprietor being the proprietor ; of the originality of the design, and of the provisions of the Copyright Designs Act, and of any rule under which the certificate appears to be made having

(a) 13 & 14 Vict. c. 104, s. 11. See 38 & 39 Vict. c. 93.

(b) 5 & 6 Vict. c. 100, ss. 15, 16.

been complied with. And such certificate may be received in evidence without proof of the handwriting of the signature thereof, or of the seal of the office affixed thereto, or of the person signing the same being the registrar or deputy registrar (a).

If the design is for an article registered under class 10, no mark is required, but there must be printed on such article, at each end of the original piece thereof, the name and address of the proprietor, and the word "Registered," together with the years for which the design is registered (b). The registration mark.

This alteration in the mode of marking the design for articles registered under class 10, was effected by the 4th section of the 21 & 22 Vict. c. 70.

If the design is for sculpture, no mark is required to be placed thereon after registration, but merely the word "Registered" and the date of registration.

If the design is for provisional registration, no mark is required to be placed thereon after registration, but merely the words "Provisionally registered" and the date.

Any person putting the registration mark on a design not registered, or after the copyright thereof has expired, or when the design has not been applied within the United Kingdom, is liable to forfeit for every offence £5 (c). Penalty for wrongful usage of the registration mark.

The provisions of the Copyright of Designs Act will be construed strictly, and should any copies of a registered design be sold without bearing the registration mark when necessary, and the name, address and date as provided by the Acts—protection will be lost. This case arose under the 6 & 7 Vict. c. 56, on a bill being filed by Mr. Pierce, described as the proprietor of a newly invented chair called "the registered royal step chair," against the defendants, who were furniture manufacturers, to restrain

(a) 5 & 6 Vict. c. 100, s. 16. See 13 & 14 Vict. c. 104, ss. 12-14, and 38 & 39 Vict. c. 93. And an action lies for false representation as to the registry of a design: *Barley v. Walford*, 9 Q. B. 197.

(b) *Harrison v. Taylor*, 3 H. & N. 301, reversed (Ex. Ch.) 4 H. & N. 815; 29 L. J. (Ex.) 3; 5 Jur. (N.S.), 1219.

(c) 5 & 6 Vict. c. 100, s. 11; *Barley v. Walford*, 9 Q. B. 197. See *Rodgers v. Nowell*, 5 C. B. 109. £10 by 21 & 22 Vict. c. 70, s. 7.

CAP. XV.

the sale of certain articles of furniture described as improved combined chair and steps, used principally for library purposes. The defendants, by their answer and the evidence, contended that the article was not a new invention, but that similar articles of furniture had been made and sold by them and others in the trade long before the registration of this particular article. In addition, they said that the plaintiff had sold some of the articles without having the word "registered" attached to them with the date of registration. It was given in evidence by a person who had been in the employ of the plaintiff, that he was his foreman at the time of the registration of the design, the 13th Nov. 1867. That, as such foreman, he had forwarded on the 15th Nov. 1867, an order to a die-cutter at Sheffield for a die to be made for stamping oval metal plates which should have on them the words "Alfred E. Pierce, 109 Hatton Garden, London," and also the word "registered" and the date of the registration, the "13 Nov. 1867," and also for the striking off and stamping 2000 of such plates to be delivered to plaintiff in London. That none of the said plates were delivered to the plaintiff until the 31st January 1868, when a packet containing 100 of such oval metal plates was delivered to him. That before the delivery of the said 100 plates there were not on the business premises of plaintiff any similar plates. That between the date of the said plaintiff's registration of his said design and the 31st Jan. 1868, a large number of combined chairs and steps made according to said plaintiff's said registered design, and amounting to upwards of fifty, were sold by plaintiff and delivered to various customers [the names of several of such customers were set out], and that they had not on them the word "registered" or the date of registration, but that all the said combined chairs and steps had on them an oval metal plate having on it the words "Alfred E. Pierce, patentee, 109 Hatton Garden, London," with the royal arms in the centre. The question was whether, under the circumstances, the

plaintiff could obtain the relief prayed. For him it was contended that the spirit of the Act had been fully complied with, but the Vice-Chancellor Giffard said he considered the words of the 3rd section of the Act too clear for argument. It was a statute which must be rendered strictly; and therefore from the fact contained in the evidence, which was not denied, that plaintiff had sold many of these articles without the word "registered" or the date of registration attached to them, he must dismiss the plaintiff's bill with costs (a).

But although a bill to prevent an infringement did not allege that the requirements of the Acts had been complied with, yet the Master of the Rolls held, that the bill was not on that ground alone open to demurrer (b). And it has been held that the copyright of a registered design is lost if the proprietor (whether English or foreign) sells the registered article even *abroad* without the letters, "Rd." being attached thereto, as required by the 5 & 6 Vict. c. 100, s. 4, and 24 & 25 Vict. c. 73; and so the benefit of the Acts is forfeited unless the proper registration marks are attached to all articles and substances to which the design is applied, whether the same are sold abroad or in the British dominions (c).

All designs of which the copyright has expired may be inspected at the Designs Office (d) on the payment of the proper fee; but *no* design, the copyright of which is existing, is, in general, open to inspection. Any person, however, may, by application at the office, and on production of the registration mark of any particular design, be furnished with a certificate of search, stating whether the copyright be in existence, and in respect of what particular article of manufacture it exists; also the term of such copyright, the date of registration, and the name and address of the registered proprietor thereof (e).

The registration books open to inspection.

(a) *Pierce v. Worth*, 18 L. T. (N.S.) 710.

(b) *Sarazin v. Hamel*, 32 Beav. 145; 9 Jur. (N.S.) 192; 32 L. J. (Ch.) 378-380.

(c) *Sarazin v. Hamel*, 32 Beav. 151; 9 Jur. (N.S.) 192; 32 L. J. (Ch.) 380.

(d) No. 1 Whitehall, S.W.

(e) 5 & 6 Vict. c. 100, s. 17. *Et vide* 6 & 7 Vict. c. 65, s. 10.

CAP. XV.

Any person may also, on the production of a piece of the manufactured article with the pattern thereon, together with the registration mark, be informed whether such pattern, supposed to be registered, is really so or not.

As this mark is not applied to a provisional registered design, or to articles registered under class 10, certificates of search for such designs will be given on production of the design, or a copy or drawing thereof, or other necessary information, with the date of registration.

In case of transfer of a registered design, whether provisionally or completely, a copy of the certified copy thereof must be transmitted to the registrar, together with the form of application properly filled up and signed. The transfer will then be registered, and the certified copy returned.

The following may be the form of transfer and authority to register:—

“I, *A.B.*, author [*or proprietor*] of designs No. _____ having transferred my right thereto [*or, if such transfer be partial*], so far as regards the ornamenting of _____ [*describe the articles of manufacture or substances, or the locality, with respect to which the right is transferred*], to *B.C.*, of _____, do hereby authorize you to insert his name on the register of designs accordingly” (a).

The following may be the form of request to the registrar:—

“I, *B.C.*, the person mentioned in the above transfer, do request you to register my name and property in the said design as entitled [*if to the entire use*] to the entire use of such design [*or, if to the partial use*], to the partial use of such design, as far as regards the application thereof [*describe the articles of manufacture, or the locality, in relation to which the right is transferred*].”

(a) The form of transfer may be varied at pleasure; no particular form is imperative.

The transfer and authority to register same.

The transfer of the copyright of a design must be in writing, as must also any partial assignment or licence (a). CAP. XV.
Transfer or
licence to be
in writing.
The 6th section of the Act provides that every person purchasing or otherwise acquiring the right to the entire or partial use of any design may enter his title in the register, and any writing purporting to be a transfer of such design, and signed by the proprietor, shall operate as an effectual transfer, and it is further provided that the registrar shall on request and the production of such writing, or in the case of acquiring such right by any other mode than that of purchase, on the production of any evidence to the satisfaction of the registrar, insert the name of the new proprietor in the register.

Upon this section and the 3rd and 5th sections of the Act it was that the Master of the Rolls, in the case of *Jewitt v. Eckhardt* (a), decided that an assignment must be in writing. "My reason," says Sir George Jessel, "is, that when you come to look at the framing of the Act of Parliament it stands in this way: the 3rd section provides that the proprietor of a design shall have the sole right to apply the same to any articles of manufacture for a certain term of years. Then when you come to the 5th section it makes the proprietor who is to have this sole right not merely a sole proprietor but a limited proprietor including, as I read it, a licensee. The words are: 'Every person acquiring for a good or a valuable consideration a new and original design, or the right to apply the same,' which is the same thing for the purpose of the Act of Parliament, 'to any one or more of the articles registered, or any one or more substances,'—you can divide it in that way, and can give a right to apply it to certain articles and not to others—'every person upon whom the property in such design or such right to the application thereof shall devolve'—it may devolve on an executor and so on—'shall be considered the proprietor of the design.' Therefore a licensee does acquire the right to a design as well as an assignee, so that a partial assignee, or a total assignee, or any person upon whom the right

(a) *Jewitt v. Eckhardt*, 8 Ch. Div. 404; 26 W. R. 415.

CAP. XV.

may devolve, whether executor or administrator, is also within the Act. Then it gives the person the right, not as proprietor according to the 3rd section, but to the extent to which his right may have been acquired, but not otherwise. It is a kind of supplement to, or interpretation of, the 3rd section. He shall have the sole limited right, or the limited sole right. It is not absolutely exclusive, but only to the extent of excluding other persons who have not any share of the right at all, and no further. But as I read the 6th section it provides that the person purchasing or otherwise acquiring the right to use any such design 'may enter his title in the register hereby provided, and any writing purporting to be a transfer of such design and signed by the proprietor thereof, shall operate as an effectual transfer; and the registrar shall, on request and the production of such writing, or in the case of acquiring such right by any other mode than that of purchase, on the production of any evidence'—that is, devolution, such as death or administration—'to the satisfaction of the registrar,' enter it on the register. Now what is the entering on the register?' 'I, A.B., author or proprietor of design No. , having transferred my right thereto, &c.' That shews it is a design already registered. You cannot enter on the register a transfer of any design not registered, and that transfer must obviously be in writing, because the writing is produced to the registrar. So that whenever you get a partial assignment, or a licence, or a devolution by law after the registration, it obviously must be in writing."

No time should be allowed to elapse between a transfer and its registration; for, in case of the bankruptcy of the registered proprietor of a design, after the execution of a transfer and before registration of such transfer, the copyright of the design would probably be considered in the order and disposition of the bankrupt, and would therefore pass to his trustee (a).

An original combination a proper subject of registration.

A new combination of old patterns may be a new and

(a) See *Longman v. Tripp*, 2 Bos. & Pul. New R. 67; *Hesse v. Stevenson*, 3 Bos. & Pul. 565; *Re Dilworth*, 1 Dea. & Clitt. 411.

original design; and as such would be a proper subject of registration.

This was determined in the Exchequer Chamber, on appeal from the Court of Exchequer, in the case of *Harrison v. Taylor* (a). The plaintiff registered, under the 5 & 6 Vict. c. 100, a design for ornamenting woven fabrics. The design was applied to a fabric woven in cells, called "The Honeycomb Pattern," and it consisted of a combination of the large and small honeycomb, so as to form a large honeycomb stripe on a small honeycomb ground. Neither the large honeycomb nor the small honeycomb was new, but they had never been used in combination before the plaintiff registered his design. Other fabrics had been woven with a similar combination of a large and small pattern. In an action against the defendant for infringing the plaintiff's copyright it was held that the plaintiff's design was a "new and original design" within the meaning of the 5 & 6 Vict. c. 100.

But where four old designs were respectively applied to three ribbons and to a button, and the three ribbons were then united by the button so as to form a badge, it was held that such union did not amount to a new design within the above statute (b).

A. registered as "a design" within class 12, sect. 3, of the 5 & 6 Vict. c. 100, a pattern of a woven fabric. He gave no written description of his claim. The design consisted of six pointed stars on an Albert chain arranged in a particular manner, and shaded, and he claimed "the particular collocation of the shaded and borrowed stars upon the ornamental chain surface, as shewn in the registered pattern, thus forming together the ornamentation of the woven fabric." B. slightly altered the com-

(a) 3 H. & N. 301, reversed (Ex. Ch.) 4 H. & N. 815; 29 L. J. (Exch.) 3; 5 Jur. (N.S.) 1219.

(b) *Mulloney v. Stevens*, 10 L. T. (N.S.) 190. A claim to a monopoly in a design registered under the 6 & 7 Vict. c. 65, for the shape or configuration of the body of a four-wheel dog-cart was rejected, because the design consisted only of an arch in the fore part of the carriage, made a little higher than that in ordinary use, to permit the convenience of larger fore wheels: *Windover v. Smith*, 11 W. R. 323; 32 Beav. 200; 32 L. J. (Ch.) 561; 9 Jur. (N.S.) 397; 7 L. T. (N.S.) 776.

CAP. XV.

ination, but not so as to affect the general appearance of the pattern, and it was adjudged that this was an infringement of the pattern registered (a).

But the combination must be one design and not a multiplicity.

In the *Queen v. Firman* (b) it was decided that the result of simultaneously applying two old and known designs to the ornamenting of a button might be a new and original combination to be protected as a design; but the result of the combination to be protected as a "design" must be one design and not a multiplicity of designs (c).

Therefore where a claim was made in respect of a design of a shawl, and it was contended that there were five points in respect of which the shawl was new and entitled to protection—first, a reversible cloth, with the two sides of different texture and colours; secondly, a scallop pattern in parts of the shawl; thirdly, a particular border round the shawl; fourthly, a particular configuration of the corners of the shawl; fifthly, a newly invented fringe to surround the shawl; and the evidence clearly shewed that all these five points, or "designs," had been in public use and had been applied to shawls before the registration of the plaintiff's shawl, but that the combination of them in the plaintiff's shawl was new; the court held that such a combination was not a "design" within the meaning of the Act of Parliament. "The five points relied upon," said Lord Campbell, C.J., "being all old, no distinction is to be made between them and any other in the texture, configuration, or ornaments of the shawl. Therefore the combination supposed to constitute the design which the plaintiff now seeks to protect comprehends all that is to be discovered on both sides of the shawl, colour as well as shape. . . . The design is always to be considered different from the 'article of manufacture or the substance to which it is to be applied.' This is particularly to be observed in sect. 3, in which the articles of manufacture are enumerated to which the design is to be applied. Among these

(a) *McCrea v. Holdsworth*, 23 L. T. (N.S.) 444.

(b) Cited in *Harrison v. Taylor*, 3 H. & N. 304.

(c) *Norton v. Nicholls*, 5 Jur. (N.S.) 1202, 1205.

(classes 7 and 8) are 'shawls,' the 'shawl' is not the 'design,' but 'the article of manufacture to which the design is to be applied.' An ornament for a lady's gown may well be a 'design,' to be protected, although the ornament be the result of a new combination of lace and ribands; but the gown itself could hardly be such a 'design,' although it be granted that the component parts and ornaments, before well known separately, are arranged according to a fashion entirely new. Such an extension of the statute is quite unnecessary for the object which the legislature seems to have had in view, and we need not point out the great public inconvenience which would arise if we were to put such a construction upon it" (a).

The mere copy of a photograph of a well-known public character, which is common to all the world, is not "a new and original design" within the meaning of the Act. Thus where, in the case of *Adams v. Clementson* (b), the plaintiff, who was a manufacturer of earthenware, claimed an injunction to restrain the defendant, who was in the same line of business, from infringing his copyright in a design which he had registered under the 5 & 6 Vict. c. 100, and it appeared that the design consisted of a portrait of General Martinez de Campos, Captain General of Cuba, copied from a photograph which had been sent to the plaintiff from Cuba, and which had been applied by him to plates and other articles of earthenware which had been sent out to Cuba for sale; and that the defendant had received an order for a supply of earthenware and been furnished with a similar photograph of the General, an injunction was refused.

Copy of photograph of well-known public character not a new design.

The 7th section of the 5 & 6 Vict. c. 100, enacts, for preventing the piracy of registered designs, "that during the period of any such right to the entire or partial use of any such design, no person shall either do or cause to be done (c) any of the following acts, with regard to any articles

Remedies for piracy of the right in designs for ornamental purposes.

(a) *Norton v. Nicholls*, 5 Jur. (N.S.) 1203; 1 El. & E. 761; 7 W. R. 420.

(b) W. N. (1879) 32.

(c) *Mallet v. Howitt*, W. N. (1879) 107.

CAP. XV.

of manufacture or substance, in respect of which the copyright of such design shall be in force, without the licence or consent in writing of the registered proprietor thereof" (that is to say):—

No person is to apply any registered design, or any fraudulent imitation thereof, for the purpose of sale, to the ornamenting of any article. No person is to publish, sell, or expose for sale, any article to which a pirated design, or any fraudulent imitation of a registered design, shall have been applied, after the person has received verbally or in writing, or otherwise, from any source other than the proprietor, notice that his consent has not been given to such application, nor after the person has been served with or had left at his premises a written notice signed by the proprietor or his agent.

Under this section it has been held that a manufacturer of an article within the provisions of the Act is bound to inquire whether the design has been already registered.

In the case referred to (a) the defendant was not a manufacturer, but a lace merchant, who bought the undressed lace from manufacturers and then caused it to be dressed and completed ready for sale. He had received a pattern of lace sent him by letter of the plaintiff's registered design, which he had sent with other designs to the manufacturer. He had only sold one parcel of the lace complained of when he received notice that the same was registered, and stopped the sale. The court being of opinion that the defendant's design was an imitation of the plaintiff's, the only question was, whether what had been done by the defendant came within the section under consideration, and the Master of the Rolls held, that the defendant, though not the actual manufacturer, had "caused to be applied" the plaintiff's design within the meaning of the 7th section, and that this amounted to piracy.

(a) *Mallet v. Howitt*, W. N. (1879) 107.

The words of the old Act rendered it necessary that the proprietor should prove that the offending party exposed the pirated goods for sale, knowing that the proprietor had not given his consent; and the proof by the proprietor of this knowledge on the part of the offending party was more than the proprietor could, in general, adduce. The objectionable words are omitted in the above clause, and in their stead are substituted the words relative to notice.

A notice under this section is not sufficient unless it expressly state that the proprietor of the design has not given his consent to the application of the design; and whether he intends to sue either for the application of the design to an article of manufacture or for the sale of such article with the design applied. It should also specify the real claim intended to be made.

Thus where a notice was addressed to the defendants, both as manufacturers who had applied the design to articles of manufacture, and as retail dealers who had sold articles of manufacture to which the design had been applied by others, and stated, that if the defendants either applied the design to an article of manufacture, or sold an article of manufacture with the design applied to it, the plaintiff would sue them; it was held that a sufficient notice had not been given under this section, the court being of opinion that it was not tantamount to a notice that he had not given his consent to the application of his design to the manufactured article, and that such notice was perfectly consistent with the fact of his having actually given his consent, and could not be considered the performance of a condition introduced to save retail dealers from very serious liability (a).

In order to establish a case of piracy under these provisions, the plaintiff must prove that the alleged piracy is an application or a fraudulent imitation of his registered design.

In a late case (b), it was contended by the defendant

(a) *Norton v. Nicholls*, 5 Jur. (N.S.) 1203.

(b) *M'Crea v. Holdsworth*, 2 De G. & Sm. 496; 2 Jur. 820.

CAP. XV.

that this 7th section must be taken in conjunction with the 3rd section, and must be held to restrict the expression, "sole right to apply the same," to an application *for the purpose* of sale during the period of the protection afforded by the Act, and in answer to this contention on the part of the plaintiff it was argued that if the privilege were thus restricted, it would lose a great part of its value, inasmuch as the period during which protection is afforded by the Act might be employed in preparation for the purpose of selling piracies at the very moment when the period expired. The Vice-Chancellor, however, thought that the manufacture, although without the intention of selling within the period, was a piracy within the meaning of the Act. The 3rd section conferred the title. The 7th section must be read in conjunction with the 8th, which provided for the recovery of penalties in the cases specified. He did not consider the legislature intended the Act to be construed according to the argument of the defendant.

Ignorance of the registration of the design does not excuse the piracy.

The above section is extended by 6 & 7 Vict. c. 65, s. 2, to designs for articles of manufacture having reference *to some purposes of utility*, so far as the design shall be for the *shape and configuration* of such article.

As to what is a subject proper for registration under the Designs Act.

Where the design was of a new ventilator, consisting of an oblong pane of glass fixed in a frame, which was inserted into an ordinary window-frame, and was hinged at the top, so as to open and admit the air, by means of a screw acted upon by cords passing over its head, and having a half-pane of glass fixed in the lower portion of the frame in which the ventilating frame ended, so as to prevent a downward draught, the claim of the inventor was said to be for the general configuration and combination of the parts, some of which were not original. This was held not to be a design for the shape and configuration of an article of manufacture within the 6 & 7 Vict. c. 65, and therefore not the subject of registration; and a convic-

tion for the infringement of such a registered design was quashed for want of jurisdiction (a). Erle, J., in giving his opinion that the invention was not within the meaning of the statute, said: "It is a combination of means for the purpose of easily admitting air and avoiding a downward draught, and there is a skilful combination of means to produce this result. But the particular shape or configuration is accidental and wholly unimportant, and unconnected with the purpose to be attained. An oblique pane is of no particular use; a square or circular pane, and a straight or curved screen, would produce the same result. If the prosecutor relies on the shape or configuration as producing a useful result, he fails in making out that the defendant has infringed his right, because there is no doubt that the shape of the defendant's invention varies materially from that registered by the prosecutor; in the one the pane being nearly square and in the other oblong, and the screw being straight in the one, and crooked in the other. The prosecutor intended to protect a combination of means producing a useful result, and that is within the law relating to patents, and not within statute 6 & 7 Vict. c. 65" (b).

Again, the design of a "protector label," which consisted in making in the label an eyelet-hole, and lining it with a ring of metallic substance, through which a string attaching the label to packages passed, was held not to be within the protection of this statute (c). But the design of a newly invented brick, the utility of which consisted in its being so shaped that when several bricks were laid together

(a) *Reg. v. Bessell*, 15 Jur. 773; 20 L. J. M. C. 177; 16 Q. B. 810.

(b) The contrary was held in *Heywood v. Potter*, 1 E. & B. 439; 17 Jur. 528; 22 L. J. (Q.B.) 133; but subsequently the 21 & 22 Vict. c. 70, s. 4, enacted that nothing in the 4th section of the 5 & 6 Vict. c. 100, should extend, or to be construed to extend, to deprive the proprietor of any new and original design applied to ornamenting any article of manufacture contained in the said 10th class of the benefits of the Copyright of Designs Act or of this Act; provided there shall have been printed on such articles at each end of the original piece thereof the name and address of such proprietor, and the word "Registered," together with the year for which such design was registered.

(c) *Margetson v. Wright*, 2 De G. & Sm. 420.

CAP. XV.

in building a series of apertures were left in the wall through which the air might circulate, and a saving in the number of bricks effected, was held to form the proper subject of registration under this Act (a).

The inventor of a design for a "dog-cart phaeton" claimed four things as new and as conducive to the *utility* of the design, the specified purpose of utility being that "higher front wheels could be used, or closer coupling effected, and a saving in horse power." Three of the things claimed as new (the seat, the opera board, and the boot) were not new, and did not contribute to the utility. The fourth (the curved arch under which the wheels turned) did contribute to the utility, but it was not new. It was held that the design did not come within the protection of 6 & 7 Vict. c. 65. Neither was it protected under the 5 & 6 Vict. c. 100, as an *ornamental* design, not having been registered under that Act (b).

The subject of registration must not be an article of manufacture, but a design; that is, a combination of lines producing pattern, shape, or configuration, by whatever means such design may be applicable to the manufacture. The "design" is always considered different from the "article of manufacture, or the substance to which it is to be applied."

This is particularly to be observed in section 3 of the Act in course of examination, where the articles of manufacture are enumerated to which the design is to be applied. Among these are "shawls." The "shawl" is not the "design," but the article of manufacture to which the design is to be applied.

Mr. Carpmael, of the Repertory of Patent Inventions, Lincoln's Inn, has thus endeavoured to make the distinction clear: "In registering any new design for a table lamp, all which could be secured under such registration would be some peculiarity of form of an ornamental

(a) *Rogers v. Driver*, 20 L. J. (Q.B.) 31; 16 Q. B. 102. See *Millingen v. Picken*, 1 Com. Ben. Rep. 799; 14 L. J. (N.S.) (C.P.) 254; 9 Jur. 714.

(b) *Windover v. Smith*, 32 Beav. 200; 32 L. J. (Ch.) 561; 7 L. T. (N.S.) 776.

character in the stem or oil vessel, or in the glass shade, or some ornament applied thereto, if under the first mentioned statute, or some novelty in the shape or configuration, without reference to ornament, if under the second statute;—no new mode of supplying oil to the wick, nor any new mode of raising the wick, nor any new apparatus for supplying air to support combustion, could become the subject-matter of a registration. The simple configuration, or contour, or ornament of the lamp, or some particular part of the lamp, would be the only subject for registration; and any person might, without infringing the registration, make the same description of lamp, all parts acting mechanically in the same manner to produce the same end, so long as the outer configurations were not imitated. A patent, on the contrary, can scarcely ever be said to depend on shape; supposing a patent be taken for any improved construction of lamp—such, for instance, as an improved means of raising the oil from the stem or pillar of a table lamp,—the patent would be equally infringed whether the external figure or design be retained or not so long as the means of raising the oil were preserved.”

There are several methods by which redress may be obtained in cases of infringement of copyright in designs.

It is provided by the 9th section of the 5 & 6 Vict. c. 100, that notwithstanding the remedies given by the Act for the recovery of penalties, it shall be lawful for the proprietor in respect of whose right such penalty shall have been incurred (if he shall elect to do so) to bring such action as he may be entitled to, for the recovery of any damages which he shall have sustained, either by the application of any such design or of a fraudulent imitation thereof, for the purpose of sale, to any article of manufacture or substance, or by the publication, sale, or exposure to sale as aforesaid, by any person, of any article or substance to which such design or any fraudulent imitation thereof shall have been so applied, such person