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the publisher at the date of the registration: it requires that the name of the person who first published the book should appear, and this for the best of reasons, in order that everybody connected with the registration may ascertain for himself how far the right of a person claiming from or under the first publisher may be successfully challenged."

Sufficient to enter first publication under name of firm.

But in registering it is sufficient to enter the first publisher under the trade name of the firm, and the actual proprietor of the copyright at the time of registration (a), without stating who the first proprietor was, or how the copyright devolved upon the present proprietor.

So where an author registered his work in 1877, it having been published in 1854, by entering the name of the publishers and place of abode as "Newby & Co., Welbeck Street, Cavendish Square, London," and the name and place of abode of the proprietor of the copyright as Christopher Edward Weldon, and the date of the first publication as "July 16, 1854," and it was objected that the name of the original proprietor should have appeared, Vice-Chancellor Malins held the registration to be sufficient. He considered it clear that the "name and place of abode of the proprietor of the copyright," meant not the original proprietor, but the person who is the proprietor at the time the registration takes place. "What difference," said he, "can it make to anybody who the original proprietor was? It may be material to know who the original publisher is, the object being that a person registering may not pass off a fraudulent entry, but that he shall give the public an opportunity of inquiring of the publisher whether it was a genuine transaction, or whether the date has been fictitiously inserted, and therefore it is required that the name of the original publisher should be given, but it does not mean

(a) See *The London Printing and Publishing Alliance, Limited, and Keep & Co. v. Cox*, 7 T. L. R. 738; [1891] 3 Ch. 291.

that the original proprietor, but that the present proprietor should be given" (a).

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

First date of publication must be stated.

The correct title of the book must be entered on the register. In an action in the County Court for an injunction and damages for infringement in a trade catalogue; infringement was admitted, but the defendant alleged that the title of the catalogue was not duly registered. It appeared that on the outside cover of the catalogue were the names, occupations, and addresses of the defendants as manufacturers of shop fittings. On the first inside page the names, occupations, and addresses were repeated, but at the foot was added "Illustrated Catalogue and Price-List. Shop fittings of every description kept in stock or made to order." There was nothing else in the nature of a title. The work contained illustrations and prices of shop fittings. It was registered under the title of "Illustrated book of shop fittings," in the names of the plaintiffs. The judge held that "the title" of the work was not properly registered under the Act, and this decision (reversing that of the Divisional Court) was confirmed by the Court of Appeal (c).

Correct title must be registered.

(a) *Weldon v. Dicks*, 10 Ch. Div. 247; "Trial and Triumph."

(b) *Page v. Wisden*, 20 L. T. (N.S.) 435; 17 W. R. 483; *Thomas v. Turner*, 33 Ch. Div. 292.

(c) *Harris and another v. Smart*, 5 T. L. R. 594.

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In the case referred to there was a title, and in a previous edition of the catalogue the same words occurred on the outside page, and also on the same part of the inside page, as the words in the catalogue in question, and those words had previously been registered as a title. Consequently the parties had actually admitted that there was a title, and it was incumbent upon them to register this accurately.

The Lord Chief Justice Coleridge considered that if the old-fashioned plan of having no short title, but a long description of the author and his work were revived, a question might arise whether taking a part of that description and registering it as the title would not be sufficient. It is not likely that we should ever return to the practice of the early printers of the 15th century, who employed no title page at all, but it was possible that books might yet be issued occasionally without a title page, and even without what in early times answered to a certain extent its object, a colophon. If such a case should arise the probability was that a statement of the fact, together with a description of the book, would be sufficient for the purpose of registration. The Act required "the title" to be entered, but if there were none, it could not be entered; all that the case of *Harris and another v. Smart* decided was that if there were a title it must be correctly entered on the register.

As to the
place of
residence.

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

As to the
abode of the
assignee.

The provision with reference to the place of abode of the assignee would seem not to apply to the case of an

(a) 1 C. B. (N.S.) 182; *Nottage v. Jackson*, 11 Q. B. D. 627; 49 L. T. (N. S.) 339.

assignee to whom the proprietorship has been assigned, not according to the statutory mode, but by an independent method. As soon as the copyright is established in the original proprietor, there is nothing to prevent him from assigning by any other method, although the statute provides one more convenient and less expensive than the ordinary mode of assurance by deed. If the statute is resorted to, the terms of it must be complied with. Unfortunately, there is a discrepancy between the enactment in the 13th section, and the schedule No. 5, to which that section expressly refers. The section requires that there shall be an entry "of such assignment, and of the name and place of abode of the assignee thereof, in the form given in that behalf in the said schedule," but when we turn to the schedule there is no reference to the place of abode of the assignee. In *Wood v. Boosey* (a) the question arose, whether section 24 (which enacts that no proprietor of copyright shall maintain an action for infringement of it, unless he shall have caused an entry to be made in the book of registry pursuant to the Act) applies to an assignee. Cockburn, C.J., without directly deciding the point, said: "I observe a distinction in the earlier sections between the term 'proprietor' (as applied to the person by whom the work is originally published and in whom the property is vested), and any person who takes by assignment from him; and there is no provision in the statute which gives the assignee a right to have his name inserted in the book of registry as the new proprietor. The only case in which the change of the name of the proprietor is to be made, is where the statutory form of assignment is resorted to, and even in that case it is only the assignor who can insist on the change being made in the book of registry. Taking all this into account, it seems to me that to hold that section 24 applies to an assignee, who has no power under the statute, either through this court or by any other means, to enforce registra-

(a) 7 B. & S. 869, 897; L. R. 2 Q. B. 340; affirmed in Ex. Ch. L. R. 3 Q. B. 223.

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tion of himself as 'proprietor,' would work considerable injustice."

Expunging
or varying
entry.

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

But the entry
must be
clearly shown
to be false.

It seems that the court will not exercise its power under the above section to expunge any entry of proprietorship of copyright in the registry book, unless it be clearly and unequivocally shewn that it is false ; or vary it, unless satisfied by affidavit that in doing so it would make a true entry (c). To induce the court to interfere it must be satisfied that there is something unfair in the entry, by reason of the misconduct of the person who made it, or some right of the applicant which has been injuriously affected thereby.

Who has a
right to have
entry ex-
punged.

It is not every one who disputes the plaintiff's title, who has a right to call upon the court to expunge the entry ; for it would seem that there is no power to restore the entry, if once struck out ; and that the Court ought not, therefore, to take such a step, unless it be clear that the plaintiff has no right to use the entry at the trial, and

(a) *Graves' Case*, L. R. 4 Q. B. 721—724, and the case of 'The Roll-Call,' *Publishers' Circular*, Feb. 16, 1876 ; *Ex parte Poulton & Son*, 53 L. J. Q. B. 320 ; 32 W. R. 648.

(b) See *Ex parte Bastow*, 11 C. B. 631.

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

this is a point which ought to be settled, not on affidavits, but by an issue. And in one case (a), where an additional entry had been made at Stationers' Hall concerning the copyright of Auber's opera, 'Fra Diavolo,' subsequent to the commencement of disputes, and an application was made under section 14 to have the entries expunged, the court refused to expunge the entry, but ordered an issue to be tried to determine the question of copyright, on the trial of which the entry was (by consent) not to be used, and stayed proceedings in the action in the meantime.

In *Ex parte Davidson* (b) Cocks brought an action against Davidson for publishing three pieces of music alleged to be the copyright of Cocks. Before the action three entries had been made in the registry. These entries as they stood would afford *prima facie* evidence of Cocks' copyright in the three pieces. Davidson obtained a rule nisi to expunge or vary these entries. It was obtained on an affidavit by which it appeared that Davidson claimed no copyright in the airs himself, but that his case was that they were old pieces, and that the persons who on the entries professed to be the authors were not really the authors; and the affidavits deposed to information and belief as to the facts, which, if true, proved the pieces were older than the supposed authors. The counsel for Cocks refused to consent not to use these entries on the trial. The court declined to expunge the entries, but made an order, without consent, that the rule should be enlarged till the trial of an issue to determine

(a) "Persons aggrieved" in general are those whose title conflicts with that of the person registered: *Chappell v. Purday*, 12 M. & W. 303. But in *Ex parte Poulton & Son* (53 L. J. Q. B. 320; 32 W. R. 684), the Court (Denman and Williams, JJ.) made an order varying the entry upon the application of the person who had caused the incorrect entry to be made. As to who is a party aggrieved under the 14th section, see further *Ex parte Davidson, supra*. But a person convicted of infringing the copyright in certain paintings and photographs of the registered proprietor, and who sets up no title in himself or adduces no evidence to rebut the *prima facie* evidence of proprietorship afforded by the book of registry, is not a person "aggrieved" within the meaning of the above section: *Re Walker & Graves*, 20 L. T. (N.S.) 877.

(b) 2 Ellis & B. 577 (1853).

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the question of copyright, in which Cocks should be plaintiff, and on the trial of which the entries should not be used; and that in the meantime proceedings in the action should be stayed.

There is no appeal from an order of the Divisional Court ordering an entry to be expunged, and the order of a vacation judge sitting as a Divisional Court is equivalent to an order of such court (a).

No copyright acquired by registration before publication.

No copyright is acquired under 5 & 6 Vict. c. 45, by the registration of a book before its actual publication (b). The statute contemplates two things: first, that the person who makes the entry at Stationers' Hall shall be the proprietor of the copyright, and secondly, that the book to which the entry relates shall be a published book. Consequently, no man who is not the proprietor of the copyright in a published book, can make an entry with respect to it that will be of any avail (c). Until the thing is published and given to the world, it is not within the statute (d). And the mere registration of the name of a proposed periodical will not give copyright in that name or the right to use it as a trade-mark. In *Hogg v. Maxwell* (e), it was contended, that as by sections 2 and 13 of 5 & 6 Vict. c. 45, every "part" of a book may be registered, and a right to restrain the piracy of it thereby

Registration of name of intended periodical will not give copyright.

(a) In the matter of the registration of a picture "The Young Duchess," under the Copyright Act, 1862, 8 T. L. R. 41, see *Ex parte Davidson*, 18 C. B. 297. *Chappell v. Purday*, 12 M. & W. 303, as to appeal generally.

(b) "It is inconsistent with the whole scheme of the Copyright Act," said Vice-Chancellor Wood, "that you should be able to register a book not published; as the Act gives a right merely from the date of the first publication, and it must therefore be idle to register a book, as it were, in embryo." *Correspondent Newspaper Co. v. Saunders*, 11 Jur. (N.S.) 540; 13 W. R. 804; 12 L. T. (N.S.) 540; *Maxwell v. Hogg*, *Hogg v. Maxwell*, L. R. 2 Ch. 307; *Henderson v. Maxwell*, 5 Ch. Div. 892; *Cassell v. Stiff*, 2 Kay & J. 279; see also *Murray v. Bogue*, 1 Drew. 353; *Talbot v. Judges*, 3 T. L. R. 398.

(c) *The London Printing and Publishing Alliance (Limited) v. Horace Cox*, [1891] 3 Ch. 291; 7 T. L. R. 738.

(d) *Henderson v. Maxwell* (2), 5 Ch. Div. 892.

(e) L. R. 2 Ch. Ap. 316; 36 L. J. (Ch.) 433; 16 L. T. (N.S.) 133; *Schove v. Schmincké*, 33 Ch. Div. 546; 55 L. J. (Ch.) 892; 55 L. T. 212; 34 W. R. 700; *The Primrose Press Agency Co. v. Mark Knowles and others*, 2 T. L. R. 404.

acquired; the registration of the title 'Belgravia' by the Messrs. Hogg in October, 1863, three years before the publication of a magazine bearing that name, gave them a copyright in that title. To this Lord Cairns replied: "It is said that the word 'Belgravia' being used upon the title-page of the magazine, was part of a volume. But at the time of making the entry in the registry of Stationers' Hall there was no volume, no part of a volume, no sheet, no separate portion of a publication of any kind or description. There was nothing in existence except that very entry itself, and the entry of the name of a future publication. It is quite absurd to suppose that the legislature in providing for the registration of that which was to be the *indicium* of something outside the registry, in the shape of a volume, or part of a volume, meant that by the registration of one word, copyright in that one word could be obtained, even although that one word should be registered as what was to be the title of a book or of a magazine. . . . I apprehend that if it were necessary to decide the point it must be held that there cannot be what is termed copyright in a single word, although the word should be used as a fitting title for a book. The copyright contemplated by the Act must be not in a single word, but in some words in the shape of a volume, or part of a volume, which is communicated to the public, by which the public are benefited, and in return for which a certain protection is given to the author of the work."

An attempt to secure a title has been made by registering a dummy book to which the title of an intended book has been appropriated, and it is thought by this means to obtain an exclusive right to the title. This is probably a delusion. No case has ever gone beyond the principle that the proprietor of the particular title has a right to prevent any other person from adopting the same name for any other *similar production*. When the proprietor of the *Era* newspaper sought to restrain the use of this title with the addition of "New" by a rival publication, the Lords

Attempt to
secure title by
dummy book.

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Justices reversed the decision of Vice-Chancellor Bacon, and held that there was no ground for granting an injunction. They considered that the real question was this, "Is what appears on the front of the paper calculated to deceive an ordinary purchaser into the belief that the article sold to him is other than what it seems, and what it seeks to imitate?" Unless fraud in a sense is proved, or at least a probability of a deception or imposition on the public is established, a plaintiff could not well succeed. In an American case (a) the Court distinctly held that the title of a copyrighted publication was not capable of protection as copyright, *except in conjunction with the publication which it was used to designate*, and that the copyright in the paper in question, not having been infringed, that in the title had not been. In the case referred to, Mr. Justice Shepley puts the point in question very clearly. "It is only," said he, "as part of the book, and as the title to that particular literary composition that the title is embraced within the provisions of the Act. It may possibly be necessary in some cases in order to protect the copyrighted literary composition, for courts to secure the title from piracy, as well as other productions of the mind of the author in the book. The right secured by the Act, however, is the property in the literary composition, the product of the mind and genius of the author, and not in the name or title given to it. The title does not necessarily involve any literary composition; it may not be, and certainly the statute does not require that it should be, the product of the author's mind. It is not necessary that it should be novel or original. It is a mere appendage which only identifies and frequently does not in any way describe the literary composition itself or represent its character. By publishing, in accordance with the requirements of the copyright law, a book under the title of the life of any distinguished statesman, jurist or author, the publisher could not prevent any other author

(a) *Osgood v. Allen*, 1 Holmes (Amer.) 185.

from publishing an entirely different and original biography under the same title. When the title itself is original, and the product of the author's own mind, and is appropriated by the infringement, as well as the whole or a part of the literary composition itself, in protecting the other portions of the literary composition, Courts would probably also protect the title. But no case can be found either in England or this country, in which, under the law of copyright, Courts have protected the title alone separate from the book which it is *used to designate*" (a).

The entry requires the date of publication to be given, and the form in the schedule to the statute makes this clear, and this obviously cannot be given if the book be not already published.

A proprietor of the copyright in a periodical in order to obtain protection for articles composed for publication in the periodical under section 18 must by section 13 make entry of the title, the time of publication and so on in the register of Stationers' Hall (b).

In the case of any encyclopædia, review, magazine, periodical work, or other work published in a series of books or parts, it is enough to register the title of the work, the date of the publication of the first volume, number or part, and the name and place of abode of the owner and the publisher. When the first volume, number, or part has been registered, all following numbers of the same work or series will be protected, without the necessity of any additional registration. As registration of the first number of a periodical applies to future issues, it extends to, and protects matter not published at the time of registration. But the copyright cannot vest in any number of the periodical until that number is published (c).

Registration necessary to protect articles in periodicals.

Of encyclopædias, reviews, magazines and periodical works.

(a) See *Dicks v. Yates*, 18 Ch. Div. 78 ; *Licensed Victuallers' Newspaper Co. v. Bingham*, 38 Ch. Div. 139.

(b) See *Walter v. Howe*, 17 C. D. 708 ; *Bradbury v. Sharp*, W. N. (1891), 143 ; *The Trade Auxiliary Co. (Limited)*, *Cate & Perry v. Middlesborough and District Tradesmen's Protection Association (Limited)*, 40 Ch. D. 425 ; 5 T. L. R. 168, 254 ; *Cate v. The Devon and Exeter Constitutional Newspaper Co. (Limited)*, 5 T. L. R. 229 ; 40 Ch. D. 500.

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

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Parties registering must be owners of copyright at time of registration.

In the case of the *London Printing and Publishing Alliance, Ltd. v. Cox* (a), it was held, by Vaughan Williams, J., on the authority of *Heap v. Hartley* (b) and *Reade v. Bentley* (c), that where the painter of a picture, after giving a licence to A. to publish it in monochrome, assigns the entire copyright to B., without notice of the licence, and then A., without notice of the assignment, publishes in monochrome, B. can sue A. for infringement.

K. & Co., art colour painters who were owners of a picture called 'The Bride,' and the copyright in it, entered into an agreement with the A. Co. the terms of which were embodied in a letter of the 19th April, 1890, from K. & Co. "for 55,000 copies of 'The Bride,' price £13 9s. per 1000 copies, which price includes sole and entire copyright net. 5000 copies not later than September, 1890; balance, 50,000, not later than November 15th, 1890. Picture and frame to become your property for an extra sum of £17, we to insure and take all risks of picture during time of progress of work. Terms of payment bills at 5, 6, and 7 months from date of delivery of goods." On the 20th May, 1890, K. & Co. registered themselves as owners of the copyright. After this the A. & Co. & K. & Co. commenced an action against an infringer, and Vaughan Williams, J., gave a judgment giving penalties to the plaintiffs. The defendant appealed and it was held by Fry and Lopes, L.JJ., that the title to the copyright passed immediately by the letter of the 19th April, 1890; that K. & Co. therefore were not owners of the copyright at the time of the registration, and did not by registration acquire a right to sue: that the A. & Co. not being registered could not sue, and that the action must therefore be dismissed. Held by Lindley, L.J., that the negotiations ended by the letter of the 19th April amounted to an agreement by K. & Co. to sell the

(a) [1891] 3 Ch. 291; 60 L. J. Ch. 707; 65 L. T. 60; 7 T. L. R. 738 (C. A.).

(b) 42 Ch. D. 461.

(c) 3 K. & J. 271.

copyright to the A. Co., but did not amount to an assignment of it, and that K. & Co. being the registered proprietors could sue as trustees for the A. Co., and that the action could be maintained.

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The registration of the first number of a periodical publication is, as we have seen, sufficient to protect the whole (a). So also the registration of the first number of a periodical or magazine will enable the proprietor to prevent the publication in a separate form of a serial published in successive numbers of the periodical, although neither the serial nor the first number containing it has been separately registered (b). Thus where the proprietor of a magazine called "The Orb," employed a person to write a serial called "The Verger's Daughter," for publication in successive numbers, upon the usual terms that the copyright should belong to, and be paid for, by the plaintiff; and after it had been published in "The Orb" the defendant published for the author the same work under the title of "Dangerous Connections;" it appearing that the first number of "The Orb" had been duly registered under section 19, the Master of the Rolls granted an injunction, saying: "Here the proprietor of the copyright of a periodical seeks to restrain a separate publication of an article which is part of that periodical; but I am told that he cannot maintain the action until he has registered that article or the first number of the serial, and the date. That is out of the question. A periodical is a book within the meaning of the Act, but the article or serial would be only part of the book, and it is unnecessary ~~that it~~ should be separately registered."

Registration
of first number
of periodical.]

A question has been raised whether the publication of the first number of a story published in parts and duly registered in this country is sufficient to entitle the proprietor to copyright in parts of the same story first

Registration
of first num-
ber in this
country and
complete
publication
abroad first.

(a) *Henderson v. Maxwell*, 4 Ch. Div. 163; but the entry must be after and not before publication: *Henderson v. Maxwell*, 5 Ch. Div. 892; *Bradbury v. Sharp*, W. N. (1891) 143; *Reid v. Maxwell*, 2 T. L. R. 790.

(b) *Henderson v. Maxwell*, 4 Ch. Div. 163.

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published abroad, in other words whether the rule that to entitle a foreign author to copyright in the United Kingdom, he must have published his work first in this country, applies conversely so as to disentitle a British subject to copyright in the United Kingdom if owing to some act on his part, his work or some portion of it has been first published abroad.

The point was not actually decided but was incidentally treated by the Court of Appeal in *Reid v. Maxwell* (a), and all the Lords Justices inclined to think that a British subject was not thereby deprived of his copyright here.

A work had been written by Captain Mayne Reid in 1866 for Messrs. Ward, Lock & Tyler, entitled "The Finger of Fate," subject to a proviso that the copyright in the story should remain in Captain Reid. It consisted of 60 chapters and appeared in the *Boy's Own Magazine* in 12 monthly parts during 1868, the first number being actually published on the 27th of December, 1867, and when completed it was issued together with other matter by Messrs. Ward, Lock & Tyler, under the name of the "Beeton's Boys' Annual for 1869." In November, 1867, Captain & Mrs. Reid went to America, and in June, 1868,—that is before the completion of the English publication,—the story began to appear in an American publication called the *Fireside Companion*, which came out weekly, so that the story was completed there earlier than it was in England—viz., in September instead of December, 1868—the American publication having outstripped the English one in July, and all the chapters from chapter 37 onwards having just appeared in America. The American publisher was a Mr. G. Munro of New York, and it appeared that he purchased the right of publishing the story from Captain Mayne Reid early in 1868. The defendants had business relations with George Munro, and their case was that this constituted a first publication of the story in America, and that there was consequently

(a) 2 T. L. R. 790.

no English copyright therein. The certificate of registration had been obtained by Mrs. Reid under the Act in her name as proprietor of the copyright. In maintaining an injunction which had been granted by the Vice-Chancellor, Lord Justice Cotton said that as to the first objection the registration in England was not sufficient to entitle Mrs. Reid to the copyright. He considered that the registration under the date of the 27th December, 1867, as the date of first publication was in strict accordance with section 19 of the Copyright Act, which provided that the proprietor of a work published in a series of parts should be entitled to all the benefits of registration on entering in the registry the title of the work so published, "and the time of the first publication of the first part thereof." The first publication of a work published in parts was the publication of the first part of it. Although, no doubt, a man might register a part only of a book, yet it was not necessary to register each part separately. If the entire parts were published as one whole, it was sufficient to register the publication of the first part as that of the whole. . . . It was urged that the story was not first published in England, because from chapter 37 it came out first in America, and that from that point in any case the plaintiff had no right to the copyright. In his opinion the Court ought not at present to decide that point, because in any case the injunction was to a great extent right, for even if the defendants were entitled to publish the latter chapters of the story, they had been in fact publishing the whole. The contention was that the earlier publication in America would have prevented Captain Reid from acquiring copyright in England under the Copyright Act. The point was doubtful, but at present the inclination of his opinion was against that contention. It was doubtful, too, how far, in a case of a work published as this had been in the two countries contemporaneously, the fact of the foreign country getting a start and overtaking the publication here could be said to amount to a prior publication, but even if this were so,

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it did not follow that the copyright of the British subject had been lost thereby. The cases did not go to that extent. They only decided that, in order to entitle a foreigner to copyright in this country, he must have published his work first here. This was laid down by the cases of *Routledge v. Low* in the House of Lords (a), and by the remarks of Bayley, J., in *Clement v. Walker* (b) where it was held that the Copyright Act extended to a foreigner only where he had added to the stock of learning in England by first publishing his work here; but no case had decided that an English author, who was clearly entitled as such to the benefit of the Act, has been deprived of his right on the ground that some one abroad has, by his authority, published some part of his work there before it was published here. The question was a serious one, and in his opinion one as to which it would not be right for him to express at present any definite decision, but he was not inclined to think that any portion of the copyright in the work had been lost through what had taken place in America.

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

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

Subsequent to the Act, however, although the author has copyright in his work still unregistered (d), yet he cannot protect himself against infringement, unless he has duly registered in accordance with the Act (e). For, by

(a) L. R. 3 H. L. 100.

(b) 2 Barn. & Cress. 861.

(c) *Tonson v. Clifton*, 1 Wm. Bl. 330; *The University of Cambridge v. Bryer*, 16 East, 317; *Beckford v. Hood*, 7 T. R. 620. The case of *Blancheti v. Ingram*, as reported in 3 T. L. R. 687, we do not pretend to understand, probably there were some facts not disclosed in the report.

(d) See *Chappell v. Davidson*, 25 L. J. (C.P.) 225; 18 C. B. 194; *Weldon v. Dicks*, L. R. 10 Ch. Div. 252.

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

the 24th section, it is declared that no proprietor of copyright in any book which shall be first published after the passing of the Act shall maintain any action or suit at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made in the book of registry of the Stationers' Company of such book, pursuant to the Act. Though the infringements have been made before registration, yet upon registration being effected an action can be maintained (*a*), and the issue of a writ in an action for infringement on the same day, but subsequently to the registration, sufficiently complies with the provisions of this 24th section so as to enable the person making the registration to sue (*b*). It is worthy of note, that a different system is adopted in regard to fine arts copyright, the Act of 1862 not permitting actions or proceedings to be taken in respect to anything done before the registration is effected under section 4. This appears a fairer principle (*c*). If the process of registration is to be considered as useful as an authentic notice of the copyright, it would seem that it ought in all conscience to be effected at a date prior to that on which the infringement of the right takes place in order to operate on it, for, otherwise, the infringer cannot reasonably be affected by notice, when such notice is subsequent to the commission of the act for which he is called upon to make amends, by the legal process issued out against him.

The prohibition imposed by section 24 on the proprietor of copyright from suing before registration, applies only

(*a*) *Goubard v. Wallace*, W. N. (1877) 130.

(*b*) *Warne v. Laurence*, 54 L. T. 371 ; 34 W. R. 452 ; W. N. (1886) 55 ; 2 T. L. R. 427.

(*c*) The Royal Commissioners in their report in 1878 on copyright recommended that proprietors of copyright should not be entitled to maintain any proceedings in respect of anything made or done before registration, nor in respect of any dealings subsequent to registration with things so made or done before registration. But as this provision they considered might in some cases operate harshly, they thought it should not apply if registration were effected within a limited time, say one month after publication. Par. 154.

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to books, and the exceptions of the section in favour of the sole representation of a dramatic piece are extended to the performance of a musical composition (a).

As to new matter—editions of works of compilation published since Copyright Act, 1842, are books which must be registered, but the old matter may be sued upon, though the subsequent editions are not registered.

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

Where the plaintiff in an action for infringement of copyright in a book, the first edition of which was published in November, 1881, had not before commencing such action registered at Stationers' Hall either the first or a second edition which he had subsequently published, but he had registered a third edition which was in fact a reprint of the first edition, describing it in the entry as a third edition, and giving the time of the first publication as the 22nd of April, 1885, which was the date at which the third edition was published, the Court of Appeal, reversing the decision of Bacon, V.-C., held that the plaintiff had not truly stated the time of the first publication of his book within the meaning of section 13 of the Copyright Act, 1842, and consequently had not caused entry to be made of his book pursuant to the Act, and was precluded by section 24 from maintaining any action for infringement until he had made due and correct entry pursuant to section 13 (c).

In the case referred to, that of *Thomas v. Turner*, it was argued that, as by section 2 of the Act the word

(a) *Russell v. Smith*, 12 Q. B. 217, 238. In other words, the proprietor of the "performing rights" in a dramatic piece may sue without registration. See *Marsh v. Conquest*, 17 C. B. (N.S.) 418.

(b) *Murray v. Bogue*, 1 Drew. 353.

(c) *Thomas v. Turner*, 33 Ch. Div. 292; 56 L. J. Ch. 56; 55 L. T. 534; 35 W. R. 177 (C.A.); 2 T. L. R. 724.

“book” included “every volume, part or division of a volume” . . . “separately published,” therefore each edition was a book within the meaning of the Act, and might be registered with its time of publication under sect. 13. But to this Lord Justice Cotton replied, “The third edition which the plaintiff has entered as first published on the 22nd of April, 1885, is a mere reprint of a work first published in November, 1881, and therefore although as a volume separately published it may come within the definition of the word ‘book’ contained in sect. 2, it is not a book in which there can be any copyright as distinguished from the original work, which is entitled to registration.” The case was decided on the point that the edition in question was practically a reprint of the former editions, and in his judgment, Lord Justice Lindley says, “If the book entered had been partly old and partly new there might have been a compliance with the Act *pro tanto*, but the entry would not have given the plaintiff a copyright for a fresh period of forty-two years for the part which was old.”

Where the date of the first publication of an illustrated catalogue, being a reprint with additions of catalogues duly registered in 1880 and 1882 was given on registration as the 22nd June, 1885, it was held that it was a correct statement as to the first publication of the new pages (a).

What constitutes an edition in these days it may sometimes be difficult to determine. According to *Reade v. Bentley* (b), an edition means “every quantity of books put forth to the bookselling trade and to the world at one time, and when the advertisements, the printing, and other well-known expenses and acts by a publisher bringing out such quantities in the ordinary way are closed, that constitutes the completion of the edition, whether the copies are taken from fixed or movable plates or types, or whether the types or plates are broken up or

What constitutes an edition.

(a) *Hayward Brothers v. Lely & Co.*; 56 L. T. 418.

(b) 27 L. J. (Ch.) 254.

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As to registration of maps.

not, and whether all the copies taken are given forth and advertised for sale, or retained and stored in the warehouse of the publisher.”

It is not absolutely necessary to register a map, chart (a), or plan under the Literary Copyright Act, yet it is generally advisable—the point arose in *Stannard v. Lee* (b). The object of the bill was to restrain an alleged infringement by the defendant of the plaintiffs' copyright in a map or plan of the recent German-French War, which the plaintiffs by their bill 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 railway and strategic positions of each army, and the great fortresses of the Rhine Provinces.’ This map or plan was published by the plaintiffs, but it was never entered at Stationers' Hall. Subsequently to the publication of their map the defendant published a similar work, which he entitled ‘Thomas W. Lee's Panoramic Bird's-eye View of the Seat of War, from special drawings by French and German artists, shewing the Rhine, France, Prussia, Belgium, and surrounding countries, rivers, roads, and railways, fortresses, and strategic positions of each army, &c.’

The bill charged that the publication of the defendant's map was contrary to the copyright statutes, and was an infringement of the plaintiffs' copyright.

Immediately on filing the bill the plaintiffs obtained *ex parte*, an injunction restraining the defendant from continuing the publication of, and from selling his map. A motion was made to dissolve this injunction, but was refused, on the ground that the plaintiffs' work did not require registration — and the defendant having subsequently pleaded this omission of registration, the plea was for the same reasons overruled, hence the appeal. It was contended in support of the two orders that the copyright in maps, charts, or plans was still governed by

(a) The face of a barometer is not a chart, *Davis v. Committi*, 54 L. J. Ch. 419.

(b) 24 L. T. (N.S.) 459.

the 8 Geo. 2, c. 13, and the 7 Geo. 3, c. 38; that this was the fact, although the preamble of the Act of 5 & 6 Vict. c. 45, mentioned and repealed the Acts 8 Anne, c. 19, 41 Geo. 3, c. 107, and 54 Geo. 3, c. 156, which all related to books, there was no reference to the above two Acts, which protected maps, engravings, &c. Those Acts required no registration; and their operation was extended to prints taken by lithography or other mechanical process. Lord Justice James, however, remarking that if the latter argument were to prevail, it would tend to one or other of two results; either that there would be two kinds of maps in respect of which there would be two distinct laws or copyright, or else that with regard to every map existing there would be now in this country two distinct and separate laws of copyright; one, a law 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, said: "Such a result would be strangely inconvenient, and my Lord Coke has observed that the *argumentum ab inconvenienti* is always of great force, particularly where we are asked to construe an Act of Parliament, not according to its letter, but contrary to its letter, for the very purpose of producing these inconveniences, because the Act of Parliament which we have before us is in its letter very plain and very simple. It says that the word 'book' shall mean 'a map, chart or plan separately published.' This is a map separately published. In another part of the Act, after expressly excepting from its operation anything affecting the right of property under this or any other Act of Parliament, it proceeds to say that 'no proprietor of copyright in any book' (that is to say, in any map, chart, or plan) 'which shall be first published after the passing of this Act, shall maintain any action or suit at law or in equity, or any summary proceeding in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or other proceeding, have caused an entry to be made in the Book

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of Registry of the Stationers' Company of such book pursuant to this Act.' That is no very heavy duty to impose upon a man, and no very difficult step for him to take before commencing his proceedings. Those words are plain and simple; it seems to me that there is no ground for saying that they do not express the intention of the Legislature, and, in truth, when one considers it, the object of the Legislature seems very reasonable.

"And there would be, as I have pointed out, clearly great inconvenience in having two laws of copyright as to two sets of maps, or as to the same set of maps. There being really no inconvenience in giving the ordinary and natural meaning to the words themselves, I am of opinion that this plea is well pleaded, and that the plaintiff has not entitled himself to commence his suit. Of course it is open to him to register the map whenever he pleases. He might have registered it on the day before he filed his bill for this injunction.

And Lord Justice Mellish, in concurring in this view, said: "It is impossible to read the 2nd section of the 5 & 6 Vict. c. 45, without seeing that, for some purposes at any rate, maps are now to be considered as books, and are brought into the Acts relating to copyright as to books. Therefore, beyond all question, the 5 & 6 Vict. c. 45, has made an alteration in the law respecting maps, and therefore that Act must to some extent have affected the Acts of 8 Geo. 2, c. 13, and 7 Geo. 3, c. 38, although these two Acts of Parliament are not recited in the preamble of the present Act."

This decision is very apt to deceive. It was decided upon principles which will not probably be extended in future cases, and its precise scope may best be exemplified by a commentary thereon made by Vice-Chancellor Bacon in the subsequent case of *Stannard v. Harrison* (a): "Although in the case of *Stannard v. Lee* before the Lords Justices it was held that the design there

(a) 24 L. T. (N.S.) 573.

'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 every thing that you allege in your bill; the plea must either be allowed or over-ruled.' 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 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 into the category of maps.'" And in this case from which we have just quoted it was held that a bird's-eye view of a locality is a landscape within the meaning of the 7 Geo. 3, c. 38, and as such does not require to be registered at Stationers' Hall pursuant to the provisions of the 5 & 6 Vict. c. 45, to entitle the designer to the protection afforded by the first Act.

A copy of every book (a), published since the 5 & 6

Copy of every
book to be

(a) *Routledge v. Low*, L. R. 3 H. L. 100; 37 L. J. (Ch.) 454.

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delivered to
the British
Museum.

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

Copies for the
use of univer-
sity libraries.

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

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

According to these provisions, the main distinctions between a presentation to the British Museum, and a presentation to any of the other four libraries, are these: first, that the delivery to the Museum is to be made without demand on the part of that institution; whereas delivery to any of the other libraries need not be made at all, unless there be a written demand within twelve months after publication; and secondly, that the copy presented to the Museum must be one from the best copies of the work, while that for any of the other libraries need be only a copy from the set the most numerous. Thus, if a publisher produce a superior and an inferior edition at the same time (as in cases of quarto and octavo editions,

so frequent in illustrated works), he must give a copy of the more valuable impression to the Museum; whereas he need only make presentations to the other libraries from the set of lesser cost, provided that set exceed the other by even a single copy (a).

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

Penalty for default.

The first enactment extant, encouraging the establishment of libraries for the use of the learned bodies, is in the reign of Charles II., when two copies of every work were ordered to be delivered by the publisher for the two English universities, and one copy for the king's library, 13 & 14 Car. 2, c. 33, s. 17, continued by 16 Car. 2, c. 18; 17 Car. 2, c. 4; 1 Jac. 2, c. 17, s. 15, &c., but expired in 1679. The clauses of the 17 Car. 2, appear to be perpetual, as far as they relate to the three copies, although it seems it was not so considered, from their not being adverted to in the statute of Anne. The first foundation for the claim by any public library to a gratuitous delivery of new publications is in a deed of 1610, by which the Company of Stationers in Loudon, at Sir Thomas Bodley's request, engaged to deliver a copy of every book printed by the company, and not before printed, to the University of Oxford. The next provision is to be found in

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

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

(b) *Ibid.* *British Museum v. Payne*, 4 Bing. 548.

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the 8th Anne, c. 19, which extended the number of copies demandable to nine, viz., one for the royal library, two for the Universities of Oxford and Cambridge, four for the libraries of the four Scotch Universities, the library of Sion College in London, and the library of the Faculty of Advocates in Edinburgh. This provision was afterwards enforced in 1775 (15 Geo. 3, c. 53, s. 6), by an express enactment that no person should be subject to the penalties of those Acts for pirating books, unless the whole title to the copyright of the book was entered at Stationers' Hall, and the nine copies delivered there for the use of the libraries. Two additional copies were given to Trinity College and the society of King's Inn in Dublin by 41 Geo. 3. The 54 Geo. 3, c. 156, s. 1, repealed so much of the 8 Anne, c. 19, s. 5, and the 41 Geo. 3, c. 107, s. 6, as required that any copy or copies of every book printed should be delivered to the warehouse-keeper of the Stationers' Company for the use of the libraries mentioned, or by him for their use, or which imposes any penalty on such printer or warehouse-keeper for not delivering the copies; and provided that eleven copies should be delivered for the use of the British Museum, Sion College, the Bodleian Library at Oxford, the Public Library at Cambridge, the library of the Faculty of Advocates at Edinburgh, the libraries of the four Universities of Scotland, Trinity College Library, and that of the King's Inn at Dublin (*a*).

Suggestions of
the Copyright
Commissioners.

The Royal Commissioners in their report in 1878 on Copyright came to this conclusion, that so much of the existing law relative to gratuitous presentation of books to libraries, as requires copies of books to be given to libraries other than that of the British Museum, should

(*a*) In the United States, the law establishing the Smithsonian Institute (Act of Congress, August, 1846, c. 178), directs, without any penalty, that a copy of every book, of which the copyright shall be secured, shall be sent to the library of that institution and one to the library of congress. Repealed by s. 6 of the Act of 1859, c. 22. In 1865, the owner was again required to transmit within one month after publication, a copy of every book to the library of congress; and in 1867 a penalty of twenty-five dollars was imposed for failure to make such delivery. See further the Acts of 1870 and 1891 in the Appendix.

be repealed. In making that recommendation they stated that they had taken into consideration the facts that the bodies to whom the libraries belong were possessed of considerable means, and were well able to purchase any books which they might require: and also that the repeal of the clause giving the privilege would not deprive the libraries of any property already acquired but merely of a right to obtain property hereinafter to be created.

They added that the importance of securing a national collection of every literary work had been recognised in most of the countries where there are copyright laws; and with a view to make the collection in this country more perfect, they were disposed to think that it would be desirable to require the deposit at the British Museum of a copy of every newspaper published in the United Kingdom.

On the general subject of registration the commissioners were of opinion that in order to provide an improved system of registration in substitution for that now in use, the two acts of registration and deposit of the copy of a book at or for the British Museum should be combined: or in other words, that, so far as the author is concerned, registration should be complete on the deposit of the copy and on obtaining an official receipt. One advantage of this would be a diminution of labour and expense, and the British Museum would probably receive all copyright books without the labour of hunting for them in booksellers' catalogues and advertisements, as the officials are obliged to do under the present system. Another advantage would be that the fees to be paid for registration might be materially diminished.

The principle of registration the commissioners intended to apply, with one exception, to dramatic pieces and musical compositions which are publicly performed but are not printed and published. Their suggestion that the acts of registration and deposit of a copy of a book should be combined manifestly could not conveniently be effected

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where the work had not been printed, therefore they proposed, in these cases, that it should be sufficient if the title of every drama or musical composition with the name of the author or composer and the date and place of its first public performance were registered.

CHAPTER V.

ASSIGNMENT OF COPYRIGHT.

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

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

It may be the subject of a bequest, and on the death of the person to whom it belongs, without any such bequest, will devolve on his personal representatives (c). The printer of a newspaper (the 'Bath Chronicle,') bequeathed to his widow the benefit of his trade, subject to the trust of maintaining and educating her family. The foreman, by her assistance in giving him the use of the letter-press, etc., on the premises, set up a paper bearing the same name. An injunction was granted, at the request of the executors, to restrain him from carrying it on (d). As the copyright in a work is entirely distinct from the Its distinctive features.

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

(b) 5 & 6 Vict. c. 45, s. 3.

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

(d) *Keene v. Harris*, cited 17 Ves. 338, and see *Cruttwell v. Lye*, 17 Ves. 335, and 8 Ves. 217.

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property in the stereotype plates from which it may have been printed; a sale of these does not carry the right to print and publish, unless the vendor is the owner of the copyright and such is the intention of the parties. So, if an execution against a stereotype founder were levied on plates which he had made for an author and not delivered, the title to these plates would be passed by the execution sale, and the purchaser might sell them, but clearly he could not print and publish the book for which they were made (a). Trustees in bankruptcy are not entitled to the manuscripts of an author (b), although the copyright of a book which has been printed and published will legally pass for the benefit of the creditors (c), and the price paid by the bookseller is as completely open to the diligence of creditors as the price of any other commodity or piece of merchandise. The reason assigned for this distinction is, that the author's right of withholding the publication continues till the very moment his book is actually given out to the public. Even the printer of the book would not be entitled to sell it for payment of the costs of printing, although there is not the smallest doubt that he has a complete lien over it, till delivery, to prevent the author or his creditors from taking advantage of the publication, till he shall have been paid (d).

The copyright
passes on

In *Mawman v. Tegg* (e), where it appeared that the

(a) *Stevens v. Cady*, 14 How. (Amer.) 528; *Stevens v. Gladding*, 17 How. 447; *Carter v. Bailey*, 64 Me. (Amer.) 458.

(b) This statement has been questioned by Messrs. Cutler, Smith & Weatherley's "Law of Musical and Dramatic Copyright," and it is by them alleged that there is authority for the contrary proposition. With deference we submit that the statement in the text is accurate. The only authorities cited in favour of the contrary proposition are *Longman v. Tripp*—not a case of MSS. at all, but an authority to the effect that the right to publish a newspaper will pass to the trustees in bankruptcy—and the comprehensive vesting clause of the Bankruptcy Act of 1883 (46 & 47 Vict. c. 52, ss. 44 and 68).

(c) *Longman v. Tripp*, 2 Bos. & Pull. New. 67; see 4 Burr. 2311; Amb. 695; *Stevens v. Cady*, 14 How. (Amer.) 528; *Stevens v. Gladding*, 17 How. (Amer.) 447; *Cooper v. Gunn*, 4 B. Mon. (Amer.) 594, 596; see *Atcherley v. Vernon*, 10 Mod. 518.

(d) 1 Bell's Com. 68.

(e) 2 Russ. 392. *In re Curry*, the Irish Commissioner in Bankruptcy

author, who was one of the original owners and publishers of a work, had gone into bankruptcy, and his copyright had passed to assignees, from whom it was bought by the plaintiffs, Lord Eldon said: "Whatever question there may be in some cases, whether an interest in copyright does or does not pass without writing, it would, I apprehend, be difficult to maintain that there must be an instrument in writing between the bankrupt and his assignees."

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bankruptcy of author to his trustees without writing.

The property in an unpublished work is personalty, and is subject to the same general rules which govern personal property. Therefore it may pass by sale and delivery. Sales may be absolute or conditional, and they may be with or without qualifications, limitations, and restrictions; and the rules of law applicable in such cases to other personal property must be applied in determining the real character of a sale of literary property. Thus the right of first publication is vested in the author, but he may sell and assign the entire property to another; or may sell the manuscript on the condition that the same shall not be published, or be published only in a particular manner. An author who has not parted with the property in his production, or has not written it to the order of some other person, may secure the copyright to himself, and at any time afterwards may transfer it to an assignee; and when the author before publication transfers his unpublished production to another, then the assignee may register under the Act as the "proprietor" (a).

Assignment of manuscript.

The Act defines the word "assigns" to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law or otherwise (b). Statutory copyright cannot exist until

expressed the opinion that copyright would pass to the bankrupt's assignee without a writing; 12 Ir. Eq. 391.

(a) *Lover v. Davidson*, 1 C. B. (N.S.) 182.

(b) 5 & 6 Vict. c. 45, s. 2.

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after publication, therefore what passes under any assignment before publication, must be the common law property in the manuscript : *i.e.*, the right to publish with or without securing the copyright, and the right to withhold from publication.

It has been held that though statutory copyright must be in existence before it can be assigned in law (*a*); yet an agreement may be made to assign at a future time (*b*), in which case an equitable title may vest in the assignee (*c*).

An assignment not to be presumed.

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

As to whether assignment must be in writing.

Questions have arisen as to whether it is necessary to

(*a*) *Colburn v. Duncombe*, 9 Sim. 161 ; *Sweet v. Shaw*, 3 Jur. 217 ; *Pulte v. Derby*, 5 McLean (Amer.) 328 ; *Lawrence v. Dana*, 2 Am. L. T. R. (N.S.) 402, 414.

(*b*) *Leader v. Purday*, 7 C. B. 4 ; *Gould v. Banks*, 8 Wend. (N.Y.) 562.

(*c*) *Sims v. Marryat*, 17 Q. B. 281 ; *Lawrence v. Dana*, *supra*.

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

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

the validity of an assignment of copyright that it should be in writing. Much confusion has existed by reason of the mixing up of rights which are essentially different. The right of an author in his unpublished production is obviously of a different nature to that which he may secure in his published work under the Copyright Act. The Copyright Act does not affect the rights of an author in his composition before publication, and it does not follow that that which may, by the express words of the Act, or by its implied effect, relate to the assignment of copyright as secured by the Act would apply to the author's rights, which exist independent of the Act. The author's right in his unpublished work exists only by common law, and the mode of its transfer must be governed by the only law applicable—the common law—and a parol assignment would seem to be sufficient at common law. If the transfer be made before the vesting of the statutory copyright and is made in England and is good by the common law, or if made in a foreign country is valid by the law of that land, the buyer becomes the owner of the property and is an assignee recognised by the statute.

This view has been partly recognised by the courts.

In *Cocks v. Purday* (a) it appeared that the plaintiff had bought from Hoffmann, of Bohemia, the exclusive right of publishing in Great Britain a musical composition which at the time of purchase had not been published anywhere. Hoffmann had bought the composition from the author, Labitzky. No writing appears to have passed between these two persons; but by the Austrian law, which prevailed in Bohemia, a parol transfer of copyright was valid. The sale by Hoffmann to Cocks was made by letter, and no formal assignment was executed until nearly a year after the latter had published and registered the work in England. The defendant argued that the

(a) 5 C. B. 860; see as to this case *post*, 190; *Jeffreys v. Kyle*, 18 Sc. Sess. Cas., 2nd Ser. 906; 3 Macq. 611; *Hazlitt v. Templeman*, 13 L. T. (N.S.) 593.

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plaintiff's title was not good, because it had not been derived by a written assignment. The Court, after quoting the definition of assigns in sect. 2 of 5 & 6 Vict., c. 45, said: "There being then a sale in this case valid by the law of Austria, where it was made, the interest of the author became vested in the plaintiff before publication, so as to make him an assignee within the meaning of the third section; and he, therefore, had a good derivative title."

An assign-
ment under
the Statute
of Anne

An assignment of the copyright of a work, under the Statute of Anne, must have been in *writing*, and attested by two witnesses, in order to entitle the assignee to maintain an action for pirating it (*a*). True, this was not expressly demanded, but as the statute required that there should be two witnesses to a consent to a publication, it was naturally inferred that an assignment, which was of a higher nature than a mere consent, must have at least the same solemnity (*b*). The 41 Geo. 3, c. 107, required the consent to be in writing, and to be signed in the presence of two or more credible witnesses. The 54 Geo. 3, c. 156, reciting the former enactments, generally extended the copyright, and spoke of the consent in writing, but said nothing about the two witnesses. Opinions differed upon this subject. It was contended by some that as it was only by implication from two witnesses being required to the consent, it was held that two witnesses were required to an assignment, therefore, when the latter Act, the 54 Geo. 3, c. 156, no longer required two witnesses to a consent, the reason failed for requiring, by implica-

(*a*) *Power v. Walker*, 4 Camp. 8; S. C. 3 M. & S. 7; *Morris v. Kelly*, 1 Jac. & W. 481; *Clementi v. Walker*, 2 B. & C. 861; *Davidson v. Bohn*, 6 C. B. 456; 12 Jur. 922; 18 L. J. (C.P.) 14; *Leader v. Purday*, 7 C. B. 4; *Jeffcrys v. Boosey*, 4 H. L. C. 815; *Cumberland v. Copeland*, 31 L. J. (Exch.) 19, 353, *post*, p. 181.

(*b*) Lord Ellenborough, in *Power v. Walker*, *supra*; as to the distinction between a licence to publish and an assignment, see 27 L. J. (Ch.) 254, and the principle on which was decided the case of *Lacy v. Toole*, 15 L. T. (N.S.) 512. The distinction between an assignment and a licence is that by the former the ownership of the copyright is vested in the assignee, while by the latter the licensee acquires the privilege of publishing but no proprietary rights in the copyright.

tion, two witnesses to an assignment. Lord St. Leonards, however, was of opinion that it was properly decided that the assignment ought to be attested by two witnesses; that, he said, was decided upon the Act of Anne as it stood originally and as it was originally construed. "If by a later Act," said he, "you take away that which was, no doubt, the ground of the decision, viz., the necessity for two witnesses to a consent, does it follow, that you therefore repeal that which was the proper construction of the law applicable to the higher instrument, viz., that the assignment also required two witnesses? It would rather seem, after such a tenor of determination, after the law had been so settled, that the legislature, by being silent with regard to the assignment, meant that to remain, although it alters the law with respect to the consent." "The Act of Anne and the Act of the 54 Geo. 3 may well stand together; the latter one does not repeal the former expressly, and there is no reason why it should do so by intendment; and with respect to the assignment, the Act of Anne, being referred to generally by the 54 Geo. 3, must be considered to be referred to as bearing the construction put upon it by the authorities."

In *Cumberland v. Copeland* (a), the farce of the "Happiest Day of my Life," with seven other plays, were assigned by the author, Mr. Buckstone, to the plaintiff in 1835, which assignment was attested by one witness only. The majority of the Court of Exchequer held this to be fatal to the validity of the transfer, the assignment having been made previous to the 5 & 6 Vict. c. 45; but the Exchequer Chamber overruled this judgment, on the ground that, after the passing of the 54 Geo. 3, c. 158, s. 4, in an action for piracy, the consent in writing of the author became a good defence. That being so, the Court thought that an assignment in writing, without the attestation of witnesses, was sufficient, and reversed the previous ruling. Erle, C.J., in delivering judgment said:

(a) 7 H. & N. 118; *Shepherd v. Conquest*, 17 C. B. 427.

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“The reasoning upon which that is founded is derived from the statute of 8 Anne, c. 19, which was passed to protect authors, and contains stringent provisions against what are called piracies, by those who infringe copyrights, and declares that when an author has established that his copyright has been infringed, the defence of the pirate, that the defendant has done what has been complained of by the consent of the author, should not be allowed in proof except by a writing attested by two witnesses. And so, therefore, the law was clearly established that the proprietor of a copyright could not give a consent to the publication except by writing attested by two witnesses; and the question having arisen in *Power v. Walker (a)*, in 1814, whether a copyright itself could be assigned without writing (and that was the only point before the Court) the Court of King’s Bench held that an assignment was in the nature of a perpetual licence—was greater than a licence—and if a licence required writing and two witnesses, an assignment certainly ought to be in writing; whether attested by two witnesses or not was not the question before the Court, and I may say here, that in *Davidson v. Bohn (b)*, the question was considered as if it had arisen before the statute, 54 Geo. 3, c. 156, and the same minute reasoning was carried out: if the assignment must be in writing because the licence must be in writing, the assignment must be attested by two witnesses, because the licence must be attested by two witnesses; that is the line of reasoning followed out in the two cases. However, the 54 Geo. 3, c. 156, passed, enacting that from and after that statute the consent must be in writing, and that a consent in writing would be a defence against a suit for infringing the copyright; and an express enactment that a consent in writing should be valid is, to my mind, by implication, an enactment that a consent in writing may be valid without being attested by two witnesses. The former statute required a consent in

(a) 3 M. & S. 7.

(b) 6 C. B. 456; S. C. 18 L. J. (N.S.) C. P. 14.

writing attested by two witnesses; the latter requires a consent in writing only. It is clear to my mind, after the Act of 54 Geo. 3, c. 156, the plaintiff could not without infringing the express words of that statute, say a consent in writing was not valid without two witnesses, because there was an enactment to that effect in the statute of Anne. The two statutes are inconsistent. After that time if a consent in writing is valid without two witnesses, it seems to me, as a matter of reasoning, to follow, that an unattested assignment is also valid: for if, as it was argued prior to the statute, because a consent in writing is not valid without two witnesses, so neither is an assignment: as a consent is now valid without two witnesses, so, also, is an assignment valid without two witnesses." And, referring to Lord St. Leonards' opinion in *Jefferys v. Boosey* (a), to the contrary, he continues: "I cannot but think myself, though with great deference to Lord St. Leonards' reasoning powers, which are of the highest order, and the conflict of authority on one side and the other, that in the nature of things, the result of the legislation is very worthy of the attention of the Court. And it seems to me that to put a construction on a statute that would enable the vendor of a thing to take the price of it and defeat the sale, if the instrument of sale has not complied with a technical formality, would be a species of legislation that, to my mind, is bad."

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

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

(a) 4 H. L. C. 915.

(b) *Ante*, p. 150, and as to registration of assignment, see *Troitchock v. Rees*, 3 T. L. R. 773.

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exempted from stamp duty, and is of the same force and effect as if it had been made by deed (a).

The entry is made on the application of the assignor, and sets forth the date of entry, title of the book, name of the assignor, and name and place of abode of the assignee. The statute makes a certified copy of the entry *prima facie* proof of assignment "but subject to be rebutted by other evidence."

Assignment must be in writing, but need not be attested.

An assignment of copyright after publication since the passing of the 5 & 6 Vict. c. 45, must, unless made by entry at Stationers' Hall, be in writing, but need not be attested, and an assignment not in writing is not sufficient. So where a song was, in the year 1868, published by the defendant under a verbal agreement with the author, Suchet Champion, but no instrument of assignment of the copyright was executed by him to the defendant; and by an assignment in writing in 1874 Champion assigned to the plaintiff the entire copyright of the words and music of the said song in consideration of a royalty on each copy sold, which assignment the plaintiff made an entry of at Stationers' Hall, it was held that the title of the plaintiff must prevail, and that he could sustain an action to restrain the defendant from infringing his copyright (b).

It will depend upon circumstances how far a receipt for the purchase-money will operate as an assignment of the copyright (c).

(a) The proposition that an assignment in writing, since the 5 & 6 Vict. c. 45, need not be attested (4 H. L. C. 855, 881, 891, 931, 943), has been ably disputed in the 8th volume of the Jurist (N. S.) pt. ii. p. 148. And see *Power v. Walker*, 3 M. & S. 8. Lord Ivory, in *Jeffreys v. Kyle*, 18 Ct. of Sess. 2nd Ser. p. 911; see 21 Ct. of Sess. 2nd Ser. p. 8, and others, have thought that both *Power v. Walker* and *Davidson v. Bohn* were wrongly decided; see 3 H. L. C. 671, and *Cumberland v. Copeland*, on appeal, 31 L. J. (Ex. Ch.) 353.

(b) *Leyland v. Stewart*, 4 Ch. D. 419; so an assignment or licence of any design under the Designs Act, 1842, must be in writing; see *Jewitt v. Eckhardt*, 8 Ch. Div. 404, and in the recent case of *Woolley v. Broad*, 9 R. P. C. 208, it was held that an exclusive licensee under a verbal agreement of a registered design was not entitled to sue. See *Stewart v. Casey*, 9 R. P. C. 9 (a patent case).

(c) See *Howitt v. Hall*, 6 L. T. (N.S.) 348; *Strahan v. Graham*, 16 L. T. (N.S.) 87; *Colburn v. Duncombe*, 9 Sim. 151; *Sims v. Marryat*, 17 Q. B. 281; *Levi v. Rutley*, L. R. 6 C. P. 523; *Cocks v. Purday*, 5 C. B. 860; see *The London Printing & Publishing Alliance (Limited) and Keep & Co. v. Horace Cox*, 7 T. L. R. 738; [1891] 3 Ch. 291.

A sale made by letter may be a valid transfer. In *Lacy v. Toole*, which was an action against the defendant for representing a play written by the plaintiff, the defence was that the latter was not the owner of the piece. A letter was produced in which the plaintiff, in reply to a letter from a third person, had written to the latter, "I accept the offer you therein make me, and agree to the conditions you propose for cancelling my debt to you; viz., to let you have my drama of 'Doing for the Best,' in discharge of £10 of the sum due." The Court expressed the opinion that this letter was a valid assignment, but left it to the jury to find whether the agreement was to transfer the property in the play, or simply to license its use. The verdict was in favour of the defendant, and the letter was accordingly held to amount to an assignment (a).

Assignment
may be made
by letter.

It may be well to mention that if the assignment is made not by registration at Stationers' Hall, but by assignment independently, an *ad valorem* duty will have to be paid. Thus, if the assignment were in the following terms:—"In consideration of the payment of £500, I hereby transfer to you the copyright and all other rights if any in a work written by me and entitled, 'The A. B. C. of Copyright,'" this would amount to a conveyance on sale which by the 54th section of the Stamp Act, 1891 (b), includes "every instrument whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser," and would be chargeable with *ad valorem* duty of £2 10s. And under s. 59 of the same Act (c), an agreement for the sale not amounting in terms to an actual assignment would require such a stamp. This section provides that "any contract or agreement made in England or Ireland under seal or under hand only or made in Scotland with or without any clause of registration . . . for the

Stamp on
assignments
not made by
entry in
register.

(a) 15 L. T. (N.S.) 512; see *Kyle v. Jeffreys*, 21 Scotch Sess. Cas. (N.S.) 8. *The London Printing & Publishing Alliance (Limited) and Keep & Co. v. Horace Cox*, 7 T. L. R. 738; [1891] 3 Ch. 291.

(b) 54 & 55 Vict. c. 39, which is a re-enactment of sec. 70 of the Stamp Act, 1870.

(c) Re-enactment of 52 & 53 Vict. c. 42, s. 15, sub-s. 1, which is repealed.

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sale of any estate or interest in any property except lands, tenements (and certain other specified species of property which do not include copyrights), shall be charged with the same *ad valorem* duties to be paid by the purchaser as if it were an actual conveyance on sale of the estate, interest or property agreed or contracted to be sold." Consequently, since the passing of the Act of 1889 the same *ad valorem* duty will be charged on a contract for the sale of copyright or an interest therein, as also on a licence to publish in many cases, as on an actual assignment of copyright. It would be well therefore, where it is desired to save the *ad valorem* duty, either to assign by entry in the Book of Registry of Stationers' Hall, or to agree to effect an assignment only by this method.

Divisibility of
copyright as
to locality.

Questions have incidentally come before the Courts as to whether copyright is divisible (a). At present there are no express decisions on the point. It would seem, however, that it is in some instances divisible as to locality, and also as to time. *First*, as to locality. It is clear that it cannot be divided among independent owners so that each may have the exclusive right of sale for a distinct part of the same country, nor probably among different countries over which one copyright law extends. For instance it is clear that the owner of an English copyright could not make an assignment to one person in Lancashire and to another person in Middlesex, and doubtful whether he could make an assignment of copyright to one person in Canada and another in India. But where a person can secure a copyright in two countries governed by two distinct copyright laws, there would seem to be no valid objection to his assigning his rights in one country to another, securing his rights in the other country to himself. For instance, suppose an author to be able to secure a copyright for himself both in France and in this country, he might make a valid assignment of his French copyright

(a) See question of joint and separate owners, *The Trade Auxiliary Co., Cate & Perry v. Middlesbrough and District Tradesmen's Protection Association*, 5 T. L. R. 254; 40 Ch. D. 45; *Cate v. Devon and Exeter Constitutional Newspaper Co.*, 40 Ch. D. 500.

to one person, and his English to another. But this could not be regarded, strictly speaking, as a division of copyright, the rights being distinct—the one conferred by one country, the other by another.

The question arose in *Jefferys v. Boosey*, where it appeared that Ricordi, the assignee of Bellini, being resident in Milan, assigned the copyright in "*La Sonnambula*" to Boosey for publication in the United Kingdom only. Lord St. Leonards, in passing judgment, observed: "The exercise of the right is confined in that assignment to the United Kingdom. Now, by the 41 Geo. 3, c. 107, copyright is extended to any part of the British dominions in Europe; and by the 54 Geo. 3, c. 156, it was further extended to every other part of the British dominions. It is quite clear, therefore, that if, in this case, there was a copyright under the law of this country, it was a copyright which extended to every part of the British dominions; even considering the right in England, if I may so call it, as being capable of being secured from any foreign right, it would consequently be a partial assignment; and, as a partial assignment, I should venture to recommend your Lordships to decide that it was wholly void, and therefore gave no right at all.

"There is also, let me observe, this particularity: that as the assignment from Ricordi is confined to the United Kingdom, Ricordi himself might without any breach of his contract, have published this composition in any other part of the British dominions; he might, also by his Milanese right, have published it the very next day in Milan, without infringing on the right of Boosey under the assignment. The more, therefore, the question is considered, the more, I apprehend, will it appear clear that the assignment in question was void because it was limited to the United Kingdom, and did not extend to the whole of the British dominions." This also was the opinion of Lord Chief Baron Pollock and Baron Parke, but a majority of the Judges who advised the House of Lords were of opinion, that the owner might assign the

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Divisibility
of copyright
as to time.

exclusive right of publication in Great Britain, and reserve to himself the Austrian copyright (a).

Secondly, as to time. The proprietor of the copyright may assign his copyright for any period less than the period during which his copyright will continue. But in such case the question has been raised as to whether such limited transferee should be regarded as a limited assign or a licensee only, and, further, could the limited transferee register for a limited period. No provision is made by the Act, and it has been doubted whether an absolute assignment would not have to be made so far as the registry is concerned, and a re-assignment be made on the expiration of the period during which the limited assignment was made. But the practice has been for many years for the registrar to enter assignments for a certain number of years, or for certain numbers of copies, or for a certain number of editions, and this practice certainly seems to be justified by the Act. The 13th section of the Act of 1842, provides that it shall be lawful for the proprietor of the copyright in any book to make entry in the registry book of the title of such book, the time of first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the said book, or of any portion of such copyright; and that it shall be lawful for every such registered proprietor to assign his interest, or *any portion of his interest therein*, by making entry in the book of registry of such assignment, and of the name and place of abode of the assignee thereof. If the proprietor has a copyright extending over a period of forty-two years, surely an assignment for ten years would be an assignment of a portion of his interest in the copyright within the meaning of the above section.

The statute gives to the owner of a dramatic composition the exclusive right to print it, and the sole liberty of

(a) 4 H. L. C. 815; see *D'Almaine v. Boosey*, 1 Y. & C. Exch. 288; *Cocks v. Purday*, 5 C. B. 860; *Low v. Ward*, L. R. 6 Eq. 415; *Routledge v. Low*, L. R. 3 H. L. 100.

performing it. Either of these rights may be absolutely assigned independently of the other.

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

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

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

Cocks v. Purday overruled.

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

The absence of an assignment in writing must be specially pleaded at law (b), but where one of the plaintiff's witnesses stated that he had heard the plaintiff declare,

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

(b) *Barnett v. Glossop*, 1 Bing. N. C. 633; but see *Johnson v. Dodgson*, 2 M. & W. 657; and *Buttermere v. Hayes*, 5 M. & W. 456; *De Pinna v. Polhill*, 8 C. & P. 78; *Cocks v. Purday*, 5 C. B. 860.

that he had parted with all his interest in the copyright, although he did not mention in what manner the transfer had been made, the plaintiff was immediately nonsuited (*a*).

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

Right of assignor to sell stock on hand after assignment.

In *Howitt v. Hall* (*c*), it appeared that the defendants, having bought the copyright for four years in a book of which the plaintiff was the author, were still continuing, several years after the end of that term, to sell copies which they had printed during the four years. The court in refusing an injunction to restrain such sales, held that the purchase of the copyright carried the right of printing; and that, while this right reverted to the author at the end of four years, the publishers were entitled to sell, after the expiration of that term, all copies which had been printed in good faith during the term. "The Copyright Acts," said Vice-Chancellor Wood, "were directed against unlawful printing; and when, as in this case, the defendant had acquired the right of lawfully printing the work, he was at liberty to sell at any time what he had so printed."

The two last cited cases must be taken as defining the law on the subject, but they are open to grave objections.

The Court of Chancery will disregard a permission from the author to infringe the copyright, given after he has parted with his equitable title for valuable consideration, and it has appeared upon the title page of his work that it was printed for the equitable assignee of the copyright (*d*). And when an author has parted with his copyright in a work, he is not at liberty to reproduce

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

(*b*) *Taylor v. Pillow*, Law Rep. 7 Eq. 418. See *Tuck & Sons v. Priester*, 19 Q. B. D. 48; 57 L. T. 110; 19 Q. B. D. 629; 56 L. J. (Q. B.) 553; 36 W. R. 93 (C. A.) S. C.; *Tuck & Sons v. The Continental Printing Co.*, 3 T. L. R. 150, 661, 826; *Troitzoch v. Rees*, 3 T. L. R. 773.

(*c*) 6 L. T. (N. S.) 348.

(*d*) *Hodges v. Welsh*, 2 Ir. Eq. Rep. 266.

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substantially the same matter in another publication (a).

A licence
not an
assignment.

A licence to publish is not an assignment of the copyright (b).

Assignment of
share in copy-
right by entry
at Stationers'
Hall.

An assignment may be made of a share in the copyright, either a third or other proportion, and it is the practice at Stationers' Hall to enter such assignments in the register when tendered at the office.

(a) *Rooney v. Kelly*, 14 Ir. Law Rep. (N.S.) 158 ; *Colburn v. Simms*, 2 Hare, 543.

(b) *Reade v. Bentley*, 4 K. & J. 656.

CHAPTER VI.

INFRINGEMENT OF COPYRIGHT.

“ *O imitatores, servum pecus!*” †

“ *Quid nos dura refugimus
Atas? quid intactum nefasti
Liquimus?*”

HORACE.

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

Infringement
of copyright.

The result, in such cases, is the true test of the act.

(*a*) *Roworth v. Wilkes*, 1 Camp. 94; *Emerson v. Davies*, 3 Story (Amer.) 768; *Campbell v. Scott*, 11 Sim. 31; 11 L. J. (N.S.) Ch. 166; 6 Jur. 186; *Clement v. Muldick*, 1 Giff. (Ch.) 98; 5 Jur. (N.S.) 592; *vide* Kindersley, V.-C., in *Murray v. Bogue*, 1 Drew. 353; Wood, V.-C., in *Reade v. Lacy*, 1 J. & H. 524; and Story, J., in *Folsom v. Marsh*, 2 Story (Amer.) 115; see *Gambart v. Sumner*, 5 H. & N. 5.

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

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Full acknowledgment of the original, and the absence of any dishonest intention, will not excuse the appropriator when the effect of his appropriation is, of necessity, to injure and supersede the sale of the original work; for a man must be presumed to intend all that the publication of his work effects (*a*).

In some of the cases it will be observed that stress is laid on the existence of the *animus furandi* (*b*). But the question of piracy cannot properly depend upon the intention of the pirate. The main point must always be what effect will the extracts have upon the original work—how far will they supply its place or injure its sale. If the extracts are such as to render the protected work less valuable, by superseding its use in any degree, the right of the author is infringed, and it can be of no importance to inquire with what intent this was done.

Plagiarism not necessarily an invasion of copyright.

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

One may not take a material part of another's work for improving a rival publication.

Thus where the plaintiff who was the inventor of a well known system of shorthand writing brought an action to restrain the publication of a book entitled "One Thousand Contracted Outlines," and it appeared that the plaintiff's system was divided into three parts—elementary, for correspondence, and for professional shorthand writers, and

(*a*) Wood, V.-C., in *Scott v. Stanford*, Law Rep. 3 Eq. 723; *Clement v. Maddick*, 1 Giff. 98; *Millett v. Snowden*, 1 West. L. J. (Amer.) 240; *Nichols v. Ruggles*, 3 Day (*ibid.*) 158; *Story v. Holcombe*, 4 McLean (*ibid.*) 306; McLean, J., Ohio, 1847.

(*b*) *Cary v. Kearsley*, 4 Esp. 170. The *animus furandi* will be taken into consideration in those cases where it is difficult to ascertain the extent of the copying, in order to determine whether the use made of a protected work by a subsequent author is fair or lawful: *Spiers v. Brown*, 31 L. T. (N.S.) 18; 6 W. R. 352.

(*c*) *Pike v. Nicholas*, 38 L. J. (Ch.) 529; 20 L. T. (N.S.) 906; reversed, L. R. 5 Ch. 251; 18 W. R. 321; 39 L. J. (Ch.) 435, but not in opposition to the principle above laid down.

in the plaintiff's work were given rules for the contraction of words and phrases, which rules mainly consisted in the omission in some cases of the middle consonant and in others of the last syllable, and numerous examples were given of contraction founded upon these rules, it was held that the book of the defendant, which professed to give an amplification of the plaintiff's rules for contraction, and 1000 examples which were alleged to be improvements of the plaintiff's examples, was an infringement of the plaintiff's copyright (a).

It may be said generally that the results of another's labour cannot be taken for adaptation to any purpose which would prove injurious to the originator's work. This was well illustrated in the case of *Ager v. Collingridge* (b). Dr. Ager finding that the system of electric telegraphy was defective by reason of the frequent mistakes occurring owing to errors in the position or duration of the pauses in words expressed by similar sequences of dots and dashes, selected from the eight languages sanctioned by the London Telegraph Conference of 1880—viz., English, French, Dutch, German, Italian, Latin, Spanish and Portuguese, and had arranged in alphabetical order 100,000 words from the word "aafsch" to the word "travail," which he considered specially adapted for correct telegraphic transmission; and in the year 1879 he published this work with the addition of figure ciphers for reference or private interpretation, in the form of a book called "The Standard Telegraph Code," which he registered at Stationers' Hall under the Copyright Act, 1842, and sold for £5 5s. per copy. The defendants printed a book containing some 70,000 of the words comprised in his book with the addition of interpretations suited for the purposes of the timber trade which book they called "Shadbolt's Telegraph Code," and as the plaintiff considered this an infringement of his copyright,

(a) *Pitman v. Hine*, 1 T. L. R. 39.

(b) 2 T. L. R. 291, following *Ager v. The Peninsular and Oriental Steam Navigation Co.*, 26 Ch. D. 637

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he brought an action for an injunction and account. The defence was that the plaintiff's book was not a proper subject for copyright, that it did not contain any interpretation or equivalent in ordinary language of any of the telegraphic words comprised in it, so that every person was obliged before he could derive any benefit from it to attribute to such of the telegraphic words as he desired to make use of some meaning or equivalent in ordinary language ; and the Messrs. Shadbolt, who were the principal defendants, maintained that having purchased one of the plaintiff's books they were perfectly justified in selecting, as they had done, words from it, and in attributing to these and to other words chosen by themselves meanings in ordinary language suitable for the purpose of their trade, and in having the book so formed printed and used by themselves and their correspondents, and they insisted that this was a legitimate use of the plaintiff's book—that they had used it for the purpose for which it was compiled, *i.e.*, by their own ingenuity and with original matter of their own had turned it into a private code for the purposes of their business and correspondents. The Court held that the defendants had infringed the plaintiff's copyright, and a perpetual injunction was granted. Mr. Justice Kay pointed out that if what the defendants had done was lawful, a person might buy one of the plaintiff's books, reprint every word of it, putting opposite to each of them his own interpretation or phrase, and then sell the work at a third or a tenth of the cost of the plaintiff's book, and so render it unnecessary for any one to buy the plaintiff's book, and in fact prevent the sale of a single further copy.

Want of
originality
in modern
works.

La Bruyère declares that we are come into the world too late to produce anything new, that nature and life are preoccupied, and that description and sentiment have been long exhausted. However this may be, it is apparent that some similarities, and a use, to a certain extent, of prior works, even to the copying of small parts, must be tolerated in the case of such works as dictionaries, gazetteers,

grammars, maps, arithmetics, almanacs, concordances, encyclopædias, itineraries, guide books, and similar productions, if the main design and execution are in reality novel and improved, and not a mere cover for important piracies (a).

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

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

Encyclopædias may not outstrip the limits of fair quotation.

And yet to be a piracy it is not necessary that the latter work should be a substitute for the original composition. This can seldom be the criterion. Vice-Chancellor Shadwell on one occasion, put the case in a simple aspect :

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

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

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

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

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

Principles by which a piracy is judged.

The inquiry in most cases, is not, whether the defendant has used the thoughts, conceptions, information, and discoveries promulgated by the original, but whether his composition may be considered a *new work*, requiring invention, learning, and judgment, or only a mere tran-

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

script of the whole or parts of the original, with mere colourable variations (a).

In *Scott v. Stanford* (b), the plaintiff had published statistical returns of all coal imported into London, and the defendant, in giving the universal statistics of the United Kingdom, had copied from the plaintiff's work to the extent of one third of the whole of the defendant's work, at the same time acknowledging the source from which his information was derived. Vice-Chancellor Wood decided, that having regard to the quantity and matter of the information which had been republished without the exercise of any independent thought and labour, and the prejudice to the plaintiff in having the sale of his work superseded by this republication, the plaintiff was entitled to an injunction. If the defendant, after collecting the information for himself, had checked his results by the plaintiff's tables, that would have been a widely different thing from the wholesale extraction of the vital part of his work. But no man is entitled to avail himself of the previous labours of another for the purpose of conveying to the public the same information although he may append additional information to that already published. This is consonant to the law as laid down in *Kelly v. Morris* (c), which was in the following terms: In the case of a dictionary, map, guide-book, or directory, where there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In the case of a road-book, he must count the milestones for himself, . . . and the only use that he

(a) *Stowe v. Thomas*, 9 Wall. C. Ct. (Amer.) 547; S.C. 2 Amer. L. Reg. 231.

(b) L. R. 3 Eq. 718; *Morris v. Ashbee*, 19 L. T. (N.S.) 550; L. R. 7 Eq. 34; *Mauman v. Tegg*, 2 Russ. 398; *Jarrold v. Houlston*, 3 K. & J. 708; *Cox v. The Land and Water Co.*, 18 W. R. 206; L. R. 9 Eq. 324; *Trade Auxiliary Co. v. Middlesborough and District Tradesmen's Protection Association*, 40 Ch. D. 425; *Cate v. Devon and Constitutional Newspaper Co.*, 40 Ch. D. 500.

(c) L. R. 1 Eq. 697.

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can legitimately make of a previous publication is to verify his own calculations and results when obtained.

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

This latter is precisely what was done in *Morris v. Ashbee* (*b*). The defendant copied the plaintiff's book, and then sent out canvassers to see if the information so copied was correct. If the canvasser did not find the occupier of the house at home, or could get no answer from him, then the information copied from the plaintiff's book was repeated bodily, as if it were a question for the occupier of the house merely, and not for the compiler of the previous directory. The copying was as direct in the case of *Kelly v. Morris*, to which we have already referred. Not only were the slips for the purpose of canvassing copied, but the course pursued really was, that when a slip was presented to the person who was canvassed, and his permission received for the insertion of the particular entry, the slip was forthwith copied into the book. "Now it is plain," observed Lord Justice Giffard, "that it could not be lawful for the defendants simply to cut the slips, which they have cut from the plaintiff's directory, and insert them in theirs. Can it then be lawful to do so, because, in addition to doing this, they sent persons with the slips to ascertain their correctness? I say, clearly not. . . . In *Pike v. Nicholas* (*c*) we had this: Two rival books were

(*a*) *Morris v. Wright*, 22 L. T. (N.S.) 78; 18 W. R. 327; L. R. 5 Ch. 279; *Scott v. Stanford*, L. R. 3 Eq. 718; *Cox v. Land and Water Journal Co.*, 9 Id. 324; *Pike v. Nicholas*, L. R. 5 Ch. 251; *Hogg v. Scott*, L. R. 18 Eq. 444.

(*b*) 19 L. T. (N.S.) 550; L. R. 7 Eq. 34.

(*c*) 38 L. J. (Ch.) 529.

published with reference to the same subject matter, and we thought certainly that the defendant had been guided by the plaintiff's book, more or less, to the authorities which the plaintiff had cited ; but it was a perfectly legitimate course for the defendant to refer to the plaintiff's book, and if he did, taking that book as his guide, himself go to the original authorities, and compile his book from the original authorities, he made no unfair or improper use of the plaintiff's book " (a).

The question as to how far advantage may be reaped from the work of another, and what use may be legitimately made of it, is difficult of solution. Perhaps the strongest case in favour of the adoption by a subsequent compiler of the work of a preceding one, is that of *Cary v. Kearsley* (b), where Lord Ellenborough thought that the former might fairly adopt part of the work of the latter, and might so make use of his labours for the promotion of science and the benefit of the public ; but having done so, he was of opinion that the question would be, was the matter so taken used fairly with that view, and without what he might term the *animus furandi* ? For while he considered himself bound to secure every man in the enjoyment of his copyright, he was fearful of putting manacles upon science.

Where the defendant published a sheet almanac containing matter pirated from a distinct part of a directory published by the plaintiff, affording information with respect to the post office, compiled from public documents, and the matter pirated formed an exceedingly small portion of the plaintiff's work, though they bore a great proportion to the other matters in the defendant's work ; the court granted and continued an injunction against him (c).

(a) "The true principle in all these cases," said Vice-Chancellor Hall, in *Hogg v. Scott*, L. R. 18 Eq. 458, "is that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work ; that is, in fact, merely to take away the result of another man's labour, or, in other words, his property."

(b) 4 Esp. 168.

(c) *Kelly v. Hooper*, 4 Jur. 2.

How far prior literature may be used.

Sale of a sheet almanac printed from a directory restrained.

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The "Guide to Science," and "The Reason Why."

In *Jarrold v. Houlston* (a), the publishers of Dr. Brewer's "Guide to Science" obtained an injunction against the publication of the "Reason Why." The works in controversy were written on the same plan, and presented, in the form of question and answer, popular information on a variety of scientific subjects. The earlier book, Dr. Brewer's "Guide to Science," had evidently been used to a considerable extent in the preparation of the later one, although copying was denied. The judge said: "The question I really have to try is, whether the use that in this case has been made of the plaintiffs' book has gone beyond a fair use. Now, for trying that question, several tests have been laid down. One, which was originally expressed, I think, by a common law judge, and was adopted by Lord Langdale in *Lewis v. Fullarton*, is, whether you find on the part of the defendant an *animus furandi*—an intention to take for the purpose of saving himself labour. I take the illegitimate use, as opposed to the legitimate use of another man's works on subject matters of this description to be this: if, knowing that a person whose work is protected by copyright has, with considerable labour, compiled from various sources a work in itself not original, but which he has digested and arranged, you, being minded to compile a work of a like description, instead of taking the pains of searching into all the common sources, and obtaining your subject matter from them, avail yourself of the labour of your predecessor, adopt his arrangements, adopt, moreover, the very questions he has asked, or adopt them with but a slight degree of colourable variation, and thus save yourself pains and labour by availing yourself of the pains and labour which he has employed, that I take to be an illegitimate use." But where the same plaintiffs filed a bill against the publishers of a work called "Class Book of Modern Science," compiled by Messrs. Thomas and Francis Bullock, for a piracy of their "Dr. Brewer's Guide," and

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

it was admitted by the defendant that he had referred to the plaintiffs' book in the course of compiling the "Class Book;" but he insisted that every fact or illustration referred to in the "Class Book," was verified by the labour and research of the authors themselves, by means of actual observation, inquiry, or experiment where such was possible, and by reference to scientific authorities and standard works of which the plaintiffs' book did not affect to be one; it was held by Vice-Chancellor James, that though if any part of a work complained of was a transcript of another work, or with only colourable additions and variations, and prepared without any real independent literary labour, such portion of the work complained of was piratical, yet it was impossible to establish a charge of piracy where it was necessary to track mere passages and lines through hundreds of pages, or where the authors of a work challenged as piratical had honestly applied their labours to various sources of information. The learned Vice-Chancellor saying, "The whole of the part about sound, fogs, winds, dew, and hoar-frost in the defendant's work has a striking similarity, almost identity of appearance, with parts of the plaintiffs' work. The defendant's authors, however, have both of them sworn positively that they did not copy from the plaintiffs' work, although that work was known to them, and had been used in tuition, in common with nearly fifty other books of the same character, and on the same topics. These authors have not been cross-examined. The defendant's counsel have gone through the works in question passage by passage, and have shown that in nearly all the instances of alleged piracy, the defendant's production had been, in fact, taken from other works which were antecedent to both plaintiffs' and defendant's books. The plaintiffs said, that the difference of language between the two, was part of the defendant's authors' fraud and artful disguise of what they had done. But the language thus complained of, is conclusively traced to other books. This fact recoils destructively on the plaintiffs' case, for it goes far to

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A compiler must produce an original result.

show that the defendant's writers honestly applied their labours to various sources of information. I do not consider that the imitation of the questions in the plaintiffs' book is a piracy, so long as the defendant's writers have gone to independent sources in the preparation of their answers" (a).

The rule appears now to be settled, that the compiler of a work in which absolute originality is of necessity excluded, is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction as to produce an original result, provided that he does not deny the use made of such preceding works, and the alterations are not merely colourable (b);

So in the case of a descriptive catalogue of fruit and trees, the court was of opinion that the later compiler might use the work of his predecessor as a guide or instructor; but might not copy the descriptions from it, although he should verify and correct them from specimens of fruit before him. Though he could not be prevented from getting much aid in the way of information, suggestions, etc., from the protected work open before him, he must write his own descriptions from actual specimens, or common sources of information (c).

The case of a dictionary analyzed.

To further illustrate the principle, take the case of a dictionary. There may be a certain degree of skill exhibited as to order and arrangement, and there may be a good deal of ingenuity exhibited in the selection of phrases and illustrations, which are the best exponents of the sense in which the word is to be used: and there may also be great labour in the logical deduction and arrangement of the word in its different senses, when the sense of the word departs from its primary signification; but there cannot be copyright in much of the information contained

(a) *Jarrold v. Heywood*, 18 W. R. 279.

(b) *Spiers v. Brown*, 6 W. R. 352; *Reade v. Lacy*, 1 J. & H. 524; and in the case of a catalogue, *Holten v. Arthur*, 1 H. & M. 603; 32 L. J. (Ch.) 771; 11 W. R. 934; 9 L. T. (N.S.) 199.

(c) *Hogg v. Scott*, L. R. 18 Eq. 444.

in the numerous dictionaries published, each necessarily having a large number of words identically similar. The great point to decide in such cases is, as we have already stated, whether in the particular case the work is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work (a).

Lord Hatherley, while Vice-Chancellor, in the case of *Spiers v. Brown* (b), thus summed-up the law in his peculiarly lucid style : All cases of copyright were very simple when a work of an entirely original character was concerned, being a work of imagination or invention on the part of the author, or original in respect of its being a work treating of a subject common to mankind, such as history, or other branches of knowledge varying much in their mode of treatment, and in which the hand of the artist would be readily discerned. But the difficulty that arose in cases of the class then before him was, that they not only related to a subject common to all mankind, but that the mode of expression and language was necessarily so common that two persons must, to a very great extent, express themselves in identical terms in conveying the instruction or information to society which they were anxious to communicate. The most obvious case was that of figures, such as the table of logarithms—the case before Sir John Leach—where it would be impossible to deviate in the calculations, or to vary the order, and the result must be identical. The same might be said of directories, calendars, court guides, and works of that description. Those were cases in which the only mode of arriving at the amount of labour bestowed was by the common test resorted to of discovering the copy of errors and misprints, indicating a servile copying. Copyright was considered, for the highest purposes of society in every country, as necessary to be secured to those who contributed to the

The case of
Spiers v.
Brown.

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

(b) 6 W. R. 352.

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civilization, refinement, or instruction of mankind, and extended, in this country, if not elsewhere, to every description of work, however humble it might be, even to the mere collection of the abodes of persons, and to streets and places; and labour having been employed upon subjects even of that class, no one had a right to avail himself of it. . . . The real question was, how far the Courts had decided that a certain amount of use of preceding works was legitimate in carrying out a second work of a similar description, calculated to afford instruction by means of a dictionary, vocabulary, or the like. In the case of *Cary v. Kearsley* (a), Lord Ellenborough laid down the law in a manner which had not been questioned. He said: "That part of the work of one author found in another is not of itself piracy, or sufficient to support an action. A man may fairly adopt part of the work of another; he may so make use of another's labour for the promotion of science and the benefit of the public; but, having done so, the question will be, was the matter so taken used fairly with that view, and without what I may term the *animus furandi*? Look through the book, and find any part that is a transcript of the other; if there is none such, if the subject of the book is that which is subject to every man's observation, such as the names of the places and their distances from each other, the places being the same, the distances being the same, if they are correct, one book must be a transcript of the other; but when in the defendant's book there are additional observations, and in some parts of the book I find corrections of misprintings, while I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles on science." Then there was the case of *Longman v. Winchester* (b), in which Lord Eldon said, "Take the instance of a map describing a particular

(a) 4 Esp. 168.

(b) 16 Ves. 269; *Cary v. Longman*, 1 East, 358; *Matthewson v. Stackdale*, 12 Ves. 270; *Bailey v. Taylor*, 3 L. J. (Ch.) 66; *Kelly v. Hooper*, 4 Jur. 21; *M'Neill v. Williams*, 11 Id. 344; *Murray v. Bogue*, 1 Drew. 353.

county, and a map of the same county afterwards published by another person; if the description is accurate in both they must be pretty much the same, but it is clear that the latter publisher cannot, on that account, be justified in sparing himself the labour and expense of actual survey, by copying the map previously published by another. So, as to Paterson's 'Road Book,' it is certainly competent to any other man to publish a book of roads, and if the same skill, intelligence, and diligence are applied in the second instance, the public would receive nearly the same information from both works; but there is no doubt that this court would interpose to prevent a mere republication of a work which the labour and skill of another person had supplied to the world. So, in the instance mentioned by Sir Samuel Romilly, a work consisting of a selection from various authors, two men perhaps might make the same selection, but that must be by resorting to the original authors, not by taking advantage of the selection already made by another." And again: "The question before me is, whether it is not perfectly clear that in a vast proportion of the work of these defendants no other labour has been applied than copying the plaintiff's work. From the identity of the inaccuracies it is impossible to deny that the one was copied from the other *verbatim et literatim* (a). To the extent, therefore,

(a) This is one of the surest tests of copying, see *Kelly v. Morris*, L. R. 1 Eq. 697; *Pike v. Nicholas*, L. R. 5 Ch. 251; *Cox v. Land and Water Journal Co.*, L. R. 9 Eq. 324. In *Murray v. Bogue*, 1 Drew. 353, 366, where instances were stated in the bill and at the bar in which the defendant had the plaintiff's errors, Vice-Chancellor Kindersley said, "Now the use of showing the same errors in both is, that where the defendant says he has got his information, not from the plaintiff, but from other sources, if the evidence is unsatisfactory on the question whether the defendant did use the plaintiff's work or not, to show the same errors in the subsequent work that are contained in the original, is a strong argument to show copying." It will be in the defendant's favour if he shows that the matter in his own book is free from many of the errors in the plaintiff's; but still the errors may have been corrected in copying. In *M'Neill v. Williams*, 11 Jur. 344, it appeared that seven errors in the plaintiff's mathematical tables were also found in those of the defendant. The latter declared that this was accidental, and that the plaintiff's book contained seventy errors not to be found in his own. It does not appear what importance the Court attached to this circumstance; but the injunction was refused.

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in which the defendant's publication has been supplied from the other work the injunction must go ; but I have said nothing that has a tendency to prevent any person from giving to the public a work of this kind if it is the fair fruit of original labour, the subject being open to all the world." Another case—which seemed to condense into one point the view taken by the courts in cases where actual use is avowed and the only question is, whether it is a fair use (a),—where Lord Eldon says this : " Upon inspection of the different works, I observe a considerable proportion taken from the plaintiff's that is acknowledged, but also much that is not ; and in determining whether the former is within the doctrine upon this subject the case must be considered as also presenting the latter circumstance. The question upon the whole is, whether this is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work." These were the words which had been relied on by Lord Cottenham in *Bramwell v. Halcomb* (b), and it was with the view thus taken by those learned judges that he (the Vice-Chancellor) had gone through a very laborious investigation of the works then in question, there being, as it seemed to him, a considerable portion of the defendant's work which came within the doctrine of its being a legitimate use and a fair exercise of mental operation, and (adding the negative used by Lord Ellenborough) not being done colourably. . . . His Honour said, that the real issue which the court was called on to decide was one of the most difficult ever presented to him, namely, as to how far this very considerable use of the work of another might be taken to be legitimate. There was no concealment of some use having been made ; no colourable alteration proved, nor anything tending to show a fraudulent design to make an unfair use of the work of another. The present case went as far as any previous, though not perhaps further than *Mawman v. Tegg* (c), where a very large and considerable

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

(b) 3 My. & Cr. 737.

(c) 2 Russ. 385.

portion of the plaintiff's work had been taken without any alteration or addition. Though a good deal had been taken from the plaintiff, yet a good deal of labour had been bestowed upon what had been taken. . . . Upon the whole, he could not think that the defendant had gone beyond what the court would allow, having produced that which in the result was, in fact, a different work from that of the plaintiff.

Copyright may be invaded in several ways :—

- 1st. By reprinting the whole work *verbatim*.
- 2nd. By reprinting *verbatim* a part of it.
- 3rd. By imitating the whole or a part, or by reproducing the whole or a part with colourable alterations.
- 4th. By reproducing the whole or a part under an abridged form.
- 5th. By reproducing the whole or a part under the form of a translation.

Modes in which copyright may be infringed.

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

1. By reprinting the whole *verbatim*.

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

2. By reprinting *verbatim* a part.

In questions as to the extent of appropriation which is necessary to establish an infringement, extreme difficulty is usually experienced, for the quality of the piracy is frequently more important than the proportion which the borrowed passages might bear to the whole work (b).

(a) This was done in the case of a book imported from America, "Clarke's House of Lords Cases," vol. viii.; see *Butterworth v. Kelly*, 4 T. L. R. 430.

(b) Vice-Chancellor in *Tinsley v. Lacy*, 1 H. & M. 747; 32 L. J. (Ch.) 535; *Warne v. Seebohm*, 39 Ch. D. 73; and see *Trade Auxiliary Co. v. Middlesborough and District, &c., Association*, 40 Ch. D. 425; *Cate v. Devon Constitutional Newspaper Co.*, *Ib.* 500.

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

Quantity
but slight
criterion of
piracy.

Lord Cottenham, in the cases of *Bramwell v. Halcomb* (a), and *Saunders v. Smith* (b), adverting to this point, said: "When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value, that is always looked to. It is useless to refer to any particular cases as to quantity." In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases a considerable portion of the materials of the original work may be fused into another work, so as to be indistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot fairly be treated as a piracy; or they may be inserted as a sort of distinct and mosaic work into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy. If a person should, under colour of publishing 'elegant extracts' of poetry, include all the best pieces at large of a favourite poet, whose volume was secured by copyright, it would be difficult to say why it was not an invasion of that right, since it might constitute the entire value of the volume. The case of *Mawman v. Tegg* (c), is to this purpose. There was no pre

(a) 3 My. & Cr. 737.

(b) 3 My. & Cr. 711.

(c) 2 Russ. 385.

tence in that case that all the articles of the encyclopædia of the plaintiffs had been copied into that of the defendants ; but large portions of the materials of the plaintiff's work had been copied. Lord Eldon, upon that occasion, held that there might be a piracy of a part of a work, which would entitle the plaintiffs to a full remedy and relief in equity. In prior cases he had affirmed the like doctrine. In *Wilkins v. Aikin* (a), he said, "There is no doubt that a man cannot, under the pretence of quotation, publish either the whole or a part of another's book, although he may use, what in all cases it is difficult to define, fair quotation."

Selections from various writers are frequently made and issued in one volume. Where the selections are made from works in which copyright subsists, questions have arisen as to whether the limits of lawful quotation have been exceeded. And in one case where it appeared to the court that the chief value of the compilation consisted in the selections, and not in the original matter, it held the work to be piratical. In the case referred to the defendant had published a 'Book of the Poets,' with the object of illustrating the characteristics of various poets, and the progress of English poetry during the nineteenth century. He had made 425 selections and extracts, from forty-three poets, and they were employed to illustrate an original essay of thirty-four pages on English poetry of the period covered, twenty-three biographical sketches of one page each, and twenty shorter notices of authors. Besides extracts, six poems were taken in their entirety from Campbell's works. "If," said Vice-Chancellor Shadwell (b), "there were critical notes appended to each separate passage, or to several of the passages in succession which might illustrate them, and shew from whence Mr. Campbell had borrowed an idea, or what idea he had communicated to others, I could understand that to be a fair criticism. But there is, first of all, a general essay ;

Selections
from various
writers.

(a) 17 Ves. 422.

(b) *Campbell v. Scott*, 11 Sim. 31.

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“The Man of his Time,” to illustrate career of person.

then there follows a mass of pirated matters, which in fact constitutes the value of the volume.”

In the case of *Bradbury v. Hotten* (a), the publication complained of was ‘The Man of his Time,’ the object of which was to illustrate the career of Napoleon III. by caricatures taken from leading English and foreign illustrated papers. Nine caricatures, with their original headings and references, but much reduced in size, were copied from nine numbers of ‘Punch,’ comprised within the period extending from 1849 to 1867. It was declared that the selections had been taken for the sole purpose of illustrating the career of Napoleon. While admitting that limited extracts might be taken from copyright works for a fair purpose of this kind, the court found that the defendant had republished the caricatures in ‘Punch’ for the same purpose as they were originally published, namely, to excite the amusement of his readers. It was held that the defendant had gone beyond the privilege of fair quotation, and therefore a case of piracy was made out (b).

(a) L. R. 8 Exch. 1.

(b) Kelly, C.B., said, “The questions raised are of interest and importance, but it is difficult to lay down any fixed principle with regard to them. No doubt the matter is, to a great extent, one of degree. It may well be that an author might copy into his book a portion of some books previously published, and yet that a jury might be justified in finding there had been no infringement of copyright; whilst on the other hand, the copying might take place under such circumstances as clearly to amount to an infringement. . . . Nine of these pictures the defendant has copied, in some instances alone, in others with the addition of the printed words underneath them. If they have been so copied as to amount to a copy of a material part of the plaintiffs’ publication, and the defendant has thus obtained a profit which would or might otherwise have been the plaintiffs’, then there has been a piracy, for which the defendant is responsible. It is said that to copy a single picture, at all events, could not be an infringement of the plaintiff’s copyright; but it is impossible to lay that down as a general rule. I can easily conceive a case where such an act would not be piracy. For example, where a picture is reproduced amongst a large collection, published for an entirely different object from that which the first publisher had in view. We must consider in such a case the intent of the copyist and the nature of his work. To turn for a moment from pictures to printed matter, the illustration put during the argument by my Brother Bramwell will explain my meaning.

“A traveller publishes a book of travels about some distant country like China. Amongst other things, he describes some mode of preparing food in use there. Then the compiler of a cookery book re-publishes the

A similar case to the last cited was that concerning the book entitled 'Thackerayana, Notes and Anecdotes, illus-

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'Thackerayana, Notes

description. No one would say that that was piracy. So again, an author publishes a history illustrated with woodcuts of the heads of kings, and another person, writing another history of some other country, finds occasion to copy one of these woodcuts. That, again, would not be a piracy. Yet, on the other hand, the copying of a single picture may, under some circumstances, be an infringement. For example, take the case of a work illustrated by one engraving of the likeness of some distinguished man, where no other likeness is extant. No one would have a right to copy that into a book upon any subject whatever, and a jury would in such a case rightly find that there had been an infringement of the copyright.

"To return to the facts of the present case: the defendant has introduced nine pictures of the plaintiffs into what I may call his comic life of Napoleon III. Is he by so doing applying to his own use and for his own profit what otherwise the plaintiffs might have turned, and possibly still may turn, to a profitable account? The pictures are of great merit, and no doubt were largely paid for, and by inserting these copies the defendant has unquestionably added to the value of his publication. Why should this not be an infringement? It was said by my brother Parry, in his able argument, that the plaintiffs will never make such a use of these pictures as the defendant has made. But suppose, as my brother Pigott suggested, that after the catastrophe which ended in the fall of Napoleon III., the proprietors of 'Punch' had chosen to re-publish all their caricatures of him, or that even now they should choose to do so. One cannot help seeing that the defendant's publication might cause many who would otherwise have bought to refrain from buying such a work. I need not refer at length to the authorities cited. The principle of them is, that where one man for his own profit puts into his work an essential part of another man's work, from which that other may still derive profit, or from which but for the act of the first he might have derived profit, there is evidence of a piracy upon which a jury should act."

Bramwell, B., said: "I am of the same opinion, though not without some doubt—doubt which it is natural to feel in a case like this, which is on the borderland between piracy and no piracy. But I think the plaintiffs are entitled to succeed. They are the proprietors of a sheet of letterpress within the meaning of the Act of Parliament. Now it is quite true that when a man publishes anything, he professes to add to the common stock of knowledge, and everybody may avail himself of what is published. This may be illustrated by the case put, of the compiler of a cookery-book taking from some traveller's account of his travels a receipt for a new dish. But, applying that principle here, it does not exonerate the defendant. If he had said, 'I propose to illustrate my history by extracts from the satirists of the day,' and had then gone on to quote to a reasonable extent the opinions, or even the very words of satirical writers, no one would call that piracy. Suppose, for instance, he had said, 'At this period of his career Napoleon was unpopular and the subject of ridicule in England. This may be seen by examining the sort of pictures of him which appeared in 'Punch.' Later on he became more popular, and the pictures published represented him more favourably.' That could not have been complained of. Then the defendant would simply have been using the knowledge acquired from 'Punch' for his benefit, as he would have a right to do. But here he has done more. He has not availed himself of the knowledge acquired from 'Punch,' but he has actually reproduced the very pictures published in 'Punch,' and for the same purpose as they were originally published, namely, to excite the amusement of his readers."

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and Anec-
dotes.' For
Biography.

trated by nearly Six Hundred Sketches, by William Makepeace Thackeray.' It purported to be a kind of biography of Thackeray, based on the assumption that his own experiences were narrated in certain of his novels. Besides some previously unpublished sketches and caricatures by Thackeray, the work contained extensive selections from his published works, the copyright of which belonged to the plaintiff. The extracts were prepared by, and interspersed with original comments by the compiler. The court found that the effect of the book was to supersede to a damaging extent the works from which the selections had been made, and accordingly held it to be a case of piracy (a).

Extracts for
criticism.

Many cases of extracts for criticism have come before the court. It is obvious that quotations to some extent must in such cases be made from the work reviewed, and this abstract right of the reviewer has never been impeached. To deny this privilege would be, as Lord Kinloch once said, "to sentence to death all our reviews, and the greater part of our works in philosophy." The reviewer may make extracts sufficient to shew the merits or demerits of the work, but not to such an extent as that the review may serve as a substitute for the book reviewed. Sufficient may be taken to give a correct view of the whole, but the privilege of making extracts is limited to these objects, and no person will be allowed to republish in the form of quotations a valuable part of the protected work and thus to an injurious extent to supersede the original (b).

Whether the limits of lawful quotation have been exceeded is a question to be governed by the particular circumstances of each case.

Reviews or
criticisms.

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

(a) *Smith v. Chatto*, 31 L. T. (N.S.) 775.
(b) *Roworth v. Wilkes*, 1 Camp. 94; *Mawman v. Tegg*, 2 Russ. 385; *Campbell v. Scott*, 11 Sim. 31; *Bohn v. Bogue*, 10 Jur. 420; *Black v. Murray*, 9 Sc. Sess. Cas. 3rd ser. 341; *Smith v. Chatto*, *supra*; *Lawrence v. Dana*, 2 Am. L. T. R. (N.S.) 402.

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

In *Bell v. Whitehead* (b) the plaintiffs had published in the 'Monthly Chronicle' an article entitled 'The Great Western Railway Inquiry,' occupying nineteen pages; the defendant had extracted four pages and a half from this, and published it in the 'Railway Times,' a weekly paper, with animadversions. Lord Cottenham, C., in dissolving an injunction which had been obtained, made these observations: "It is difficult to prescribe the legitimate mode of extracting what is published in other publications, and to lay down the rule of quantity; but it is necessary for a party to be able to substantiate the value of the matter extracted before he comes for an injunction. It appears to me that the subject of the injunction comes within all the rules which are prescribed for trying what is a fair extract or not. The first is, that they are allowed for the purposes of criticism. Now, it is well known that there is a controversy going on as to the principles upon which a railway should be constructed, and on one side is Mr. Brunel, and on the other Dr. Lardner, and what they each contend for is found stated in the reports of the railway company. The 'Railway Times' is the medium of intelligence, and contributes information on the subject of railways; and in publishing the reports of the railway company it is admitted that they have done that which

The Great
Western
Railway
inquiry.

(a) *Whittingham v. Wooler*, 2 Swans. 428. In *Cobbett v. Woodward*, L. R. 14 Eq. 407, the Court was willing to grant an injunction against about eight lines copied from the plaintiff's publication. In *Sweet v. Benning*, 16 C. B. 459, copied matter forming about one-twentieth part of defendant's work was held to amount to piracy. See *Bradbury v. Hotten*, L. R. 8 Exch. 1; *Chatterton v. Cave*, L. R. 10 C. P. 572; 1st app. 2 C. P. D. 42; 2nd app. 3 App. Cas. 483; *Gray v. Russell*, 1 Story (Amer.) 20; *Tinsley v. Lacy*, 1 H. & M. 752; *Ward Lock & Co. v. Scott*, W. N. (1886) 190.

(b) 17 L. J. (Ch.) 141; 3 Jur. 68.

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they had a right to do ; but they take the side contrary to Dr. Lardner. They then print so much of the article from the ' Monthly Chronicle ' as is complained of, and call it Dr. Lardner's further report, and they comment on the controversy between Mr. Brunel and Dr. Lardner. The controversy is also taken up by the editor. They say that they intended to give the whole of the article ; but they state that they are unable to do so, and mean to give the remainder in the ensuing number ; and there is an advertisement, saying, the next number will contain the whole. It is certainly not a report, but an article on the controversy which the respective engineers had engaged in. In the number of the 8th of January, they state that Dr. Lardner was to superintend Mr. Wood's experiments, and that they should only extract that portion of the article which relates to the ' opposition of the air to railway trains at high velocities,' and they say they do not mean to publish the whole. . . . On Tuesday they state that they have given the substance of the report. It is not holding out a threat that they will publish more. They make uncourteous observations upon Dr. Lardner ; and it is a pity that scientific gentlemen cannot discuss questions of science with more temper. It is fair that no strictures should be made on a work contrary to the spirit of prior decisions ; but it would be injurious to the public to limit the right of discussing questions of this kind, and for that purpose to make necessary extracts. And the question is, whether this was inserted for purposes of criticism, and for the purpose of supporting such observations as the editor thinks proper to make. This was the ground proceeded on in *Whittingham v. Wooler*, and is acted on in such publications as the ' Edinburgh ' and ' Quarterly ' Reviews, and when fairly acted on, the result most probably is, that the sale is extended by the notice, when not given for the purpose of superseding the work itself. And, if I were to entertain this application, how could I exclude the similar application of one newspaper seeking to restrain the sale of an article taken from another. It is impossible to say

there is any value in the nature of property in what is here inserted. The question is too minute, as a question of property or value, how far, in point of value, it interferes with the sale of the 'Monthly Chronicle.' The injunction is not to depend altogether on a question of account; but to what value the question, in point of utility, is to be carried. If no other danger were to arise from granting this application than what would be consequent in encouraging the litigation of such minute inquiries, it would be a sufficient ground to refuse it, that the court should not be so occupied to the exclusion of other matters which press upon it. The injunction is dissolved, each party paying their own costs."

But where, in the recent case of *Maxwell v. Somerton*, (a), the publisher, Mr. Maxwell, applied for an injunction against the proprietor of the 'Bristol Mercury' to restrain him from publishing two stories, 'A Troubled Life,' and 'How I Lost the County,' which he had taken *verbatim* from 'Belgravia' and the 'Belgravian Annual'; and it appeared that the magazines were sent to the defendants for review, and that it was the custom, and had been so for many years, to extract short stories in the way defendants had done, Vice-Chancellor Bacon decided that the defendants had no right to publish articles from publications sent to them for criticism; but in granting the injunction asked, made no order as to costs, being of opinion that the defendants had acted unwittingly in making use of the articles in question.

It has become a custom for many country papers to copy or abridge articles appearing in current magazines. The proprietors of these country papers seem to be under the impression that because the magazine is sent to them for review they are justified in the use they make of the articles in question. There can be no doubt that the reproduction of articles or portions of articles in this way may materially advance their popularity and increase their circulation, so that to some extent editors should not be

Copying short stories for review.

Copying articles in current magazines into country newspapers.

(a) *Maxwell v. Somerton*, 30 L. T. (N.S.) 11; 22 W. R. 313.

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restricted in their custom, but it must be remembered that what helps the circulation of the magazine from which the article is taken does not necessarily increase the circulation of the article itself. For instance, assume a short story of great interest appears in one number of a magazine, the reproduction of this story in a newspaper, though it might assist the circulation of the magazine from which it is taken, generally might seriously interfere with the value of the copyright in the particular story. The reason why probably the custom above referred to has been permitted to have sway is the absurd terms of the Copyright Act, giving the proprietor of the magazine a copyright for 28 years, without the right of republishing in a separate form without the consent of the author, and revesting the right to publish in the author after a period of 28 years, when the probability is that this right is valueless. As the law stands authors should reserve to themselves the right of separate publication as authorized by the 18th section of the Act. The recent bill promoted by the Society of Authors and entrusted to the hands of Lord Monkswell, meets the difficulty by substituting the period of three years for 28 years, after which the copyright in magazine articles is to revert to the author. This period of three years is ample, inasmuch as all fear of competition between the article as separately reprinted and as appearing in the magazine will in that time in 99 cases out of 100 have been removed.

The Rudyard
Kipling
articles copied
from the
‘Times.’

In a recent case (a) the proprietors of the ‘Times’ brought an action against the proprietor and publisher of the ‘St. James’s Gazette,’ to restrain the defendants from further publishing any copy of a newspaper containing any copy of an article by Mr. Rudyard Kipling, or substantial portions thereof, and also extracts from the ‘Times’ contained in twenty-two separate paragraphs of the ‘Gazette’ of the 13th of April. An interlocutory order had been made restraining the publication of the

(a) *Walter v. Steinkopff*, 36 Sol. Jour. June 11, 1892, p. 556 ; 8 T. L. R. 633.

Rudyard Kipling article. It was not denied by the defendants that they had copied some two-fifths of the article, and all the paragraphs from the 'Times' practically *verbatim*, but it was contended that the consent of the proprietors of the 'Times' might be assumed if the four following conditions were observed:—(i.) That the source of the information was acknowledged; (ii.) That the paper copying and the paper copied were not direct rivals or competitors; (iii.) That the paper copied from had also copied; (iv.) That the editor of the paper copied had given no notice of his objection to matter being copied. It was proved by the 'Times' that the copyright in the Rudyard Kipling article and in those of the 22 paragraphs was vested in them. Mr. Justice North in delivering judgment, said that the plaintiffs could not have asked successfully for the interference of the court with respect to the paragraphs in which they had not proved that they had any copyright: their claim to relief was confined to the Rudyard Kipling article, and three of the paragraphs in which they had proved that they had copyright. With regard to the article the plaintiffs' case was clear, it was practically undisputed by the defendants' advisers, the defendants had deliberately reprinted the most attractive portion of an article which they admitted they knew had been acquired by the plaintiffs at a high cost. There were purposes, no doubt, for which notwithstanding the plaintiffs' copyright, the defendants might legitimately have made reasonable extracts, as, for instance, if they had been criticising Mr. Kipling's works, &c., but in the present case there was a mere reproduction of copy without trouble or cost. The same remarks applied also to the three paragraphs. It was said that there was no copyright in news, but there was or might be in a particular form of language or modes of expression by which information was conveyed, and not the less so because the information might be with respect to the current topics of the day. With regard to the quality of the matter copied, the paragraphs pirated were taken in their entirety for the

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very purpose for which they were used in the 'Times,' viz., to convey information to the readers of the paper. It was not a case of the selection of a part or quotation, or an extract. The defendants had failed to prove that the first three of the four alleged conditions had been observed, but even if they had, the plea of the existence of such a custom or practice of copying as was set up could no more be supported when challenged than the highwayman's plea of the custom of Hounslow Heath. It had often been relied on, but had always been repudiated by the courts. In the result, therefore, the defendants were entirely wrong.

Law Reports.

It is manifest, also, from what fell from Lord Chancellor Cottenham in *Saunders v. Smith* (a), that he entertained no doubt (although he did not decide the point) that there might be a violation of the copyright of volumes of reports, by copying *verbatim* a part only of the cases reported. It is questionable, how far and to what extent certain cases in Law Reports may be reprinted at length in a treatise on the particular subject to which they relate; but it is clearly piracy to collect together, and reprint from the reports all the cases upon a particular subject, though the collection and classification may be new, and the publication be adorned with the addition of several unpublished decisions and notes (b). In the case last cited, however, the substance and value of the book consisted mainly of the cases pirated; and a case presenting greater difficulty was that of the well-known book entitled 'Smith's Leading Cases,' where the annotations really form the substance and essence of the work. In regard to the legal right in the last-mentioned case (c) Lord Cottenham said: "In this case I find the publication complained of to be of a character which, whether it be or be not an infringement of the copyright of the plaintiffs, is a course of proceeding which has been pretty

(a) 3 My. & Cr. 711; see *Hodges v. Welsh*, 2 Ir. Eq. Rep. 266; *Buttsworth v. Kelly*, 4 T. L. R. 430.

(b) *Hodges v. Welsh*, *supra*.

(c) *Saunders v. Smith*, 3 My. & Cr. 711, 728.

largely admitted, and pretty generally adopted. Several cases occurred to me, and several were mentioned to me at the bar, in which a gentleman at the bar, desirous of publishing a work upon a particular subject, has collected the cases upon that subject, and has taken these cases, generally speaking *verbatim*, from reports which are covered by copyright. No instance has been represented to me in which those entitled to the copyright have interfered; no judgment, therefore, has been pronounced upon that subject. I am not stating whether the owner of the copyright is entitled to interfere in such a case, or whether the use of published reports is or is not to be permitted. That is a question of legal right upon which I find at present no reason for coming to an adjudication." But in a subsequent case, where eleven cases only had been copied *verbatim*, and a considerable number of what were called abridged cases were mere copies of the plaintiff's with slight variation, Sir L. Shadwell, V.-C., granted an injunction (a). He distinguished the case from *Saunders v. Smith*. "In that case," said he, "there was no question but some parts of the plaintiff's work had been copied in the defendant's work. But there the publication of the defendant appeared to me to be altogether distinguished from that in which the cases originally appeared, and one which could never be substituted for the other. In this case, from the class of persons who are held out as likely to be purchasers of the defendant's publication, I think it may be materially injurious to the sale of the plaintiff's work." This was the true criterion of the infringement, and it may be said generally that in cases where the work in which the copying or extract is introduced, is a new and distinct work, and not a work with merely colourable variations, the test which the court will apply is the capability of the new work being taken as a substitute for the whole work. In *Lewis v. Fullarton* (b), the

(a) *Sweet v. Shaw*, 3 Jur. 217; 8 L. J. (N.S.) Ch. 216; see *Wheaton v. Peters*, 8 Peters (Amer.) 591.

(b) 2 Beav. 6.

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case of a typographical dictionary, Lord Langdale held that largely copying from a work, in another book having a similar object, was a violation of that copyright, although the same information might have been (but, in fact, was not) obtained from common sources, open to all persons; and accordingly in that case he granted an injunction as to the parts pirated, notwithstanding the fact that there was much which was original in the new work (a).

The custom of the trade no excuse.

The copying into a newspaper whole articles taken from another periodical—as a monthly magazine—professedly for the purpose of reviewing, is, as we have seen, an unlawful use, and a Court of Equity will restrain the publication of the work containing these articles, notwithstanding an allegation that it is the custom of the trade (b).

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

Distinction between a copy and an imitation.

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

A copy is one thing, an imitation or resemblance another. It is indeed certain, that whoever attempts any common topic will find unexpected coincidences of his thoughts with those of other writers; nor can the nicest judgment always distinguish accidental similitude from artful imitation. "There is likewise," says Dr. Johnson, "a common stock of images, a settled mode of arrangement, and a beaten track of transition, which all authors suppose themselves at liberty to use, and which produce the resemblance generally observable among contemporaries. So that in books which best deserve the name of originals there is little new beyond the disposition of materials already provided; the same ideas and combinations of ideas have been long in the possession of other hands; and by restoring to every man his own, as the Romans must have returned to their cots from the

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

(b) *Maxwell v. Somerton*, 30 L. T. (N.S.) 11; 22 W. R. 313; *Waller v. Steinkopff*, 36 Sol. Jour. 11 June, 1892, p. 556.

possession of the world, so the most inventive and fertile genius would reduce his folios to a few pages. Yet the author who imitates his predecessors only by furnishing himself with thoughts and elegancies out of the same general magazine of literature, can with little more propriety be reproached as a plagiarist, than the architect can be censured as a mean copier of Angelo or Wren because he digs his marble from the same quarry, squares his stones by the same art, and unites them to columns of the same order."

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

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

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

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

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

There may be a strong likeness without an identity. The question is, therefore, in many cases a very delicate one: what degree of imitation constitutes an infringement of the copyright in a particular composition? Certainly not such a similitude as the instances from the classics given above.

It is very evident that any use of materials, whether they are figures or drawings, or other things which are well known and in common use, is not the subject of a

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

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

An American court, in speaking of a case in which

(a) 1 East, 363, note,

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

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

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

One test,
substantial
identity.

Cases such as those referred to, namely, those where there is a resemblance between the substance and the general scheme of the two works in question, while at the same time the language of each is by no means similar, occasion great difficulty. The inquiry usually resolves itself into a matter of fact which rests with the court to determine—Is there such a resemblance between the two works in controversy as to constitute an infringement of copyright.

The most general test is that of substantial identity. Is the similarity between the two works such as to make the one substantially identical with the other? Has the second author produced what is substantially an independent work, or has he appropriated merely the fruits of another's labour? (b) Each case must depend on its own

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

(b) *Wilkins v. Aikin*, 17 Ves. 422; *Mawman v. Tegg*, 2 Russ. 385; *Bramwell v. Halcomb*, 3 My. & Cr. 737; *Lewis v. Fullarton*, 2 Beav. 6; *Kelly v. Hooper*, 4 Jur. 21; *Sweet v. Maugham*, 11 Sim. 51; *Sweet v. Cater*, *Ib.* 572; *Campbell v. Scott*, *Ib.* 31; *Stevens v. Wildy*, 19 L. J. (N.S.) Ch. 190; *Rosen v. Kelly*, 14 Ir. Com. Law Rep. 158; *Tinsley v. Lacy*, 1 H. & M. 747; *Kelly v. Morris*, L. R. 1 Eq. 697; *Scott v. Stanford*,

peculiar circumstances, and different judges may upon the very same evidence arrive at different conclusions.

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

Not every imitation a proof of plagiarism.

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

4. By reproduction under an abridged form.

A fair abridgment, when the understanding is employed in retrenching unnecessary circumstances, is not a piracy of the original work. Such an abridgment is allowable, and is regarded in the light of a new work. The law with reference to abridgments might, we think, with justice receive some modification (a). The decisions on the subject are somewhat inconsistent. The fundamental principle on which is based the protection afforded to authors from piracies, appears to be the injury or damage caused to them by the depreciation in the value of their original works. It seems a very unsatisfactory answer to an author, who has been injured by an abridgment, to say, that because the wrongful taker has exhibited talent and ingenuity, both in the taking and in the use which he has made of it, the original author has no remedy, “The form,” says Mr. Curtis (b), “under which the original matter reappears should be treated as a disguise; and the extent of the transformation shews only the extent to which the disguise has been carried, as long as anything remains which the original author can shew to be justly and exclusively his own.”

3 Id. 718; *Jarrold v. Heywood*, 18 W. R. 279; *Cobbett v. Woodward*, L R. 14 Eq. 407; *Ager v. Peninsular and Steam Navigation Co.*, 26 Ch. D. 637.

(a) See the suggestions of the Copyright Commissioners on the subject, *ante*, p. 64, note (a).

(b) ‘Copyright,’ 272.

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

To constitute a proper abridgment, the arrangement of the book abridged must be preserved, the ideas must also be taken, and expressed in language not copied but condensed. To copy certain passages and omit others, so as to reduce the volume in bulk, is not such an abridging as the Court would recognise as sufficiently original to protect the author. The judgment of the abridger must be called into play in condensing the views of the author. There is a clear distinction between an abridgment and a compilation. As an American judge (a) well observed: "A compilation consists of selected extracts from different authors; an abridgment is a condensation of the views of the author. The former cannot be extended so as to convey the same knowledge as the original work; the latter contains an epitome of the work abridged, and consequently conveys substantially the same knowledge. The former cannot adopt the arrangements of the works cited; the latter must adopt the arrangement of the work abridged. The former infringes the copyright, if matter transcribed, when published, shall impair the value of the original book; a fair abridgment though it may injure the original is lawful."

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

(a) Leavitt, in *Story's Executors v. Holcombe*, 4 McLean (Amer.) 314.

(b) Amb. 403. *Read v. Hodges*, 2 Atk. 141. See *Pinnock v. Rose*, 2 Bro. C. C. 85, note. Mr. Curtis, the learned author of an American work on Copyright, thus states, in his lucid style, the injustice of the law respecting abridgments: "When the author of a book," says he, "of whatever kind, possessing the legal attributes of originality, has secured his copyright according to the prevailing law of his country, he has secured the exclusive right to print and publish his own book. In the jurisprudence

an injunction was applied for, to restrain the publication of an abridgment of Dr. Johnson's 'Rasselas.' It appeared that

with which we are concerned, this right includes the whole book and every part of it; for we have seen that there may be a piratical taking of extracts and passages, and that the quantity thus taken may be immaterial. It includes also, or may include, the style, or language and expression; the learning, the facts, or the narrative; the sentiment and ideas, as far as their identity can be traced; and the form, arrangement, and combination which the author has given to his materials. These are, or may be, all distinct objects of the right of property; and in every work of originality, likely to be abridged or capable of being abridged, they are all important objects of that right. However imperfectly the subject may have been regarded in former times, it is now, I think, to be regarded as settled, that whatever is metaphysically part or parcel of the intellectual contents of a book, if in a just sense original, is protected and included under the right of property vested by law in the author; and it is very material to observe, that the arrangement, the method, the plan, the course of reasoning, or course of narrative, the exhibition of the subject, or the learning of the book, may be, according to its character, as much objects of the right of property as the language and the ideas.

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

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not one-tenth part of the first volume had been abstracted, and that the injury alleged to have been sustained by the author arose from the abridgment containing the narrative of the tale and not the moral reflections. The Master of the Rolls, Sir Thomas Clarke, refused the injunction, saying, "I cannot enter into the goodness or badness of the abstract. It may serve the end of an advertisement (a). In general it tends to the advantage of an author, if the composition be good; if it be not, it cannot be libelled. What I materially rely upon is, that it could not tend to prejudice the plaintiffs, when they had before published an abstract of the work in the 'London Chronicle.' If I were to determine this to be elusory, I must hold every abridgment to be so." Chancellor Kent, in referring to this case, says, "This latitudinarian right of abridgment is liable to abuse, and to trench upon the copyright of the author. The question as to a *bonâ fide* abridgment may turn, not so much upon the quantity as the value of the selected materials" (b).

But an injunction will be granted where the facts and the *terms* in which the facts are related are merely the same in both books. Thus where an injunction was moved for to restrain the publication of a book entitled 'Memoirs of the Life of Mrs. Bellamy,' which was alleged to have been pirated from a book called 'An Apology for the Life of George Anne Bellamy,' and it appeared in evidence that Mrs. Bellamy was author of the latter work; and that she sold the copyright to the plaintiff, who printed it in five volumes at a selling price of fifteen shillings; and that the work against which the injunction was prayed was in one volume, which sold for two shillings and sixpence; upon passages being read from each to shew that the *facts*, and even the *terms* in which they were related in the latter

(a) It is no defence to say that the pirated work is not offered for sale itself, but merely used to promote the sale of the books mentioned in it: *Hotten v. Arthur*, 1 H. & M. 603; 32 L. J. (Ch.) 771; 11 W. R. 934; 9 L. T. (N.S.) 199.

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

work, were frequently taken *verbatim* from the original one, an injunction was immediately granted (a).

The question as to how far an abridger may go without infringing the rights of the author was exhaustively considered in an American case which arose respecting Mr. Story's 'Commentaries on Equity Jurisprudence.'

It appeared that the chapters and the subjects were the same in Mr. Story's work and the work complained of; the former book contained 1,856 octavo pages, including notes, the latter 348 octavo pages, including notes; a page in the latter contained a little more than one in the former; reduced to the same sized page, the ratio in the amount of matter in the latter book to that in the former was about two to nine. In the entire work of Story there were 226 pages, constituting nearly an eighth part, on which there was some matter which had been extracted in the same language, or very nearly so, into the defendant's book, this matter comprising 879 lines, or about 24 pages of his book, and 30 pages of Story, which made one fifteenth part of the defendant's book and one-sixtieth of Story; this matter being found in scattered paragraphs in the first third of the defendant's book; all the other portions of Story's book were abridged without any transcription of his common language, the part so abridged comprising two-thirds of the defendant's book. The defence was set up that the defendant's book was a *bonâ fide* abridgment of the plaintiff's. The Master reported that Story's work had been fairly abridged, and hence that there was no infringement. Against this conclusion, the court found that the first third of the defendant's book, including one hundred pages, was not a fair abridgment, and granted an injunction against that part. The rest was regarded as an abridgment, and its publication was not enjoined. Mr. Justice McLean thus states the principles upon which the decision was arrived at: "This controversy has caused me great anxiety and embarrassment.

(a) *Bell v. Walker*, 1 Bro. C. C. 451.

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On the subject of copyright, there is a painful uncertainty in the authorities; and indeed, there is an inconsistency in some of them. That the complainants are entitled to the copyright which they assert in their bill is not controverted by the defendants. The decision must turn on the question of abridgment. If this were an open question, I should feel little difficulty in determining it. An abridgment should contain an epitome of the work abridged—the principles, in a condensed form, of the original book. Now it would be difficult to maintain that such a work did not affect the sale of the book abridged. The argument that the abridgment is suited to a different class of readers, by its cheapness, and will be purchased on that account by persons unable and unwilling to purchase the work at large, is not satisfactory. This, to some extent, may be true; but are there not many who are able to buy the original work, that will be satisfied with the abridgment? What law library does not contain abridgments and digests, from Viner's and Comyn's down to the latest publications? The multiplication of law reports and elementary treatises creates a demand for abridgments and digests: and these being obtained, if they do not generally they do frequently, prevent the purchase of the works at large. The reasoning on which the right to abridge is founded, therefore seems to me to be false in fact. It does, to some extent in all cases, and not unfrequently to a great extent, impair the rights of the author, a right secured by law.

“The same rule of decision should be applied to a copyright as to a patent for a machine. The construction of any other machine which acts upon the same principle, however its structure may be varied, is an infringement on the patent. The second machine may be recommended by its simplicity and cheapness; still, if it act upon the same principle of the first patented, the patent is violated. Now, an abridgment, if fairly made, contains the principle of the original work; and this constitutes its value. Why, then, in reason and justice, should not the same principle

be applied in a case of copyright as in that of a patented machine? With the assent of the patentee, a machine acting upon the same principle, but of less expensive structure than the one patented, may be built; and so a book may be abridged by the author, or with his consent, should a cheaper work be wanted by the public. This, in my judgment, is the ground on which the rights of the author should be considered.

“But a contrary doctrine has long been established in England, under the Statute of Anne, which in this respect is similar to our own statute; and in this country the same doctrine has prevailed. I am therefore bound by precedent, and I yield to it in this instance more as a principle of law, than a rule of reason or justice” (a).

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

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

(a) *Story's Executors v. Holcombe*, 4 McLean (Amer.) 308.

(b) 8 Jur. 183.

(c) 5 Ves. 709.

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

Piracy by way
of digest.

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

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

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

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

Lord Hatherley, when Vice-Chancellor, in the case of *Tinsley v. Lacy* (a), spoke very unfavourably in regard to the rights of an abridger; he said: He must confess that he did not agree in the reasons for upholding such a work given by some learned judges, viz.: that an abridger was a benefactor. He should have himself regarded him rather as a sort of jackal to the public, to point out the beauties of authors.

In *D'Almaine v. Boosey* (b) the question arose as to what imitation or use of a musical composition constituted a piracy. In this case the plaintiffs published, first, the overture to Auber's opera of '*Lestocq*,' and then a number of airs, and all the melodies. It was admitted that the

What use of former musical composition constitutes a piracy.

(a) 1 H. & M. 747; 11 W. R. 877; see *Story's Executors v. Holcombe*, 4 McLean (Amer.) 308.

(b) 1 Y. & C. 288.

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

"I remember, in a case of copyright, at *nisi prius*, a question arising as to how many bars were necessary for

the constitution of a subject or phrase. Sir George Smart, who was a witness in the case, said, that a mere bar did not constitute a phrase, though three or four bars might do so. Now it appears to me that if you take from the composition of an author all those bars consecutively which form the entire air or melody, without any material alteration, it is a piracy; though, on the other hand, you might take them in a different order, or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is, where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear. The adding variations makes no difference in the principle."

Where only eight consecutive bars, taken from an opera, were inserted in a song and constituted but a small proportion of the eleven pages of the song, the court on application to dissolve would not continue the injunction.

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

5. By translation.

Though it does not appear, if the original work be a foreign work, not entitled to protection in this country, and a translation of it be made and published first by A., and a translation be subsequently made and published by B., that this latter would be necessarily a piracy of A.'s translation or an infringement of his right; yet a

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retranslation without the consent of the author of the original work is a piracy whenever that original work is entitled to copyright.

Translation
of protected
work a piracy.

It is clear that an unauthorized translation of a protected work is a violation of the copyright therein, for a translation cannot be made without appropriating the entire substance of the protected composition. It has been argued that the translator by his own labour and skill reproduces in a new and useful form what is practically a new work, and that having exercised independent labour in its production he is entitled to publish. But the same reasoning would lead to the conclusion that a person might republish any protected work, if he did so with notes which required the exercise of independent labour. A translation of an unprotected work is certainly a work deserving of copyright, and in respect of which copyright may be obtained, but the allowing of a translation to be issued of a protected work without the consent of the author is a very different thing.

Principle on
which this
rests.

The principle on which the position rests, that an unauthorized translation of a protected work is piratical, is that the property of the author consists not in the language alone; but in the matter of which the language is but the expression and means of communication. It is in the substance of the composition and not in the form only. And the matter is as much taken possession of by the translation into a different language, as it would be by a transcript of its language only.

The point has only once come before the court, and then the case was decided on other grounds. The case referred to came before Lord Chancellor Macclesfield 160 years ago, when he granted an injunction against an English translation of Thomas Burnett's 'Archæologia Philosophica,' a work which had been published in Latin and registered by the author. The unauthorized publication of the book in England was enjoined, on the ground that it "contained strange notions, intended by the author to be concealed from the vulgar in the Latin language, in which language it could not do much harm." The Chancellor there

remarks that "a translation might not be the same with the original, on account that the translator has bestowed his care and pains upon it, and so not within the prohibition of the Act" (a).

In *Murray v. Bogue* (b), a case respecting an alleged infringement of the copyright in a guidebook, the question of translations was again considered. The plaintiff complained that his 'Handbook for Travellers in Switzerland' had been infringed by a guidebook published by the defendant. The latter had been made up from various sources, and in part was an abridged translation of Baedeker's German work, the copyright of which appears not to have been secured in this country. It was claimed, however, on this point that Baedeker's book was a translation of Murray's, and that its retranslation into English by Bogue was a violation of Murray's copyright. The Vice-Chancellor put the following case: If Baedeker's were a translation of Murray's into German, and the other defendant had retranslated Baedeker's work into English, even if he did not know that Baedeker's was taken from Murray, the plaintiff's book could not be thus indirectly pirated. But it was found that Baedeker's was substantially an original work, and not a reproduction in German of Murray's: and therefore its translation in English could not infringe the copyright in Murray's book (c).

Translation of a foreign work infringing a protected work.

Notwithstanding what has been already said, it must be admitted that there are many who are of the opinion that any work, whether the copyright therein be subsisting or not, may be translated with impunity, and indeed this has been held in America to be the law. The book in question was Mrs. Stowe's celebrated 'Uncle Tom's Cabin.' She first published it in America and secured the copyright there, subsequently causing it to be translated into German and securing copyright for such translation. Afterwards the defendant Thomas made a translation into German,

Opinion of some that piracy not committed by translation of protected work.

(a) *Burnett v. Chetwood*, 2 Meriv. 441; *Wyatt v. Barnard*, 3 Ves. & B. 77.

(b) 1 Drew. 353, 368.

(c) See the argument in *Jarrold v. Heywood*, 18 W. R. 279.

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and this was the piracy complained of. Mr. Justice Grier decided that Mrs. Stowe was not entitled to the protection sought. He considered that by the publication of her book, the creations of the genius and imagination of the author had become as much public property as those of Homer or Cervantes. That Uncle Tom and Topsy were as much *publici juris* as Don Quixote and Sancho Panza. That all her conceptions and inventions might be used and abused by imitators, playwrights, and poetasters. They were no longer her own; those who had purchased her book might clothe them in English doggerel, in German or Chinese prose. Her absolute dominion and property in the creations of her genius and imagination had been voluntarily relinquished, and all that remained was the copyright of her book, the exclusive right to print, reprint, and vend it; and those only could be called infringers of her rights or pirates of her property who were guilty of printing, publishing, importing or vending without her licence "copies of her book." In tropical but not very precise phraseology, a translation might be called a transcript or copy of her thoughts or conceptions, but in no correct sense could it be called a copy of her book (a).

The law on this point has since been altered in America, and we trust the principle of the above decision will never be followed in this country, but that, when the question shall come before the court, it will find itself, as it is practically at present, unfettered by precedent, and able to take that view which will at once afford protection to literary men and be in accord with the spirit of the copyright laws.

(a) *Stowe v. Thomas*, 2 Am. Law. Reg. 231; 2 Wall. jr. 547 (Amer.). Since this decision the law in America has been altered by statute. In 1870 it was enacted, section 4952 of the Revised Statutes of 1873-4, that "authors may reserve the right to translate their own works," and this section was amended in 1891, March 3rd, chap. 565, Supplement to the Revised Statutes, and as amended provides that "authors or their assigns shall have the exclusive right to translate any of their works for which copyright shall have been obtained under the laws of the United States." During the existence of copyright importation of copyrighted books is prohibited, provided nevertheless that in case of books in foreign languages, of which only translations in English are copyrighted, the prohibition of importation shall apply only to the translation of the same, and the importation of the books in the original language shall be permitted.

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

It will be seen from what has been already said that there is nothing to prevent a person from copying common materials from an existing compilation, and arranging and combining them in a new form, or using them for a different purpose.

Compiling
for various
objects.

The first compiler had no copyright in the common materials, but only in his own arrangement of those materials, and if this be not infringed, though the subsequent compiler may have considerably profited by his compilation, yet there would be no remedy. There would be a difference, however, if the first compiler had so worked upon the common materials, whether by translation, paraphrase, or abridgment, as to have practically elaborated a new work. Thus would he have placed the stamp of authorship upon the same, and have acquired a title thereto accordingly.

Where the arrangement or general plan has been copied, there may or may not be an infringement of the rights of the first compiler. The principle would seem to be this: that where the arrangement or general plan only is copied, the materials used being different, there is no infringement. Thus, in an American case (b) where the owner of a copyright of maps of certain wards of "the city of New York, surveyed under the direction of insurance companies of said city, which exhibit each lot and building and the classes as shown by the different colouring and characters set forth in the reference," brought a bill to restrain the publication of similar maps of the city of Philadelphia, it was held that the bill could not be sustained. But on the other hand where the arrangement or general plan and also the materials (though they may be taken directly from the original sources) are copied, then the rights of

Copying
general
arrangement.

(a) See *post*, chapter on International Copyright; see *Lauri v. Renad*, 8 T. L. R. 536.

(b) *Perris v. Hexamer*, 9 Otto's Rep. (Amer.) 674.

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the first compiler are infringed. The first compiler's rights consisted not in the materials, for they were common to all, and not in the arrangement apart from the materials, for in such copyright could not exist, but in the combined result of the common materials as arranged; and if the arrangement and materials together were taken, then the second compilation would be substantially the same work, it would be practically identical (a).

Though there has been no express decision on the above point, yet the principle has been frequently admitted. Thus, in the case of *Black v. Murray*, where Lockhart's annotated edition of Scott's 'Minstrelsy of the Scottish Border' was in question, and it appeared that of the two hundred notes added by the editor, all but fifteen were quotations from common sources, and the ballads themselves were common property, Lord Kinloch said: "To a considerable extent the notes borrowed (to use a euphemism) from Messrs. Black's edition consist of quotations from various authors, employed by Mr. Lockhart to illustrate ballads in the 'Minstrelsy.' It was perhaps thought that to repeat quotations from well-known authors was not piracy. If so, I think a great mistake was committed. In the adaptation of the quotation to the ballad which it illustrates, the literary research which discovered it, the critical skill which applied it, there was, I think, an act of authorship performed, of which no one was entitled to take the benefit for his own publication and thereby to save the labour, the learning, and the expenditure necessary even for this part of the annotation" (b).

Dramatizing
copyright
work.

The unauthorized dramatization of a work for public performance is not an infringement of the author's rights in that work, nor in a drama adapted from it made by the author himself after publication of the original work; but when the author's drama has preceded the publication of the novel, the latter cannot be dramatized without

(a) *Godfrey v. Bradley & Co.*, Times, 23rd July, 1892, "Mad Marriage" and "Loyal."
(b) 9 Sc. Sess. Cas. 3rd Ser. 355.

violating the author's rights in his play, except with his consent (a).

This subject is more fully dealt with under the head Dramatic Copyright.

The gratuitous distribution of copies of a copyright work of another is an infringement. And an injunction will be granted to restrain the publication of lithographic copies of music intended for private use and not for sale or exportation. The members of the Liverpool Philharmonic Society, who perform gratuitously, made impressions of a musical composition called 'Benedict's part song, The Wreath,' and distributed them solely among themselves; this was held to be an infringement of the author's "sole and exclusive right and liberty of printing, or otherwise multiplying copies," of any subject to which the word "copyright" is applied (b).

Gratuitous distribution of copies an infringement of author's rights.

So in a case (c) to which we have already referred on another point where the plaintiff published "The Standard Telegram Code," a book of words selected from eight languages, for use in telegraphic transmissions of messages, and it was accompanied by figure cyphers for reference or private interpretation, and the book was registered under the 5 & 6 Vict. c. 45, and a copy being purchased by the defendants they compiled for their own use with its aid a new and independent work as alleged which was their own private telegraph code, and they distributed copies of their book amongst their agents at home and abroad, but they had not printed their book for sale or exportation; it was held that the defendants had infringed the copyright of the plaintiff and a perpetual injunction was granted. It appeared that the defendants had distributed about sixty copies of their code among their own private establishments and agents. Mr. Justice Kay in his judg-

(a) *Reade v. Conquest*, 9 C. B. (N.S.) 755; 11 Id. 479; *Toole v. Young*, L. R. 9 Q. B. 523. See *Warne v. Seeborn*, 39 Ch. D. 73.

(b) *Novello v. Ludlow*, 12 C. B. 177; 21 L. J. (C.P.) 169; *Ager v. Peninsular & Oriental Steam Navigation Co.*, 26 Ch. Div. 637; 53 L. J. (Ch.) 519; 50 L. T. 477; 32 W. R. 116.

(c) *Ager v. Peninsular & Oriental Steam Navigation Co.*, *supra*; *Ager v. Collingridge*, 2 T. L. R. 291.

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ment, which is a clear exposition of the law on this subject, says, on the question of private distribution: "The justification attempted is the circumstance that they only give the books to their own agents and correspondents and do not publish or use them otherwise than privately; and they point to the word 'Private' printed conspicuously on the cover, and to the fact that their object would be defeated if their code were made public, as sufficiently showing that it is out of the question that they make any public use of the plaintiff's book.

"But copyright is the right, by printing or otherwise, to multiply copies. To multiply copies of a material portion of a work which is entitled to copyright is as much a breach of the law, though differing in degree, as to multiply copies of the whole work. And it has long been settled that multiplying copies for private distribution among a limited class of persons is just as illegal as if it were done for the purpose of sale. Take for example a valuable copyright like Lord Tennyson's poems. No one can print them and distribute the copies among his friends or among the boys at a school or any limited class of persons any more than he can print them for sale (a).

"Therefore, I have no hesitation in saying that the circumstance that the defendants do not sell their books, but only give them to their own agents and to merchants with whom they correspond, does not justify the multiplication of copies."

The same view has been taken by the Scotch Court of Session in the case of a gratuitous circulation (b).

It is no defence to an action for infringement that the book said to have been pirated contains false statements, or that its author has in some incidental cases made such mistakes as might involve him in a penalty under the Copyright of Designs Acts, e.g. by untruly describing designs and articles as "registered" or "patent" (c).

(a) *Novello v. Ludlow*, 12 C. B. 177.

(b) *Alexander v. Mackenzie*, 9 Sc. Sess. Cas. 2nd Ser. 748.

(c) *Macfarlane v. Oak Foundry Co.*, 10 C. of S. Cas. (Sc.) 801.

The point has been raised whether if the copying is not done direct from the work which is registered, but from a work not registered, but lawfully taken from such registered work, an infringement of work copyrighted is effected. There can be little doubt as to this, for otherwise a licence to use part for a limited object would be equivalent to a loss of copyright in that part. The point came before the court in *The Trade Auxiliary Company (Limited) and Others v. Jackson (a)*, but was not then decided. In that case the plaintiffs were the registered proprietors of a trade periodical called *Stubbs' Weekly Gazette*. The plaintiff Perry was the registered proprietor of another weekly periodical called *Perry's Gazette*, and the plaintiff Cate was also the registered proprietor of a weekly periodical called *The Commercial Compendium*. The most important part of the information contained in these three periodicals consisted of lists of the Bills of Sale registered at the Bill of Sale Office, under the provisions of the Bills of Sale Acts and of County Court Judgments, the information being collected from the various public offices, and compiled by persons specially employed and paid by the plaintiffs for that purpose, and the necessary government fees for the extracts being paid by the plaintiffs. The plaintiffs' complaint was that the defendant was publishing a paper issued three times a week called *The County of Middlesex Independent*, into which they alleged that he copied these lists of Bills of Sale and Judgments directly from the lists compiled by the plaintiff. The defendant admitted having copied the lists in question into his paper, but said he had taken them not from the plaintiffs' periodicals, but from a newspaper called *Hepworth & Co.'s Trade Protection Circular*; that he had for several years been the correspondent of Messrs. Hepworth & Co., and had under a special arrangement with them, furnished them with information as to trade matter connected with his own neighbourhood in exchange,

(a) 4 T. L. R. 130.

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for which information they had been in the habit of supplying him with copies of their circular, from which he took extracts for his own papers. It appeared that Hepworth & Co.'s circular was a reprint with the substitution of a fresh title page of *The Commercial Compendium*, Messrs. Hepworth having purchased the right of publication from the plaintiff Cate; that they had not registered the circular as copyright. Mr. Justice Kay, in refusing an interim injunction, said, the question was whether the defendant, in copying from what had been sent to him, was infringing the plaintiffs' copyright. It was said that the plaintiffs had copyright entitling them to prevent persons from publishing that composition in which they had a copyright, but people could not copy or multiply copies from Hepworth & Co.'s publication, even if there was no copyright in it, because that would be an infringement of the original copyright. That was an important question which must receive careful consideration when the action came on for trial, but it was not a question which his lordship could decide off-hand. But in the subsequent case of *Cate v. The Devon and Exeter Constitutional Newspaper* (a), North, J., granted an injunction.

Infringement
by importa-
tion.

Copyright may also be infringed by the importation for sale or hire into any part of the British dominions of copies printed abroad.

The 17th section of the Copyright Act provides that after the passing of the Act it shall not be lawful for any person not being the proprietor of the copyright, or some person authorized by him, to import into any part of the United Kingdom, or into any other part of the British dominions, for sale or hire, any printed book first composed or written or printed and published in any part of the United Kingdom, wherein there shall be copyright, and reprinted in any country or place whatsoever out of the British dominions; and if any person, not being such

(a) 40 Ch. D. 500. See as to this case, *post*, Chapter "Newspapers."

proprietor or person authorized as aforesaid, shall import or bring, or cause to be imported or brought, for sale or hire, any such printed book into any part of the British dominions, contrary to the true intent and meaning of the Act, or shall knowingly sell, publish, or expose to sale, or let to hire, or have in his possession for sale or hire any such book, then every such book shall be forfeited, and shall be seized by any officer of customs or excise, and the same shall be destroyed by such officer: and every person so offending, being duly convicted thereof before two justices of the peace for the county or place in which such book shall be found, shall also for every such offence forfeit the sum of ten pounds, and double the value of every copy of such book which he shall so import or cause to be imported into any part of the British dominions, or shall knowingly sell, publish, or expose to sale or let to hire, or shall cause to be sold, published, or exposed to sale or let to hire, or shall have in his possession for sale or hire, contrary to the true intent and meaning of the Act, five pounds to the use of such officer of customs or excise, and the remainder of the penalty to the use of the proprietor of the copyright in such book (a).

It is under this section an offence to import copyright matter for sale or hire, and the defendant who has imported such matter must pay the costs of an action, even if he has not done so knowingly, and though he may not have sold or let out on hire a single copy (b).

Offence committed though no copy sold or let out on hire.

In Scotland it was held by Lord Gifford (c), that where a bookseller had sold copies of a copyright work which had been pirated and printed in America, an action of damages lay against him at the instance of the proprietors of the copyright in this country, though no such remedy is prescribed in sect. 17 of the Copyright Amendment

(a) This section would exclude books reprinted out of the British dominions only, and not books reprinted in a colony; but see the 39 & 40 Vict. c. 36, s. 42, *post*.

(b) *Cooper v. Whittingham*, 28 W. R. 720; 15 Ch. D. 501.

(c) *Tennyson v. Forrester*, 43 Scottish Jurist, 278.

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Act, his Lordship being of opinion that copyright is not the mere creature of a statute, but a natural and civil right, entitled to protection at common law.

The pursuer A. Tennyson, D.C.L., who is the proprietor of the copyright of the whole of his poetical works, had conveyed to the other pursuers, A. Strahan & Co., publishers, London and Edinburgh, the exclusive right to print and publish his poetical works within the British dominions for five years, from and after 1st January, 1869. Messrs. S. & Co. alleged that defender, who is a bookseller at Glasgow; sold, published, exposed for sale, or had in his possession for sale, reprints of Mr. Tennyson's works printed or published in the United States of America, and that within the period referred to and without their consent. They accordingly raised a suspension and interdict against defender, and on 20th April, 1870, that interdict was declared perpetual. Messrs. Strahan & Co. then raised the present action for damages averred by them to have been incurred in consequence of the sale of said copies. Damages laid at £500.

The Lord Ordinary refused to give effect to the defender's argument for the following reason: He thought that the right of copyright, although protected and favoured, and regulated by statute, was not the mere creature of statute, and that offences against copyright were not to be viewed as mere statutory offences for which the statutory remedy or punishment was alone applicable. On the contrary, he thought that the right of the author and his assigns in his work was a natural and civil right which the statute had defined and protected but had not created, and infringements of copyright were violations of this civil right and not mere statute-made offences.

The 42nd section of the 39 & 40 Vict. c. 36 (The Customs Consolidated Act, 1876) gives a list of "goods, &c. absolutely prohibited to be imported, and which shall be forfeited, and shall be destroyed or otherwise disposed of as the Commissioners of Customs may direct." In this list will be found enumerated "Books wherein the copy-

By Customs Act copies of books protected may not be imported.

right shall be first subsisting, first composed, or written, or printed in the United Kingdom, and printed or reprinted in any other country, as to which the proprietor of such copyright or his agent shall have given to the Commissioners of Customs a notice in writing that such copyright subsists, such notice also stating when such copyright will expire."

This section is much wider than the corresponding section in the 5 & 6 Vict. c. 45; it not only does away with the limitation of the restriction to books printed for sale or hire, but it prohibits books printed or reprinted in any other country.

The Copyright Act, 5 & 6 Vict. c. 45, especially prohibits books reprinted out of her Majesty's dominions; the Customs Act especially prohibits books reprinted in any other country. It is by no means clear whether in the latter Act the words "any other country" mean and include the colonies.

The Commissioners of Customs are to have printed lists of all such books in respect of which they shall have received such notices, and to expose the same at the several ports in the United Kingdom and in Her Majesty's possessions abroad.

In the lists so to be printed and posted up a statement is to appear as to when the copyright will expire.

By the 152nd section of the same Act any book wherein the copyright may be subsisting, first composed, or written or printed in the United Kingdom, and printed or reprinted in any other country, are absolutely prohibited to be imported into the British possessions abroad. But it is provided that no such books shall be prohibited to be imported as aforesaid unless the proprietor of such copyright or his agent shall have given notice in writing to the Commissioners of Customs that such copyright subsists, and in such notice shall have stated when the copyright will expire. And it is further provided that the Commissioners shall cause to be made and to be publicly exposed at the several ports in the British

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possessions abroad, from time to time, printed lists of books respecting which such notice shall have been duly given, and all books imported contrary thereto shall be forfeited; but nothing contained in the Act shall be taken to prevent Her Majesty from exercising the powers vested in her by the 10 & 11 Vict. c. 95, intituled "An Act to amend the Law relating to the Protection in the Colonies of Works entitled to Copyright in the United Kingdom," to suspend in certain cases such prohibition.

The 45th section of the Act gives leave to any person complaining of the insertion of any books in the lists required by the above sections, to apply to any judge at chambers for a summons calling upon the person upon whose notice such book shall have been so inserted, to appear before such judge to show cause why such book shall not be expunged from such list, and such judge is at the time appointed in the summons to hear and determine upon the matter and make his order thereon in writing: And it is provided that upon service of such order or a certified copy upon the Commissioners of Customs or their secretary, the said Commissioners shall expunge such book from the list, or retain the same therein, according to the tenor of such order.

It is further provided that if at the time appointed in any such summons the person summoned shall not appear before such judge, then upon proof by affidavit that such summons or a true copy thereof has been personally served upon or left at the last known or usual place of abode of the person so summoned, or in case the person to whom such summons was directed and his place of abode cannot be found, that due diligence has been used to ascertain the same, such judge shall be at liberty to proceed *ex parte* to hear and determine the matter.

In the event of either party being dissatisfied with the order of the judge, he may apply to the superior court of which such judge is a member to revise such order and make such further order thereon as such court may see fit.

CHAPTER VII.

REMEDY AT LAW IN CASES OF INFRINGEMENT OF
COPYRIGHT.

THERE are three remedies in cases of infringement of copyright—an action at law, or in equity, and in some instances by summary proceeding before justices of the peace.

Three remedies for infringement of copyright.

Since the Judicature Act has come into operation, Courts of Law and Equity are, at any rate in theory, no longer separate tribunals, but it must be remembered that though the rules of Law and Equity are assimilated and a uniformity of procedure established, yet suitors are not deprived of any of their existing rights or remedies. The nature of the relief granted in each particular case will, as heretofore, depend on the form of the action or proceeding in which the relief is sought; according as the plaintiff seeks to avail himself of his legal or his equitable remedy. It is therefore still advisable to consider separately what are the rights and remedies of the parties whose copyright is infringed both at law, and in equity. We propose to deal, in the first place, with the remedy provided by the 5 & 6 Vict. c. 45.

Actions at law may be divided into two classes, first, under the statute for penalties and forfeiture; and, secondly, independent of the statute, for damages. In other words, where the statute has imposed penalties and forfeiture for the violation of copyright, these may be sued for, but where the statute confers a right but provides no specific remedy, then an action for damages lies.

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Of course a common law action for damages will not lie where no right is conferred by the statute, but where the right exists and the statutory remedies are either not complete nor adequate for the protection of the right conferred, the common law remedies may be made available (a).

The issue of a writ in an action for the infringement of a copyright on the same day, but subsequently to the registration of such copyright, sufficiently complied with section 24 of the Act, so as to enable the person making the registration to sue in respect of the infringement (b).

But the person registered as the proprietor of a copyright, the property in which is in fact in another person not so registered, cannot maintain an action for damages for infringement (c).

Remedy for piracy by action on the case.

By the 15th section of the Act, it is provided, that if any person in any part of the British dominions shall print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor, or import for sale or hire any such book unlawfully printed from parts beyond the sea, or knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose for sale or hire, or cause to be sold, published, or exposed for sale or hire, or shall have in his possession for sale or hire, any such book without the consent of the proprietor, such offender shall be liable to a special action on the case, at the suit of the proprietor of the copyright, to be brought in any court of record in that part of the

(a) Thus, by the 15th section of the Act of 1842, the printer is made liable to an action for damages only when the printing is for "sale or exportation," and the importer only when copies are imported for "sale or hire." No remedy is given against any person who prints or imports for gratuitous distribution, or who gratuitously distributes copies printed or imported without authority. But in *Novello v. Ludlow* (12 C. B. 177) it was held that an action for damages would lie under the statute for the gratuitous distribution among the members of a singing society of lithographic copies of a musical composition. See too *Rooney v. Kelly*, 14 Ir. L. R. (N.S.) 158; and *Warne & Co. v. Seebohm*, 39 Ch. Div. 73.

(b) *Warne v. Laurence*, 54 L. T. 371; 34 W. R. 452; W. N. (1886) 55; 2 T. L. R. 427.

(c) *The London Printing & Publishing Alliance (Limited) and Keep & Co. v. Horace Cox*, 7 T. L. R. 738; [1891] 3 Ch. 291.

British dominions in which the offence shall be committed :
 Provided always, that in Scotland such offender shall be liable to an action in the Court of Session, there to be brought and prosecuted in the same manner as any other action of damages to the like amount (a). No person except the proprietor of the copyright, or some one authorized by him, may import into the United Kingdom, or other parts of the British dominions, for sale or hire, any printed book first composed or written, or printed and published, in the United Kingdom, wherein there is copyright, and reprinted in any country or place out of the British dominions ; and if any person, not the proprietor or party authorized by him, shall import or bring or cause to be imported or brought, for sale or hire, any such printed book into the British dominions, or shall knowingly sell, publish, or expose for sale, or let to hire, or have in his possession for sale or hire, any such book, then every such book shall be forfeited and be seized and destroyed by any officer of the customs or excise, and every person so offending shall, on conviction, forfeit the sum of ten pounds, and double the value of every such book so unlawfully imported, sold, published, or exposed for sale, or let to hire ; five pounds to the use of such officer of customs or excise, and the remainder of the penalty to the use of the proprietor of the copyright in such book (b).

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

(a) 5 & 6 Vict. c. 45, s. 15.

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

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that such copyright subsists, such notice also stating when such copyright will expire (a).

Ignorance of wrong no excuse for printer or importer.

Neither the printer nor the importer can successfully plead that he did not intentionally violate the copyright of another; but the publisher or the seller is not liable unless he knows that the book was unlawfully printed or imported (b). Of course, if the publisher is also the printer or the importer, ignorance of wrong cannot be any excuse.

Action for recovery of pirated copies.

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

(a) The notice may be in the following form :—

To the Honourable the Commissioners of Her Majesty's Customs.
 the undersigned of being the Proprietor of a certain Book intituled do hereby give you notice that the Copyright in such Book now subsists in [or is partly vested in] and that such Copyright will expire on the of 18 , if [the author] of the above-mentioned work shall then have been dead for seven years, but if the author shall not have been dead for seven years at that date the Copyright aforesaid will expire at the expiration of Seven years next after the author's death [or in the case of joint authors, of that of the survivor].

And claim that such Copyright may be protected pursuant to the Act, 39 & 40 Vict. chap. 36, or other Acts referring to Copyright.*

Signed in London this day of 18 , by of the firm of & Co.

Mr. is authorised by to attend to the above notice and to complete the declaration of the same.

(Signed)

I , of , do solemnly and sincerely declare that the contents of the above Notice are correct, and I make this solemn declaration conscientiously believing the same to be true and by virtue and in pursuance of the "Statutory Declaration Act, 1835," and the "Customs Consolidation Act, 1876."

Declared by the above-named,
 his day of 18 , before me. }

* If the copyright has been previously registered insert here the following words :— "Notice has already been given that the Copyright in this work is subsisting in and request that the existing entry in the official List may be cancelled."

(b) *Colburn v. Simms*, 2 Hare, 543, 557; *Leader v. Strange*, 2 Car. & Kir. 1010.

for and recover the same, or damages for the detention thereof, in an action of detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover (a).

The owner of the copyright may therefore sue for the recovery of the copies found in the possession of the wrongdoer, and for the value of those he may have unlawfully disposed of.

There is no common law right in the author or proprietor of a book which is pirated to the delivery up of the copies of the illegal work: and therefore, in a case under the 54 Geo. 3, c. 156, s. 4, it was held that the proprietor of a book who was entitled to an injunction to restrain the printing and sale of the unlawful work, nevertheless was not entitled to an order for the delivery up of the illegal copies, if the book, the copyright of which had been infringed, was not composed and entered according to the statutes in force at the time the illegal copies were printed (b). In a case, however, under the Designs Act, 1842, Lord Justice Knight Bruce made an order for the delivery up to the plaintiff, for the purpose of being destroyed, of the drawings and cards used by the defendant in applying the plaintiff's design, and also the articles manufactured by the defendants to which the plaintiff's design had been applied (c).

The 16th section of the Copyright Act, 1842, enacts that in actions for piracy the defendant shall give notice of the objections to the plaintiff's title on which he intends to rely; and if the nature of his defence be that the plaintiff in such action was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the

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

(a) 5 & 6 Vict. c. 45, s. 23.

(b) *Colburn v. Simms*, 2 Hare, 643; 12 L. J. (N.S.) Ch. 388; 7 Jur. 1104; and see *Delfe v. Delamotte*, 3 K. & J. 581.

(c) *McRae v. Holdsworth*, 2 De G. & Sm. 497. See *post*, and *Hole v. Bradbury*, 12 Ch. D. 886; *Warne & Co. v. Secbohm*, 39 C. D. 73, 82.

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proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person whom he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when and the place where such book was first published; otherwise the defendant in such action shall not, at the trial or hearing of such action, be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein; and at such trial or hearing no other objection shall be allowed to be made on behalf of such defendant than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified in such notice, or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication, with the title, time, and place specified in such notice.

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

When
sufficient.

The notice of objection is sufficient, if it allege a definite publication of the disputed work at some particular place, by some definite party, either before, or

(a) 7 C. B. 4.

simultaneously with, the publication by the plaintiff, or with a publication in another place (a): but a suggestion in an affidavit filed before the date of the statement of claim on an interim injunction is not a sufficient (b) notice of the objection nor a compliance with sect. 16.

In an action in the County Court for an injunction and damages for infringement, the plaintiff with his plaint filed particulars basing his copyright upon a registration on the 13th Jan., 1887, but after receiving from the defendants a notice of objection, filed amended particulars basing his copyright on earlier publications. The defendant applied at the trial to disallow the particulars, and the County Court Judge disallowed them as raising new and independent causes of action. The plaintiff, on the other hand, argued that the defendants had filed no proper notice of objections under sect. 16 of the Act. The Judge held that the provisions of sect. 16 requiring such notices to be given "on pleading" did not apply to the County Court which was subsequently created (c).

Notices on pleading under s. 16, do not apply to County Court.

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

Amending notice of objection.

In *Chappell v. Purday* (e), however, the defendant was

(a) *Boosey v. Purday*, 10 Jur. 1038; see *Boosey v. Davidson*, 4 D. & L. 147; *Leader v. Purday*, 7 C. B. 4; 1 D. & L. 408; *Sweet v. Benning*, 16 C. B. 461; Bullen and Leake's Pleadings, 3rd ed. 298, 720; 4th ed. Part i. 383, Part ii. 362; and see *Neilson v. Harford*, 8 M. & W. 806. For form of particulars of objections, *Cocks v. Purday*, 5 C. B. 862.

(b) *Hayward Brothers v. Lely & Co.*, 56 L. T. 418.

(c) *Harris v. Sheldon & Smart*, W. N. (1889) 92, 128; 5 T. L. R. 594.

(d) *Boosey v. Davidson*, 4 D. & L. 147.

(e) 1 D. & L. 458; 12 M. & W. 303; see *Harris v. Sheldon & Smart*, W. N. (1889), p. 92.

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allowed to plead that the plaintiff was not the proprietor of the copyright at the time of commencing the grievance; and also that he was not the proprietor of the copyright when the books were printed. If no notice of objection, according to the statute, be given by the defendant, he will be precluded from giving any evidence in support of his case, or putting the plaintiff to the proof of his (a).

In an action for infringement and where objections to the registration are not delivered within the prescribed time, the action may nevertheless be dismissed if a defect in the registration is brought out from the plaintiff's evidence (b).

Defendant allowed to raise objection to registration not having given notice on terms.

A plaintiff in an action to restrain the infringement of his copyright in a catalogue, put in evidence the entry of his copyright in the registry before the writ in the action was issued. On the plaintiff being cross-examined as to the validity of the registration, the objection was taken that the defendant had not raised in his pleadings any objection to the registration. In answer to that the defendant said that he had suggested the objection to registration in an affidavit filed before the date of the statement of claim on a motion for an interim injunction. On the trial of the action it was held that though the notice was not good within sect. 16 of the Act, yet the case was one where the court would allow the defendant to raise the objection by amendment on terms. The terms were that the defendant was not to raise any objection to the plaintiff proving the registration made since the action was brought, or raise any objection on the ground that such registration was not made before action (c).

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

The 26th section of the Act enacts that if any action or suit be commenced or brought against any person for doing or causing to be done anything in pursuance of the Act, the defendant may plead the general issue and give the

(a) *Haycock v. The North of England Co-operative Printing Society*, County Court, Manchester, 13 October, 1874, J. Russell, Q.C.

(b) *Cooté v. Judd*, 23 Ch. Div. 727; 31 W. R. 423; 48 L. T. 205; 53 L. J. (Ch.) 36; see *Cole v. Gear*, 4 T. L. R. 246.

(c) *Hayward Brothers v. Lely & Co.*, 56 L. T. 418.

special matter in evidence ; and if upon such action a verdict be given for the defendant, or the plaintiff become nonsuited, or discontinue his action, then the defendant shall have and recover his full costs, for which he shall have the same remedy as a defendant has by law in any case.

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

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

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

All actions to be commenced within twelve months.

To what proceedings does not apply.

In *Hogg v. Scott* (d) it appeared that in 1868 the defendant had published the first edition of a work, and issued a second edition in 1872. The work contained matter

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

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

(c) See the principle on which were decided the cases of *Clark v. Bell*, 29 Feb. 1804 ; Mor. Dict. of Dec. No. 3, App., Lit. Prop. ; and *Stewart v. Black*, 9 Sess. Cas., 2nd Ser. 1026 ; *Hogg v. Scott*, L. R., 18 Eq. 444.

(d) L. R., 18 Eq. 444. The offence is committed every time a copy is sold : James, V.C., in *Jarrold v. Heywood*, 18 W. R. 281.

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pirated from the plaintiff's works. He also intended to publish a third edition. In August, 1873, the plaintiff applied for an injunction to restrain the defendant from further publishing or selling any copies of such piratical work. One of the defences set up was that the statutory limitation applied to all actions and suits, whether for the penalties, or damages, or injunctions, and hence that the plaintiff's suit was barred by lapse of time. Vice-Chancellor Hall, however, expressed the opinion that the word "offence" was not used in the above section in the same sense as in section 15, which gives an action on the case for damages; that the limitation prescribed was intended to apply only in cases of penalties and forfeitures, that it could not operate to destroy the property secured; and that an action for damages, or a suit for an injunction might be maintained, although more than a year had passed since the wrong was done. But, however, this might be, he had no doubt that the defendant could not go on committing new wrongs or offences by continually publishing and selling the piratical work, in violation of the plaintiff's right of property. The injunction was therefore granted.

The statutes of 31 Eliz. c. 5, s. 2, and 21 James 1, c. 4, s. 2, requiring that in actions on penal statutes, the venue shall be laid in the county where the offence was committed, do not apply to actions for debt, brought by a party aggrieved to recover a penalty expressly given to him, but has reference only to proceedings by informers. So in *Planché v. Hooper*, where the defendant sued for ten penalties of forty shillings each under the 3 & 4 Will. 4, c. 15, for representing a dramatic piece called the 'White Cat.' The representation constituting the breach took place at Bath, and the case was tried at Westminster, and the Court held that the venue was rightly laid in Middlesex, thus distinguishing between actions brought simply for penalties, and actions brought under penal statutes to recover compensation for injuries.

Matters of
evidence.

For the plaintiff it must of course be proved, if the

action be brought by him, that he is the author or proprietor of the work. The certificate of registration is *prima facie* proof that the plaintiff is the proprietor (a). It will next be necessary to produce a copy of the work complained of, and prove the injury sustained according to the specific allegations in the pleadings; whether by printing and publishing, or by exposing to sale or hire or importing. Proof is often given that parts of the first work were used in the printing of the second, and that the alterations supplied in the MSS. were merely colourable. The prevalence of errors in the second work identical with those in the first is likewise good evidence of piracy, since it can scarcely have happened that two persons would fall into precisely the same mistakes in repeated instances. To entitle the proprietor of a book or periodical to maintain an action in respect of articles, reports, or other contributions supplied to him by persons employed and paid by him for that purpose, he must, under section 18 of the Act of 1842, prove that he has actually paid for such articles, reports, or other contributions (b), and that they have been composed on the terms that copyright therein should belong to such proprietor (c). For the defendant the evidence will of course vary according to the nature of his defence.

In an action for infringing copyright airs in an opera, the defendant, to prove publication abroad, cannot ask a witness skilled in music to whom a piece of music had been shewn, whether he had seen printed copies of it at Milan, without accounting for the non-production of the original prints (d). Nor is a statement of the same witness that he had heard the music, produced in court sung by persons in private society with printed music

(a) *Hildesheimer & Faulkner v. Dunn & Co.*, 64 L. T. 452; W. N. (1891) 66.

(b) *Collingbridge v. Emmott*, 57 L. T. 864.

(c) *Walter v. Howe*, 17 Ch. D. 708, but three newspaper proprietors may jointly employ an author to write an article for them, *Trade Auxiliary Co. v. Middlesborough, &c., Association*, 40 Ch. D. 425.

(d) *Boosey v. Davidson*, 13 Q. B. 257.

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before them, as if singing therefrom, evidence to prove that the music so printed was the same as the music in court (a).

In an action for damages for infringement of copyright, the proprietor of a copyright need not aver that the defendant published the plaintiff's book (b). And where the *locus* of the infringement was not specified, yet the plaintiff was allowed to amend his statement on payment of expenses incurred since the closing of the record (c).

The Act 2 & 3 Vict. c. 12, imposes a penalty of 5*l.* per copy for every omission to print the name and place of abode of the printer, on the first or the last leaf of every paper or book. It is no answer, however, to an action for infringing the copyright of the work, that it was printed and published without the name and residence as required by this Act (d).

The evidence of an offer to compromise an action for a certain amount cannot be accepted as conclusive, or even as suggestive that such amount was the extent only to which the party so offering to compromise has been damaged or has suffered injury. So where a person had offered to take 160*l.* as the price of his right, and therefore had (it was argued) shewn that he did not consider the probable harm that would be done to him as irremediable, and consequently had no right to ask for an injunction, it was said by Lord Hatherley, then Vice-Chancellor, that that argument would not go far with the court. A person might be willing to forego his rights, and so avoid litigation; but after the litigation, which he had shewn himself anxious to avoid, had begun, the circumstances were altered, and he surely should be allowed to insist on his right to the utmost (e).

The court will not entertain an application for security

Effect of
evidence of
offer to com-
promise.

Security for
costs.

(a) *Boosey v. Davidson*, 13 Q. B. 257.

(b) *Rooney v. Kelly*, 14 Ir. C. L. R. 158, Q. B.

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

(d) *Chappell v. Davidson*, 18 C. B. 194.

(e) *Ainsworth v. Bentley*, 14 W. R. 632.

for costs, where there has been delay on the part of the applicants in making the application (a); nor will it, when a defendant has simply denied that a work was duly registered, permit him to prove that the name of the publisher has been untruly stated; nor even give him leave to amend the statement of defence, so as to raise the latter point (b).

(a) *In re Musical Compositions called 'Kathleen Mavourneen' and 'Dermot Astore,' Ex parte Hutchins & Romer*, W. N. (1879) 99.

(b) *Collette v. Gooch*, 7 Ch. Div. 842; 47 L. J. (Ch.) 370; 38 L. T. 504; 'What an Afternoon!' This case has, however, been doubted by Mr. Justice North in *Ederain v. Cohen*, 41 Ch. D. 566.

CHAPTER VIII.

REMEDY IN EQUITY IN CASES OF INFRINGEMENT OF
COPYRIGHT.

Remedy by
injunction.

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

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

Definition of
an injunction.

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

(a) 2 Inst. 299.

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

with the due preservation of the property affected by the act sought to be restrained (a).

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

In the general discussion of the common-law right of literary property, in *Millar v. Taylor* (e), great stress was laid upon the different injunctions which had been granted by courts of equity in favour of such right. Lord Mansfield (who had had very great experience in the Court of Chancery) said, that he looked at the injunctions which had been granted or continued before hearing, as equal to any final decree; for, such injunction never was granted upon motion, unless the legal property of the plaintiff was made out, or continued after answer, unless it remained clear. The Court of Chancery never granted injunctions in cases of this kind, when there was any doubt. Sir Joseph Yates, on the contrary, in combating the general common-law right, expressed his opinion that the injunction, being temporary only, decided nothing at all. Lord Camden, in his speech in *Donaldson v. Becket*, already referred to, expressed himself upon this part of the argument as follows: "All the injunction cases have been

Lord Mansfield's opinion upon the issuing of injunctions.

(a) *Drewry on Injunc.* Intro. 5.

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

(c) 1 Vern. 120.

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

(e) 4 Burr. 2303.

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

The modern practice.

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

Where this remedy applied, and on what evidence.

The jurisdiction will be exercised in all cases where there is a clear colour of title founded upon long possession and assertion of right (c). Lord Eldon distinctly lays down this doctrine, he says (d): "It is said in cases of this sort the universal rule is, that if the title is not clear at law, the court will not grant or sustain an injunction until it is made clear at law. With all deference to Lord Mansfield, I cannot concede to that proposition so unqualified. There are many instances in my own memory in which this court has granted or continued an injunction to the hearing under such circumstances. In the case of patent rights, if the party gets his patent, and

(a) But see *Osborne v. Donaldson*; *Miller v. Donaldson*, 2 Eden, 327.

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

(c) *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 689; *Mawman v. Tegg*, 2 Russ. 385, 391; *Sheriff v. Coates*, 1 Russ. & My. 159, 167; *Shaw v. Shaw*, 3 Jur. 217; *Colburn v. Duncombe*, 9 Sim. 151; *Chappell v. Purday*, 4 Y. & C. 485; *Bohn v. Bogue*, 10 Jur. 420; *Tonson v. Walker*, 3 Swanst. 679; Jeremy on Eq. Jur. bk. 3, ch. 2, s. 1; Eden on Injun. ch. 13, p. 284; Story on Eq. s. 935.

(d) *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 707.

wright

puts his invention in execution, and has proceeded to a sale, that may be called possession under it, however doubtful it may be whether the patent can be sustained. This court has lately said, possession under a colour of title is ground enough to enjoin and to continue the injunction until it shall be proved at law that it is only colour, and not real title." An injunction *pendente lite* should not be granted on light grounds, nor in doubtful cases, but should await the full proof upon the final hearing (a). Even an equitable interest limited in point of time or extent is sufficient (b). An equitable title, which will support an application for an injunction, occurs where the legal right has not been vested, but from the dealings between the actual owner and the party applying for the injunction such party has acquired a limited equitable right in the copyright, to the extent of being entitled to be one of the publishers, or the sole publisher of the work, for a given or an indefinite time.

Equitable
title will
support
injunction.

"This court" said the Vice-Chancellor of England in *Bohn v. Bogue* (c), "always takes notice of the equitable interest: and if the equitable right to the copyright is complete, this court will take care that the real question shall be tried, notwithstanding there may be a defect in respect of the legal property." As to what amounts to an equitable interest sufficient to maintain an action, must depend upon circumstances, but it is clear that where there is no material interest in the work for which protection is claimed, no action can be maintained. An injunction will not be granted until the work has been registered, but the court will interfere by injunction to protect the copyright of the assignee of the author, though it appear that at the time of the alleged piracy there was not an assignment in writing (d). But a mere agent to sell has not such a real interest in a work as will entitle him to relief (e).

(a) *Redfield v. Myddleton*, 7 Bosw. (Amer.) 649. See principle in Patent Actions, *The British Tanning Co. v. Groth*, 7 Rep. Pat. Cas. 1.

(b) *Sweet v. Cater*, 11 Sim. 572; *Chappell v. Purday*, 4 Y. & C. 485; *Sims v. Marryat*, 17 Q. B. 281. (c) 10 Jur. 421.

(d) *Hodges v. Welsh*, 2 Ir. Eq. 266.

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

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Prima facie
title must be
shown.

Nor will the court interfere where a *prima facie* title is not shewn, as in *Platt v. Button* (a), where the plaintiff claimed protection for the music of certain dances which he had permitted several persons to publish. Where the plaintiff states circumstances shewing a good equitable title, the court will, for the purpose of determining the fact of piracy, order the defendant to admit the legal title of the plaintiff (b). Judge Story remarks: "In some cases a court of equity will take upon itself the task of inspection and comparison of books alleged to be piracies; but the usual practice is, to refer the subject to a master, who then reports whether the books differ, and in what respects; and upon such a report the court usually acts in making its interlocutory, as well as its final decree" (c). And Mr. Curtis, on the same head, says: "In general, if the court sees strong ground for supposing that the defendant's work is a violation of the plaintiff's copyright, the course is to grant an injunction *ex parte*, until answer or further order. Then, in order to ascertain the fact of piracy or no piracy, it is referred to a master to examine into the originality of the new book, or the court takes upon itself the inspection of both works. Where the works are long and of a complex character, containing original matter mixed with much that is common property, they will be referred to a master; but where they are of a class affording facility for the detection of piracy by immediate inspection, the court will examine them" (d). At the present day the court usually takes upon itself the inspection of the book (e).

In all cases of injunctions in aid of legal rights, whether

Injunction
auxiliary to
legal right.

(a) 19 Ves. 447.

(b) Kerr, on Injunc. 439, citing *Dickens v. Lee*, 8 Jur. 183; *Bohn v. Bogue*, 10 Jur. 421; *Sweet v. Shaw*, 8 L. J. (N.S.) Ch. 216; *Sweet v. Cater*, 11 Sim. 572; 5 Jur. 68.

(c) 2 Story, Eq. Jur. 124, s. 941; Eden on Injunc. chap. 13, 289; *Carnan v. Bowles*, 2 Bro. C. C. 80; — v. *Ladbetter*, 4 Ves. 681; *Cary v. Faden*, 5 Ves. 24; *Jeffery v. Bowles*, 1 Dick. 429; *Trusler v. Comyns*, cited *Id.*

(d) Curtis on Copy. 325; *Sheriff v. Coates*, 1 Russ. & My. 164.

(e) *Murray v. Bogue*, 1 Drew. 368; *Spiers v. Brown*, 6 W. R. 352; *Jarrold v. Houlston*, 3 K. & J. 708; *Hotten v. Arthur*, 1 H. & M. 603; *Pike v. Nicholas*, 38 L. J. (Ch.) 529; L. R. 5 Ch. Ap. 251; *Chatterton v. Cave*, L. R. 10 C. P. 572; 2 C. P. D. 42; 3 App. Cas. 433.

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

The court will exercise its discretion in following that course which appears to be most conducive to justice to both parties. Although the matter may not be wholly free from doubt, yet if the plaintiff makes out a *prima facie* case, and the court is reasonably satisfied that a piracy has been committed, a temporary injunction will usually be granted.

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

In what cases
it will be
granted.

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

(*b*) *Sweet v. Shaw*, 8 L. J. Ch. (N.S.) 216; *Dickens v. Lee*, 8 Jur. 183.

(*c*) *Saunders v. Smith*, *supra*; *Bramwell v. Halcomb*, 3 My. & Cr. 737; *Spottiswoode v. Clarke*, 2 Ph. 154, 157; *M'Neil v. Williams*, 11 Jur. 344; *Smith v. Chatto*, 31 L. T. (N.S.) 775. "No doubt," said Hall, V.-C., in this last case, "this question might be left to be decided at the hearing, but I think it better to decide it at once, particularly considering how difficult it would otherwise be to assess the plaintiff's damages, if he should ultimately prove to be in the right. But in granting the injunction for which the plaintiff asks I do not lose sight of the fact that compensation may have to be made to the defendants, if at the hearing I decide in their favour. The amount of such compensation can, however, be more easily fixed than if it had to be made to the plaintiff, and if given will have to be substantial. . . . The plaintiff must undertake to abide by such damages, if any, as the Court may at the hearing think fit to award."

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the court is disposed rather to restrict than increase the number of cases in which it interferes by injunction before the establishment of the legal title (a), and it will give great weight to the consideration of the questions, which side is more likely to suffer by an erroneous or hasty judgment, and the prejudicial effect the injunction may have on the trial of the action (b). In a case (c), where the defendant was a vendor of a literary work published in weekly numbers, and in one of the numbers of which was contained the commencement of a work of fiction, which, with the exception of a few colourable alterations, was in all respects similar to a prior work of which the plaintiff was the author and publisher; on a bill by the plaintiff, praying that the defendant might be restrained from publishing, selling, or otherwise disposing of the number containing the commencement of such work of fiction, or any continuation or other part thereof, and from copying "or imitating," the whole or any part of the plaintiff's book, the court granted an injunction as prayed, except as to the words "or imitating," but directed the plaintiff to bring an action within ten days against the defendant for the invasion of his alleged copyright.

Equitable
remedy
refused in
cases of a
certain
description.

Though the author or his assignee may enjoy a *prima facie* legal title sufficient to support an application for an injunction, yet the subject of his title may be such that, for reasons of morality or public policy, no action at law could be maintained upon it (d). The doctrine of equity in reference to works of such a nature is, that if an author can maintain an action he may, at least with some exceptions, come into equity to have his remedy made more effectual. But if the action could not be maintained in the former court, nothing can be done in equity, which is

(a) See *Bacon v. Jones*, 2 My. & Cr. 433; *Stevens v. Keating*, 1 Mac. & G. 659; *Norton v. Nicholls*, 6 W. R. 764.

(b) *M'Neil v. Williams*, 11 Jur. 344.

(c) *Dickens v. Lee*, 8 Jur. 183; see also *Ingram v. Stiff*, 5 Jur. (N.S.) 947; 33 L. T. (N.S.) 195.

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

only auxiliary to the law, and therefore gives not relief, except where the law gives damages (a).

Consequently an injunction will not be issued to restrain the publication of a literary composition, on the ground that it is injurious to the reputation or hurtful to the feelings of the person seeking relief. Nor on the ground that it is libellous or blasphemous, immoral or mischievous (b).

And where there is a fair doubt whether damages could be recovered at law, a court of equity will not maintain an injunction granted *ex parte*, but will leave the plaintiff to establish his legal right before it interferes in his behalf (c).

So also where evidence as to the plaintiff's right is contradicted by the defendant's evidence, no injunction will be granted until the right of the plaintiff be established at law. Thus where the copyright of a work had been assigned by the author to the plaintiff, and the plaintiff and author swore that A. (a stranger to the suit) had only a qualified interest in the work, but A., in an affidavit filed by the defendant, swore that, under a bargain between him and the author, he had the entire copyright of the work, but did not state any deed of assignment, the plaintiff was held not entitled to an injunction till he had established his right at law (d).

In Scotland the question is disposed of otherwise; the principle adopted in English practice is not sanctioned. Even if property in the work be the sole ground of interdict, the proof of ownership alone (undistracted by any inquiry into the nature or value or subject of it) in that country guides judicial interference. For the use or abuse of that property the law provides another remedy, in administering which, that particular use forms the true point of inquiry.

Scotch law on this subject.

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

(b) *Southey v. Sherwood*, 2 Mer. 435; *Hime v. Dale*, 2 Camp. 27, note b; *Seeley v. Fisher*, 11 Sim. 581; *Clark v. Freeman*, 11 Beav. 112; *Walcot v. Walker*, *supra*.

(c) *Byron (Lord) v. Dugdale*, 1 L. J. (Ch.) 239.

(d) *Lowndes v. Duncombe*, 1 L. J. (Ch.) 51.

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In trifling cases an injunction has been denied. Thus, in a periodical work of theatrical criticism, the defendant inserted a few pages of scattered passages from a farce of the plaintiff, forty pages in length. The profits did not amount to 3*l.*, and the court dismissed the bill for an injunction (*a*). So, an injunction was refused against the copying of tables of calculations, which could be cast anew for less than 8*l.*, and in a short time (*b*), and where the infringement consisted in copying a collection of facts easily obtained (*c*).

Where in 1830, A., a foreigner resident in Paris, made a legal assignment of his copyright in an opera (*'Fra Diavolo'*) to L., a resident in England, and L., in the same year, sold his interest to C., without executing any written memorandum, and C. died in 1834, and in 1836 C.'s executrix obtained a legal assignment, and in the meantime copies of the full score had been imported into England, and sold in London by several tradesmen, and in 1841 P. published and sold the overture of the opera in London; the court held, that C.'s executrix could not maintain an injunction against P. for piracy, on the ground that the question being whether a party who, before the copyright had been actually parted with to him (because at the time there was no conveyance), had permitted the books to be imported here and sold without interference, was afterwards to be at liberty to come forward and say that no party should do the like again, and that it was an important question, and the court thought it sufficiently doubtful to prevent any interference by injunction until it was decided (*d*).

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

It is frequently a matter of difficulty to decide whether the injunction should be continued, or whether it should be dissolved until hearing (*e*). An injunction should in

(*a*) *Whittingham v. Wooler*, 2 Swans. 428 ; see *Bell v. Whithead*, 8 L. J. (N.S.) Ch. 141 ; 3 Jur. 68. ; *Ward, Lock & Co. v. Scott*, W. N. (1886) 190.

(*b*) *Baily v. Taylor*, 1 Russ. & My. 73.

(*c*) *Cox v. Land and Water Co.*, 18 W. R. 206.

(*d*) *Chappell v. Purday*, 4 Y. & C. 485.

(*e*) *Bramwell v. Halcomb*, 3 My. & Cr. 737 ; *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 689.

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

Thus, in *Spottiswoode v. Clarke* (b), the Lord Chancellor laid down the principles which ought to govern the discretion of the court, as follows: "I have often expressed my opinion, that unless a case depending upon a legal right is very clear, it is the duty of the court to take care that the right be ascertained before it exercises its jurisdiction by injunction. The first question to be determined is as to the legal right, and if the court doubts about that, it may commit great injustice by interfering until that question has been decided. One objection to that course is, that it compels future litigation, for it orders the plaintiff to bring an action; whereas, by adopting the alternative course—suspending the injunction, with liberty to the plaintiff to bring an action,—it enables him to pause a little and consider whether it is worth his while to embark in such a course of litigation as will be necessary to establish the right on which he insists. A second objection is, that the court in granting the injunction is expressing a strong opinion upon the legal question, before that question is discussed in the proper tribunal. It is much better, if the legal right is to be litigated, that this court should abstain from expressing any opinion upon it in the meantime."

When the part which has been copied from the plaintiff's work can be separated from that which has not been copied, an injunction will be granted only against the objectionable part or parts, but even where a very large proportion of a work of a piratical nature is unquestionably original, but the parts which have been copied cannot be separated from those which are original without de-

Where a portion only of the work is piratical.

(a) Curtis on Copyright, 317.

(b) 2 Phillips, 154.

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stroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequences of so doing, for an injunction will be issued against the whole (a).

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

To what extent the injunction is to go.

The opinion of Lord Hardwicke (b) appears to have been that an injunction might be granted against the whole, although only a portion was pirated; and in the instance of Milton's 'Paradise Lost,' with Dr. Newton's notes, there being nothing new in that work except the notes, he granted an injunction against the entire book. There is the record of a case tried before Lord Kenyon (c), in which he states that the question whether an injunction could be issued against the whole of a book on account of the piratical quality of a part, came before Lord Bathurst; and Lord Bathurst seems to have held it could not, unless the part pirated was such, that granting an injunction against such part necessarily destroyed the whole. Lord Kenyon, who possessed great information on this subject, states himself to have been perfectly satisfied with the opinion of Lord Bathurst, as bearing upon the judgment of Lord Hardwicke and the other cases. In the case referred to before Lord Kenyon the declaration at law contained a count for publishing the whole work, and

(a) In *Stevens v. Wildy* (19 L. T. N. S. Ch. 192), the Vice-Chancellor said "I do not think I am bound to go through the whole book, but I apprehend the law at present is in conformity with the old Roman law which is, that if the defendant will take the plaintiff's corn and mix it with his own, the whole should be taken to be the plaintiff's."

(b) 4 Burr. 2326. See *Campbell v. Scott*, 11 Sim. 31; *Kelly v. Hooper*, 4 Jur. 21; *Whittingham v. Wooller*, 2 Swans. 428; *Cobbett v. Woodward*, L. R. 14 Eq. 407; see *Story's Executors v. Holcombe*, 4 McLean (Amer.): 306, 315; *Warne & Co. v. Seeborn*, 39 C. D. 73, 82.

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

another for publishing a part ; and Lord Kenyon's direction to the jury seems to have been to find damages for publishing the part only.

"As to the hard consequences which would follow from granting an injunction," said Lord Eldon, in *Mawman v. Tegg* (a), "when a very large proportion of the work is unquestionably original, I can only say, that, if the parts which have been copied cannot be separated from those which are original, without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me ; and if the parts of the work cannot be separated, and if by that means the injunction, which restrained the publication of my literary matter, prevents also the publication of his own literary matter, he has only himself to blame."

"In the cases which have come before me," continued the Lord Chancellor, in the case from which we have already quoted, "my language has been, that there must be an injunction against such part as has been pirated ; but in those cases the part of the work which was affected with the character of piracy was so very considerable, that if it were taken away there would have been nothing left to publish except a few broken sentences. Now, the difficulty here is this : whether I have before me sufficient grounds to authorize me to say, how far the matter which is proved (if I may use the word) to have been copied, is sufficient to enable me to decide how much I may enjoin against ; and if I can be thus authorized to say how much I can enjoin against, then the question is, what will be the

(a) 2 Russ. 385, 391.

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effect if that injunction applied to so much of the work, in the state of uncertainty in which we now are? Or whether, on the other hand, as the matter cannot be tried by the eye of the judge, I must not pursue a course which has been adopted in cases of a similar nature, namely, refer it to the Master (a) to report to what extent the one book is a copy of the other, upon the comparison of all the numbers [the works were periodicals] that have been published?

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

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

case direct an issue to try what further damnification the plaintiff had sustained."

Where the court, availing itself of the evidence read pending the motion, was led to conclude, that if the parts affected with the character of piracy were taken away, there would be left an imperfect work which could not, to any useful extent, serve the purpose intended by the publication, the injunction to restrain the publication of any parts pirated from the plaintiff's work was granted, without waiting till all the parts pirated could be distinctly marked (a).

An injunction may be obtained to restrain the publication of a book whose external appearance so nearly resembles that of a work wherein copyright exists as to have the effect of deceiving the public, by leading them to believe it to be the same or a continuation thereof (b).

Similarity of appearance.

Thus in one case the defendant was restrained from publishing, selling, or offering for sale the defendant's work, in or with its present form, title-page, or cover; or any other form, title-page, or cover, calculated to deceive persons into the belief that it was the plaintiff's work (c).

And in another case (d) Lord Romilly, M.R., said: "The defendants must be restrained from the publication of this work, and they are not entitled to publish a work with such a title, or in such a form as to binding or general appearance as to be a colourable imitation of that of the plaintiff."

The true criterion in such cases must be the effect upon the public, whether the similarity of the one publication to the other is so great as to mislead the public—is such as that an intending purchaser of the one might be misled into purchasing the other. And where such a

(a) *Lewis v. Fullarton*, 2 Beav. 6; *Kelly v. Morris*, L. R. 1 Eq. 697; *Stevens v. Wildy*, 19 L. J. (N.S.) Ch. 190.

(b) *Spottiswoode v. Clarke*, 2 Phillips, 154; *Chappell v. Davidson*, 2 K. & J. 123.

(c) *Metzler v. Wood*, 8 Ch. D. 609.

(d) *Mack v. Petter*, L. R. 14 Eq. 431.

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similarity does not exist the court will not interfere. Thus where there was a well-known comic paper called 'Punch,' and another called 'Judy,' and the defendant issued a publication with the title, 'Punch and Judy,' the court held that though the defendant would not be at liberty to use either 'Punch' or 'Judy' singly as a title, yet there was no reason why he should not use the two combined, for in such combination the title was not such as to deceive persons of ordinary intelligence. The Vice-Chancellor considered that the defendants clearly had no right to use a name which was calculated to mislead or deceive the public in purchasing, and he intimated that if he had thought on the whole that their journal was calculated to mislead persons of ordinary intelligence (for those were the persons he had to consider) he would have granted the injunction. "'Punch,'" said he, "is well known both in name and appearance. 'And its price is threepence. Could any one be misled into buying this other paper instead, which has the words 'Punch and Judy' printed on it in distinct letters, with a different frontispiece and its price a penny? I am clearly of opinion that the mass of mankind would not be so misled" (a).

Publication falsely represented to be the production of another.

An injunction may be obtained to restrain the publication of a literary composition falsely represented to be the production of the plaintiff (b); and also of manuscripts obtained surreptitiously (c); or about to be published in breach of some contract whereof the plaintiff has the benefit (d).

The well-known composer, Gounod, in 1872 took proceedings against the publishers, Messrs. J. B. Cramer & Co., and Messrs. Hutchings, to restrain them from the

(a) *Bradbury v. Beeton*, 18 W. R. 33; *Borthwick v. The Evening Post*, 37 Ch. D. 449, in which it was laid down that the plaintiff must show that there is a probability that he will be injured.

(b) *Byron v. Johnston*, 2 Meriv. 29; *Sceley v. Fisher*, 11 Sim. 581; see *Wright v. Tallis*, 1 C. B. 893; *Gounod v. Wood*; *Gounod v. Hutchings*, 'Times,' Nov. 22, 1872.

(c) *Tipping v. Clarke*, 2 Hare, 383; *Prince Albert v. Strange*, 2 De G. & Sm. 652; 1 M. & Gor. 25.

(d) *Colburn v. Simms*, 2 Hare, 543; *Ward v. Beeton*, L. R. 19 Eq. 207; *Kemble v. Keen*, 6 Sim. 333; see *Brooke v. Chitty*, 2 Coop. (temp. Cottenham), 216; *Barfield v. Nicholson*, 2 Sim. & Stu. 1.

publication of songs stated on the title-page to have been "composed by Gounod." In the first suit the two songs in question were called 'Good Night, Heaven bless you!' and 'Hero and Leander.' They were neither written nor composed by Gounod, nor published by his authority, the music of the first being taken from a short chorus for soprano voices, written by the plaintiff, and entitled '*Bon Soir*,' to which an accompaniment full of musical faults had been added; and the music of the second being taken from a duet composed by the plaintiff for one of his early operas entitled '*La Reine de Saba*,' with the music altered and the end changed.

These songs, the plaintiff alleged, were of a low order of merit, and calculated to injure his musical reputation. The defendants submitted to a perpetual injunction and paid the costs of the suit. In the second case, which was in respect of seven songs and three duets, the defendants stated that they had acted only in accordance with the custom of the trade in selling arrangements of music, but they offered to refrain from selling any of the works complained of with their present title-pages, and to undertake not to sell any arrangement of M. Gounod's music without expressing on the title-page that the music was arranged from music by him. And these terms were agreed to (a).

So where a mining engineer K. made a report upon a mining property and handed it to a person engaged with a syndicate in bringing out a company. It was agreed between them that the report might be printed and shewn to the syndicate, and if they determined to proceed with the formation of the company and published the report, K. was to be paid £1000 for it, but if the company was not proceeded with, the report was to be returned to him. Some 100 copies of the report were printed and shewn to the syndicate. Copies were given to some of the members of the syndicate, and to one or two other persons. The proposed company having been abandoned, the defendant

(a) *Gounod v. Wood*; *Gounod v. Hutchings*, 'Times,' 22 Nov. 1872.

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company took up the property, and having obtained a copy of the report, made use of it in the prospectus issued by them, and it was held that K. was entitled to an injunction against the company to restrain them from publishing the report, which damaged his property, and also to an enquiry as to damages (a).

Due diligence to be observed in obtaining an injunction.

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

If a party is guilty of laches or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief,—more especially where being cognizant of his rights, he does not take those steps to assert them which are open to him, but lies by and suffers other parties to incur expenses. The court looks most minutely to the time during which the parties have permitted the matter to proceed, and will not allow them to obtain an injunction in the absence of the other party, when they have themselves, for some time, acquiesced (c). Acquiescence, although not conferring a right on the opposite party, deprives the complainant of his right to the interference of a court of equity, for unless the applicant has acted promptly, he is held to have impliedly authorized what he eventually objects to.

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

(a) *Kenrick v. Danube Collieries and Minerals Co.*, 39 W. R. 473.

(b) *Mawman v. Tegg*, 2 Russ. 385, 393; *Baily v. Taylor*, Taml. 295; 1 Russ. & My. 73; *Campbell v. Scott*, 11 Sim. 31; 11 L. J. (N.S.) Ch. 166; 6 Jur. 186; *Buxton v. James*, 5 De G. & Sm. 80; *Tinsley v. Lacy*, 1 H. & M. 747; *Lewis v. Chapman*, 3 Beav. 133; *Crossley v. Derby Gas-Lights Co.*, 4 L. J. (N.S.) Ch. 25; 1 Webs. 119, 120; *Parrott v. Palmer*, 3 M. & K. 643; *Harrison v. Taylor*, 11 Jur. (N.S.) 408; see *Bagot v. Bagot*, 32 Beav. 509; *Tinsley v. Lacy*, 1 Hem. & M. 752.

(c) Per Lord Langdale, M.R., in *Mexborough v. Bower*, 7 Beav. 130.

(d) Vide *Smith v. London and S.W. Railway Co.*, 1 K. 408, 412; *Lewis v. Chapman*, 3 Beav. 133, 135; *Bridson v. Bencke*, 12 Beav. 3; *Lewis v.*

And where the copyright of a work of an alien had been sold to a British subject, who published it in this country in 1844, and the copyright was infringed in 1849, but the state of the law then rendered it very doubtful whether the copyright was protected, and the purchaser merely protested against the infringement, but in 1851, within a reasonable time after the decision of a case in the Exchequer Chamber had established, as was then supposed, the general question of copyright in an alien, he filed his bill, and moved to restrain the publication of the pirated work, the court held that there had been no such delay as to disentitle him to an injunction (a). But where the publication of which the plaintiff complained as a piracy was completed six years and a half before the bill was filed, and for more than a year before the bill was filed a complete copy of the defendant's work was in the possession of the plaintiffs; the court said that it was its duty, in the circumstances of the case, to impute to the plaintiffs such a knowledge of the contents of the defendant's work as made it their duty to apply for an injunction, if at all, at a much earlier period (b).

What sufficient excuse for delay.

The tendency of modern times is towards the doctrine that a person does not lose his rights in equity by mere delay, and the recent decision of Vice-Chancellor Hall in *Hogg v. Scott* (c) is in favour of such view. In that case it appeared that the defendant had published in 1868 the first edition of a work called 'The Orchardist,' and in the latter part of 1872 the second edition, the book containing matter pirated from the plaintiff's works. He also intended to publish a third edition. In August, 1873, the plaintiff applied for an injunction to restrain the defendant from further publishing or selling any copies of such piratical work. In defence it was urged that the plaintiff

Tendency of modern decisions on the subject

Fullarton, 2 Beav. 8; *Buxton v. James*, 5 De G. & Sm. 80; 16 Jur. 15; *Wintle v. Bristol and S. Wales Union Railway Co.*, 6 L. T. (N.S.) 20; *Bacon v. Jones*, 4 My. & Cr. 433.

(a) *Buxton v. James*, *supra*.

(b) *Lewis v. Chapman*, *supra*.

(c) L. R. 18 Eq. 444; *Fullwood v. Fullwood*, 9 Ch. D. 178 (an action of deceit).

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had knowledge in 1869 of the piracy, and was therefore barred by delay from sustaining his suit; that the defendant was entitled to re-issue in his third edition anything which had appeared in the earlier ones. The court held that, even if the plaintiff had been aware of the piratical nature of the defendant's book for four years before commencing the suit, he was not thereby deprived of his remedies in equity. "The omission to take any proceedings at law or in equity for a time," said the Vice-Chancellor, "does not in itself appear to me an encouragement to the defendant amounting to an equitable bar in this court. It is not enough to shew that the legal right is not to be protected here."

So in a case (a), where the defendant's book had passed through three editions, the first having been published in 1879, and he had sent the plaintiff a copy of each edition, but the plaintiff did not bring his action till 1884, it was held that there had been no such delay in taking proceedings as to disentitle the plaintiff to an injunction as there had been no waiver of the plaintiff of, or acquiescence or assent in, what had been done by the defendant.

Institution of proceedings after lapse of twelve months.

One of the defences in this case was, that the statutory limitation applied to all actions and suits, whether for the penalties or damages or injunctions, and hence that the plaintiff's suit was barred by lapse of time. But to this the Vice-Chancellor replied: "I cannot allow the objection taken to the plaintiff's right to sue, because more than twelve months elapsed before he filed a bill in this court. By the 3rd section of the statute a property is created in an author's work which *primâ facie* is to endure for a term certain, and that property will remain in the author or his representatives, as owners of it, till it be taken away from him or them. The argument that, if a case arises for a suit in respect of the author's right to his property, and the author does not commence his suit within twelve months, that therefore his property is gone,

(a) *Pitman v. Hine*, 1 T. L. R. 39.

I do not agree with. I do not find that clearly expressed in the statute, and I cannot put such a construction upon the 26th section. The 15th section gives to an owner of copyright a special action on the case in respect of any piracy. The remedy so provided is apparently a cumulative one; and, whether it be so or not, is not very important. The remedy is given against the person who is called the 'offender,' and the act spoken of as the 'offence' is the printing for sale or exportation of any book in which there shall be subsisting copyright. Mr. Morgan, in his argument, contended that the court ought to put upon the word 'offence' in the 26th section the same construction as it bears in the 15th section of the statute. If that were a reasonable construction it might be adopted; but looking at the other sections in the statute which refer to penalties, I do not think it would be reasonable. There is nothing to be found in them about any 'offence,' in the sense contended for on the part of the defendant. If the book which had been improperly published by the defendant contains property belonging to the plaintiff, the owner of the copyright, I do not see how it can be successfully contended that he is suing in respect of an offence in the sense urged on the part of the defendant. The plaintiff is suing in respect of his copyright; that is his property. The 20th section is, no doubt, not very happily framed: but I am of opinion that, on the true construction of that and the other sections of the statute, the 'offence' contemplated by it must be the doing, in contravention of its provisions, of something expressly prohibited by them.

"The real question is, what is the 'offence' intended by the statute? It is the printing for sale or exportation of any work, or part of a work, by a person who is not the owner of the copyright of that work, and without the consent of the owner. The non-suing by the owner of the copyright in respect of a particular edition, or part of an edition, of the defendant's work is one thing, and even if it could be said that so far the owner's remedy was

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barred by his own neglect, still I find nothing in the statute which states that the person who has already published the edition or part of the edition complained of, may go on doing so, and that if he does, the owner has then no remedy for such further 'offence.' . . . The right of the owner of the copyright to his property in it, is not to cease because one copy of the work, which without his sanction contains the piracies, has been sold and disposed of without any complaint on his part. He is not on that account to lose all his property in his copyright; therefore I hold, in accordance with the decisions referred to, and on the construction of the statute, that the plaintiff has not lost his right to sue."

If the conduct of the party complaining has conduced to the condition of affairs that occasions the application, or has been such as to lead to the supposition that the publication would not be objected to, he cannot have relief (a).

Injunctions
not granted
generally
where there
has been
acquiescence.

In *Rundell v. Murray* (b), where it appeared that the plaintiff had given a manuscript to the defendant and permitted him to publish it as his own for fourteen years, at the end of which period she claimed the exclusive property in it, and sought to restrain the defendant from further publishing it, Lord Eldon, in refusing to grant the injunction sought, said: "There has often been great difficulty about granting injunctions, where the plaintiff has previously by acquiescing, permitted many others to publish the work; where ten have been allowed to publish the court will not restrain the eleventh. A court of equity frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining has led to the state of things that occasions the application, and therefore, without saying with whom the right is,

(a) *Rundell v. Murray*, Jac. 311; *Saunders v. Smith*, 3 My. & Cr. 711; 7 L. J. (N.S.) Ch. 227; 2 Jur. 491, 536. See also *Lewis v. Chapman*, 3 Beav. 135; *Platt v. Button*, 19 Ves. 447; S. C. nom. *Platts v. Button*, Coop. 303; *Campbell v. Scott*, 11 Sim. 31; 11 L. J. (N.S.) Ch. 166; 6 Jur. 186; *Southey v. Sherwood*, 2 Mer. 435.

(b) Jac. 311.

whether it is in this lady, or whether it is concurrently in both, I think it is a case in which strict law ought to govern."

On somewhat similar grounds to this, yet, under the circumstances of the case pressing the doctrine still further, Lord Cottenham acted in *Saunders v. Smith*, where he refused to restrain the publication of the second volume of 'Smith's Leading Cases' before trial at law, for the reason that he found "in the dealings of the plaintiff in this case what amounts to that species of conduct which prevents, in this stage of the cause at least, the interposition of this court." And he continued, referring to the case of *Rundell v. Murray*, "Lord Eldon there lays it down that not only conduct with the party with whom the contest exists, but conduct with others, may influence the court in the exercise of its equitable jurisdiction by injunction. Now here I find permission, whether express or implied, given to others" (a).

The view taken in this case by Lord Cottenham does not seem to have met with unqualified approval in later times, and in a recent case (b) where it was stated in defence by one of the defendants that the plaintiff had said to him that it would not be unlawful for any one to copy certain parts from the plaintiff's or any other directory, the Vice-Chancellor said: "A copyright is not lost by the mere expression of an opinion." "In order that the defence should prevail, it must be made out that there is proof of, at least, one of three propositions: viz., either that the plaintiff authorized what was done by the defendants; or that his conduct conduced to what was done by them; or that there is enough to displace the *prima facie* proof of the plaintiff's copyright."

No custom of the trade can be pleaded as a justification for infringement of the copyright. Thus in a case (c) where the publisher of the 'Belgravia Magazine' and the

Custom of trade no excuse for piracy.

(a) 3 My. & Cr. 729.

(b) *Morris v. Ashbee*, L. R. 7 Eq. 34.

(c) *Maxwell v. Somerton*, 30 L. T. (N.S.) 11; 22 W. R. 313; *Campbell v. Scott*, 11 Sim. 31; *Walter v. Steinkopff*, 8 T. L. R. 633, where North, J., stated the defence of custom of the trade has always been repudiated by the Courts.

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'Belgravia Annual' was plaintiff, it appeared that the periodical had been sent for about eight years to the defendants, who had been in the habit of selecting therefrom extracts, and occasionally entire stories, and reprinting them in the 'Bristol Mercury.' The 'Mercury' was a weekly paper, and copies of the same were sent to the plaintiff, he thus being acquainted with the defendants' general custom. In 1873, the defendants received the 'Belgravia Annual' with a request to notice it in their paper. This they did, and reprinted one entire story. The following month to this they reprinted another story from the magazine, in each case the sources from which the tale emanated being acknowledged. Without any notice to the defendants the plaintiffs moved to restrain the further publication or sale of any copies of the paper containing either of the stories. In defence the custom of the trade was relied on, but V.-C. Bacon held that any such alleged custom was no defence, and that the defendants could not thus be justified in reprinting, as they had done, entire stories, and the injunction sought for was accordingly granted.

Methods usually adopted by the court in particular instances.

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

Formerly when an injunction was granted for the protection of a legal right, and a question was raised as to the existence of the right, the court made the continuance of the injunction depend upon an action being brought to try the right, or it required the complainant first to establish his title at law, and suspended the grant of the

(a) Kerr on Injunc. chap. 20; *Walcot v. Walker*, 7 Ves. 1; *Wilkins v. Aiken*, 17 Ves. 422. See *British Tanning Co. v. Groth*, 7 Rep. Pat. Cas 1 (a Patent case).

injunction until the result of the legal investigation had been ascertained; but the Chancery Amendment Act, 15 & 16 Vict. c. 86, s. 62, provided, that in cases where it was the practice of the court to decline to grant equitable relief until the legal title or right of the parties seeking such relief had been established in a proceeding at law, the court might itself determine such title or right without requiring the parties to proceed at law to establish the same: and the 21 & 22 Vict. c. 27, s. 3, provided for the trial of questions of fact arising in any suit or proceeding in Chancery, either before a common or special jury, or (s. 5) before the court itself without a jury (*a*). Where the trial takes place before a jury, the court has the same powers, jurisdiction, and authority, as any judge of any of the superior courts sitting at *nisi prius*. But this provision does not, by its reference to proceedings at law, impose limits upon the right of appeal previously existing upon questions both of law or fact, against any order made by the Court of Chancery (*b*). Nor does it give the defendant a right *ex debito justitiae* to have his case tried by a jury, where a trial by the judge alone is preferable (*c*); and by 25 & 26 Vict. c. 42, s. 1, it is enacted, that in all cases in which any relief or remedy within the jurisdiction of the Court of Chancery is sought in any cause or matter instituted or pending in either of the said courts, and whether the title to such relief or remedy be, or be not, incident to, or dependent upon, a legal right, any question of law or fact cognizable in a court of common law, on the determination of which the title to such relief or remedy depends, *shall* be determined by or before the same courts (*d*). But whenever it shall appear that any question of fact may be more conveniently tried by a jury at the assizes, or at any sitting in London or Middlesex for the trial of issues, the court may, nevertheless, direct

(*a*) See *Simpson v. Holliday*, L. R. 1 H. L. 316.

(*b*) *Curtis v. Platt*, L. R. 1 Ch. Ap. 337.

(*c*) *Bovill v. Hitchcock*, L. R. 3 Ch. Ap. 417.

(*d*) *Fernie v. Young*, L. R. 1 H. L. 63.

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any issue to try the question at the assizes, or at a sitting for the trial of issues in London or Middlesex. All the provisions with reference to the trial of questions of fact by the Court of Chancery, contained in the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), apply to the determination of questions of fact under this Act. But the court is not bound to grant relief in any matter respecting which a court of common law has concurrent jurisdiction, if it shall appear that such matter has been improperly brought into equity, and that the same ought to have been left to the sole determination of a court of common law (s. 4). It has been held that this section applies to cases where there has been some interference with the plaintiff's rights, but not sufficient to entitle the plaintiff to an injunction (a).

Under this Act therefore it was compulsory upon the Court of Chancery to decide the whole question brought forward, both as regards the legal title of the parties, and the claim to equitable relief (b). The above Act applies not only to rights, but to remedies given by a court of equity, and does away with the power of refusing or postponing remedies until the legal title has been established by an action at law (c). There is nothing, however, which authorizes the court to transfer to itself an action actually pending at law (d), or to take cognizance of wrongs and interfere by injunction, when the act complained of has been done, and the question whether the act is wrongful or not depends upon matters of fact and law, for the trial of which no tribunal is so fit as a jury having the assistance of a judge to direct them (e).

But since the passing of the Judicature Acts (f), the

(a) *Durell v. Pritchard*, L. R. 1 Ch. App. 214.

(b) *Fernie v. Young*, L. R. 1 H. L. 63.

(c) *In re Hooper*, 32 L. J. (Ch.) 55.

(d) *Curlewis v. Carter*, 33 L. J. (Ch.) 370.

(e) *Att.-Gen. v. United Kingdom Telegraph Co.*, 30 Beav. 287 ; 31 L. J. (Ch.) 329 ; *Dowling v. Beljemann*, 2 J. & H. 544.

(f) 36 & 37 Vict. c. 66 ; 38 & 39 Vict. c. 77 ; 39 & 40 Vict. c. 59 ; 40 & 41 Vict. c. 9 and c. 57.

Chancery and the Common Law Divisions of the High Court of Justice have equal jurisdiction in determining rights and redressing wrongs. Consequently the Courts of Equity now determine all questions relating to the validity of the copyright and the alleged piracy.

In a case in 1861 it was held that the court will hesitate to commit a defendant alleged to have violated an *interim* injunction, if he has endeavoured to set himself right with regard to the original charge against him, of infringing the plaintiff's copyright (a). In *McRea v. Holdsworth* (b) Vice-Chancellor Sir W. M. James said that the cases in which the Court of Chancery had given a decree not in accordance with a verdict were either cases in which the trial had taken place before it, and it had full cognizance of the matter, or cases in which it had directed an issue to be tried, the object of which was merely to inform the conscience of the court. When the court withheld granting relief until a right was established at law, it was bound by the decision at law. But the court is not bound by the amount of damages awarded by the jury, and the Vice-Chancellor directed an inquiry as to what damage the plaintiff had sustained by reason of the piracy of his design; the defendants to pay the costs of the suit.

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

In instances where the publication is of a temporary character.

In refusing to restrain in December the sale of an almanac for the ensuing year, in a case where the rights of the parties were doubtful, Lord Cottenham said: "But the greatest of all objections is that the court runs the risk of doing the greatest injustice in case its opinion upon the legal right should turn out to be erroneous.

(a) *Cornish v. Upton*, 4 L. T. (N.S.) 862.

(b) 18 W. R. 489.

(c) See *Gurney v. Longman*, 13 Ves. 493.

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Here is a publication, which, if not issued this month, will lose the greater part of its sale for the ensuing year. If you restrain the party from selling immediately, you probably make it impossible for him to sell at all. You take property out of his pocket, and give it to nobody. In such a case, if the plaintiff is right the court has some means at least of indemnifying him, by making the defendant keep an account; whereas, if the defendant be right, and he be restrained, it is utterly impossible to give him compensation for the loss he will have sustained. And the effect of the order in that event will be to commit a great and irremediable injury. Unless, therefore, the court is quite clear as to what are the legal rights of the parties, it is much the safest course to abstain from exercising its jurisdiction, till the legal right has been determined" (a).

Yet in some cases the ephemeral character of the work in question may be an additional reason for an interlocutory injunction being granted, especially when the publication complained of is sold, or intended to be sold, at a lower price than the original work from which it has been taken. It is obvious that in some such cases the remedies after sale of the plaintiff might be practically worthless. The principle was recognised by Lord Eldon in a case relating to an East India Calendar or Directory.

He considered there was a great difference between works of a permanent and of transitory nature. The case upon the former might be brought to a hearing, but the effect was very different upon a work of a perishable kind—a work that would be good for nothing in a year's time. "I am bound," said he, "under these circumstances to continue this injunction to the hearing; for the defendant would merely have to account at the rate of 2s. 6d. for each book: and if his publication proceeds at that reduced price, it will be impossible for the plaintiffs,

(a) *Spottiswoode v. Clarke*, 2 Phillips, 157.

obliged by the expense they have been at, to charge a much higher price, to sell another copy (a).

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Where indeed an intermediate injunction is granted it does not often happen that the cause is brought to a hearing; for the merits of the case will probably have been discussed upon the motion (b), and therefore it rarely happens that a perpetual injunction is decreed (c). If, however, the cause should be brought to a hearing, the court will then, if the plaintiff's cause be relieved of all doubt, grant a perpetual injunction (d), or it will dismiss the plaintiff's bill (e). And the plaintiff has a right to bring his cause to a hearing for the purpose of obtaining a perpetual injunction, although he has obtained an interlocutory injunction, which has been acquiesced in by the defendant (f), and though the general rule of the court is not to grant perpetual injunctions except at the hearing of the cause (g), yet by consent an injunction may be made perpetual on an interlocutory motion (h).

As to bringing to hearing where interlocutory injunction granted.

It is not necessary to apply in the first instance on interlocutory application, for a perpetual injunction may be obtained without such application at the hearing (i); but care should be taken in such case to bring the cause to the hearing in a state such as to enable the court to adjudicate upon it without delay; for it is a mere matter of discretion how far the court will assist at the hearing if this be neglected (k).

A necessary incident to an interlocutory injunction is

Dissolving of interlocutory injunctions.

(a) *Matthewson v. Stockdale*, 12 Ves. 275; see *Johnson v. Egan*, Sol. Journ. 29 May, 1880.

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

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

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

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

(f) *Beaufort (Duke of) v. Morris*, 6 Hare, 350; 2 Ph. 683; 12 Jur. 614.

(g) *Day v. Smce*, 3 V. & B. 171.

(h) *Morrell v. Pearson*, 12 Beav. 284.

(i) *Bacon v. Jones*, 4 M. & C. 436; *Collins & Co. v. Walker*, 7 W. R. 222; *Davies v. Marshall*, 1 Dr. & Sm. 557; *Gale v. Abbott*, 8 Jur. (N.S.) 987.

(k) *Bacon v. Jones*, *supra*; *Ward v. Key*, 10 Jur. 792; *Rodgers v. Nowill*, 6 Hare, 331; *Norton v. Nicholls*, 4 K. & J. 475; *Patent Type Foundry Co. v. Walter*, Johns. 721.

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a liability to be terminated or *dissolved* before the termination of the suit in equity of which it was made a part. Whether or not an injunction should be dissolved, rests in the discretion of the court. If the answer or statement of defence contains a sufficient defence to the case stated in the bill, the injunction will be dissolved. So where a plea is allowed, there is ordinarily an end of the injunction, but not always; and the court has said that an injunction is not absolutely dissolved upon the allowance of the plea, but only *nisi*, because there may be some equity shown to continue it. Where a cross bill has been filed, if, when the first has been answered, the second is not answered in eight days, the injunction will be dissolved.

The usual method of obtaining a dissolution of injunctions has been by *answer*. And it has been held that an order *nisi* for dissolution cannot be obtained on putting in a *plea*. The Vice-Chancellor in the case referred to said: "It cannot stand for a moment. The order *nisi* begins with a recital that the defendant has put in a full answer, and thereby denied the plaintiff's equity" (a).

An injunction may be continued to the hearing, though the equity of the bill is fully answered by the defendant. Where its dissolution would work a greater injury than its continuance, the question of continuance must rest in discretion, though controlled by rules. So, notwithstanding a complete denial of the equity of the bill, the court may, at the hearing, retain the injunction in so far as it finds in the facts disclosed good reason for so doing.

If the plaintiff show that his copyright has been infringed, the court will grant an injunction without proof of actual damage (b).

"Then the only question," said Vice-Chancellor Shadwell(c), "is whether there has been such a *damnum* as will justify the party in applying to the Court; because *injuria*

Where copy-
right
infringed,

(a) *Wroe v. Clayton*, 10 Sim. 185.

(b) *Smith v. Johnson*, 33 L. J. (Ch.) 137; 9 Jur. (N.S.) 1223; but see *Borthwick v. Evening Post*, 37 Ch. D. 449, there must be a probability of damage.

(c) *Campbell v. Scott*, 11 Sim. 39; *Tinsley v. Lacy*, 38 L. J. (N.S.) Ch. 539; *Kelly v. Hooper*, 4 Jur. 21; *Sweet v. Maugham*, 11 Sim. 51.

there clearly has been. What has been done is against the right of the plaintiff. Now, in my opinion, he is the person best able to judge of that himself; and if the court does clearly see that there has been anything done which tends to an injury, I cannot but think that the safest rule is to follow the legal right and grant the injunction."

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injunction
granted
without proof
of damage.

Where a plaintiff claiming a copyright in a work of a foreigner obtained an injunction on giving an undertaking to abide by any order the court might make respecting damages, and the law was, pending the suit, finally settled against the existence of such a copyright, the Lords Justices held that the defendant was entitled to have the damages sustained by him ascertained as correctly as practicable and paid, and that a mere dismissal of a bill with costs was not a sufficient accurate assessment and award of damages (a).

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

Proprietor
entitled to
nett profits
only.

To recover the pirated copies he must proceed at law (d).

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

Matters of
procedure.

The right of an author against different booksellers

(a) *Novello v. James*, 5 De G. M. & G. 876.

(b) *Delfe v. Delamotte*, 3 Jur. (N.S.) Ch. 933; 3 K. & J. 581. The defendant must account for every copy sold, as if it had been the plaintiff's, and pay the profits to him: *Pike v. Nicholas*, 38 L. J. (Ch.) 529; 20 L. T. (N.S.) 906; 17 W. R. 842.

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

(d) *Delfe v. Delamotte*, *supra*; in which case, however, the order actually made was for delivery up to the plaintiff. Fry, L. J., in *Hole v. Bradbury*, 12 Ch. D. 886, refused to order delivery up except for destruction, but Sir G. Jessel, M. R., in *Isaacs v. Fiddeman*, 42 L. T. (N. S.) 395, refused to follow this decision and held the plaintiff entitled to delivery up of infringing books for his own benefit. And see Sup. Ct. of Judic. Act, 1873, s. 16.

(e) *Dilly v. Doig*, 2 Ves. 486; and see *Hudson v. Maddison*, 12 Sim. 416; and *Midwinter v. Kincaid* (H.L.), 11 Feb. 1751, 1 Pat. App. 488; *Pollock v. Lester*, 11 Hare, 274; *Cowley v. Cowley*, 9 Sim. 299.

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selling the same spurious edition of his work is not joint but perfectly distinct, for there is no privity between them (*a*). But it would be otherwise of a right of fishery, or the custom of a mill: such bills prevent multiplicity of suits, and one general right being in the latter cases liable to invasion by all the world. But a plaintiff must not act oppressively and file an unnecessary number of bills: if he does, the court will order them to be consolidated or make some other equivalent order (*b*).

An injunction against the seller will not be refused on the ground that the plaintiff has not proceeded against the publisher.

The court will not restrain one of the several partners in a patent from publishing a book containing an account of the invention (*c*).

If the defendant transfers his interest in the publication to another person, it seems that the latter may be made a party to the suit. Where a joint proprietorship exists, either party may sue.

In a recent case Mr. Justice Kekewich held that where a plaintiff had an assignment from some only of part owners, he was entitled to sue in trespass to prevent a stranger from interfering with his rights (*d*).

Formerly a bill of complaint was the formal document for the commencement of a suit, but now, under the new procedure, suits have become actions and are commenced by writ of summons (*e*). The writ is to specify the division of the High Court to which it is intended that the action should be assigned (*f*), and if assigned to the Chancery Division it must be marked by the officer issuing the writ with the name of one of the judges of the Chancery Division to be ascertained in the manner now used in the distribution

(*a*) *Dilly v. Doig*, *supra*; *Brinckerhoff v. Brown*, 6 John. Ch. (Amer.) 155.

(*b*) *Foxwell v. Webster*, 10 Jur. (N.S.) 137; 12 W. R. 186; 2 De G. & Sm. 250; 9 Jur. (N.S.) 1189; Daniell's Chan. Prac., 5th edit., 286, 1492, note (*z*); 6th edit., pp. 423, 1426, 1450, 1889, 1954. And as to multifariousness, R. S. C., 1883, O. 18.

(*c*) *Hawkins v. Blackford*, 1 L. J. (Ch.) 142.

(*d*) See *Lauri v. Renad*, 8 T. L. R. 536.

(*e*) Rules of the Supreme Court, 1883, O. 1, r. 1.

(*f*) R. S. C., 1883, O. 2, r. 1.

of business amongst the conveyancing counsel of the Court. For this purpose a separate rotation is kept (*a*).

Every writ of summons is to be indorsed with a statement of the nature of the claim made, or of the relief or remedy required, in the action (*b*).—It is not essential in the endorsement to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled, but the general nature of the claim and relief sought must be clearly indicated, especially when different causes of action are joined, for the plaintiff will be limited to the indorsement on the writ unless he obtains leave to amend.

If the plaintiff has merely an equitable title, the person in possession of the legal title should be made a party (*c*). The right to sue for infringement of a registered design is vested in the registered proprietor only and a licensee has no right of action (*d*).

It was held not necessary to allege in a statement of claim under the Copyright of Designs Act, 5 & 6 Vict. c. 100, which provided that no person was to have the benefit of the Act *unless* every article had attached thereto the letters "Rd.," that that had been done, and it was also held that a bill was not on the ground of such omission alone, open to a demurrer (*e*).

Every application for an injunction before answer must be supported by an affidavit of merits verifying the material statements of the plaintiff (*f*); and where the plaintiff had forgotten a material fact when he made his application for the injunction, and so stated on oath in answer to a motion to dissolve, his defect of memory was

(*a*) R. S. C., 1883, O. 5, r. 9, and see the Annual Practice.

(*b*) R. S. C., 1883, Ord. ii. r. 1.

(*c*) *Colburn v. Duncombe*, 9 Sim. 151, and see *Jewitt v. Eckhardt*, 8 Ch. D. 404; *Walter v. Howe*, 17 Ch. D. 708; *Trade Auxiliary Co. v. Middlesborough, &c., Association*, 40 Ch. D. 425.

(*d*) *Woolley v. Broad*, 9 R. P. C. 208.

(*e*) *Sarazin v. Hamel* [No. 1], 32 Beav. 145.

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

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held to be no excuse, otherwise the same excuse might prevail in every case.

There must be an affidavit of title, when the injunction is applied for *ex parte*, and the affidavit in support should always state the precise time at which the plaintiff, or those acting for him, became aware of the alleged injury (a). They must shew either that notice to the defendant would be mischievous, or that the mischief is so urgent that it would be done if notice were served on the defendant before the injunction could be obtained. If the affidavits fall short of this point, the motion will be ordered to stand over, and notice of it must be served on the defendant (b).

Upon the hearing no reference was formerly allowed to the affidavit filed upon the application for the injunction (c); but under R. S. C., 1883, O. 37, r. 1, the Court or Judge may, at any time, for sufficient reason order that the affidavit of any witness may be read at the hearing or trial on such conditions as the Court or Judge may think reasonable.

Not necessary to specify in statement parts of work said to be pirated.

Neither the statement of claim nor affidavit need specify the parts of the work stated to have been pirated; though no copyright is claimed in all the identical passages, a general allegation that the defendant's work contains pirated passages, and a verification by affidavit of those passages, are sufficient. The Vice-Chancellor, in *Sweet v. Maugham* (d) said, "It has always been considered sufficient to allege, generally, that the defendant's work contains several passages which have been pirated from the plaintiff's work. Then, when the injunction

(a) An affidavit in which it was stated that the plaintiff had purchased or legally acquired the copyright, was considered to be bad, for not stating that he had purchased it from the author: *Gilliver v. Snaggs*, 4 Vin. Abr. 278.

(b) *Anon.* 1 L. J. (Ch.) 4.

(c) *Barfield v. Kelly*, 4 Russ. 359; and see *Dunstan v. Patterson*, 2 Ph. 341.

(d) 11 Sim. 51; 9 L. J. (N.S.) Ch. 323; 4 Jur. 456, 479; *Hotten v. Arthur*, 1 H. & M. 603; 32 L. J. (Ch.) 771; 11 W. R. 934; 9 L. T. (N.S.) 199. See other instances where generality of statement is permitted of those facts well known to the defendant: *Darthez v. Clemens*, 6 Beav. 164; *Williams v. Earl of Jersey*, Cr. & Ph. 91; *Smith v. Kay*, 7 H. of L. Ca. 764—766; *Baker v. Bradley*, 7 De G. M. & G. 597; Lewis on Eq. Pleading, 83, 84, 129.

has been moved for, the two works have been brought into court, and the counsel have pointed out to the court the passages which they rely upon as shewing the piracy." But if a plaintiff files a bill to protect a work, being only entitled to copyright in a small part of such work, he ought to tell the defendant in his bill what that part is, otherwise costs unnecessarily incurred must be borne by the plaintiff (a).

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

In an American case (c), where a bill was filed against three defendants shewing title on its face in the plaintiff to a copyright, and shewing a wrongful and wilful violation of it by all the defendants, and serious injuries inflicted by, and apprehended from such violation, and praying for an injunction against all the defendants, and for discovery from all. On general demurrer it was held that the relief by injunction was not dependent upon the discovery prayed for, but rested on the equities set forth in the bill, and might be refused or granted irrespective of the discovery, although the bill was bad as a bill of discovery.

If the plaintiff claims as assignee, he must, by affidavit or otherwise, shew that the assignment to him has been in accordance with the provisions of the Act, or in what other way; if, however, he claims as assignee of an assignee, it will be sufficient for him to shew that the assignment to himself was in writing, without tracing the title through the *mesne* assignees from the original author; under such circumstances the court will assume that the title is regular, until the contrary is shewn (d); and if there has

On claim by assignee what must be shewn.

(a) *Page v. Wisden*, 17 W. R. 483.

(b) *Redfield v. Myddleton*, 7 Bosw. (Amer.) 649.

(c) *Atwill v. Ferrett*, 2 Blatch. Cir. Ct. (Amer.) 39.

(d) *Morris v. Kelly*, 1 Jac. & W. 481. An instance has occurred in which the assignee of a copyright, to whom the assignment was made by

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been a complete assignment, the assignor should not be made a party to the suit (a). Any one associated by the proprietor of a copyright with himself in an entry in the book of registry has *primâ facie* a title to sue jointly with him in a court of equity (b). Thus where the bill stated that one of the plaintiffs had composed a book, and that all the plaintiffs had caused the book to be printed and published for their joint benefit, and that the book had been registered by the plaintiffs as proprietors of the copyright thereof, and that the copyright had ever since remained in the plaintiffs for their joint benefit, and that the defendants had published a book in which numerous passages were copied from the plaintiffs' book; the court held, upon a motion for the injunction, that under the Copyright Act, 5 & 6 Vict. c. 45, the plaintiffs had a joint right to sue: and upon comparison of the two books, that in the defendants' book there had been such copying from the plaintiffs' book as entitled them to an injunction (c).

Where the plaintiff has suffered persons to publish the subject of his copyright without interposition, the court will not interfere. But this acquiescence is no proof of assignment, even if a receipt be produced for money paid for copyright.

Nature of relief usually sought and obtained.

In the majority of cases, the statement of claim prays that an account may be taken of the books printed, and of the profits thereof, from the person who has pirated from the plaintiff's works, or alternatively damages for the loss caused by the infringement, and moreover that an injunction may be issued to restrain the further sale (d).

parol, obtained an injunction. The distinguishing feature of that case was this, that some of the defendants had actually received the purchase-money and had permitted the plaintiffs to print and publish the work: *Longman v. Oxberry*, Nov. 1820, MSS. cited Godson on Patents, &c., 314; see *Gilliver v. Snaggs*, 2 Eq. Abr. 522; 4 Vin. Abr. 278, A 4.

(a) *Sweet v. Maugham*, 11 Sim. 51; 9 L. J. (N.S.) Ch. 323; 4 Jur. 456; *Colburn v. Simms*, 2 Hare, 560.

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

(c) *Stevens v. Wildy*, 19 L. J. (N.S.) Ch. 190; see *Lauri v. Renad*, 8 T. L. R. 536.

(d) Where in America an account only was sought for, and no injunction applied for, the Court held that the party must proceed at law for damages: *Monck v. Harper*, 3 Edw. Ch. (Amer.) 109. Equity cannot

The court may require the defendant to disclose the number of piratical copies which he has printed, imported, or sold, the number on hand, the proceeds of sale, &c. And the plaintiff has a right to a full and particular discovery as to the original sources from which the defendant alleges himself to have drawn his work (a), and this notwithstanding the defendant offers to submit to an injunction, and to pay the costs, and a motion by the defendant to stay proceedings after interrogatories had been filed, and before the defendant had answered, was refused (b). And in a suit to restrain an infringement, a plaintiff who, in opposition to the defendant's denial of his title, has obtained an injunction, is entitled to an answer from the defendant for the purpose of having his title admitted (in case, by arrangement between the parties, the title is not established at law), and also for the purpose of having an account from the defendant of the profits made by the sale of the spurious work. The plaintiff, therefore, under such circumstances, is entitled to the costs of the suit, including the answer; and if, by the refusal of the defendant to pay those costs, the plaintiff is compelled to bring his cause to a hearing, he will be entitled to the whole costs of the suit as between party and party, although at the hearing he may waive the account; and the plaintiff's equity in this respect will not be affected by his having offered to waive his right to an answer with a view to obtain terms more beneficial to himself

relieve on the ground of a right which the party has failed to redress at law; but proper matters for the exercise of its jurisdiction must be set out and sustained: *Stevens v. Gladding*, 17 How. (Amer.) 447; *Stevens v. Cady*, 2 Curt. (Amer.) 200. If no benefit appears to be gained by proceedings in equity rather than at law, the bill will be dismissed without prejudice, in order that proceedings may be had at law. In this country, where the powers of law and equity are concurrent, equity may in its discretion proceed to act; but in the Circuit Court of the United States it is otherwise, under the Judiciary Act of 1789, if the remedy at law and in chancery is equally full and perfect; and the objection may sometimes be taken under the answer, and at the hearing as well as by demurrer. But where the title to the copyright under a contract of sale is also in dispute, this question may be settled in equity, in preference to sending the parties to the law side of the court. *Id.*; Hilliard on Injunctions, 2nd ed. ch. xxv. s. 5, note (a).

(a) *Kelly v. Wyman*, 17 W. R. 399; see also *Tipping v. Clarke*, 2 Hare, 383.

(b) *Stevens v. Brett*, 10 L. T. (N.S.) 231; 12 W. R. 572.

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than the court would, under any circumstances, accord to him, as for instance, with a view to receive costs as between solicitor and client (*a*).

Form of
injunction.

The parts to be restrained from publication may be specified in the order, or the defendant may be enjoined from printing, publishing, selling, or otherwise disposing of any copies of the book "containing any articles or article, passages or passage copied, taken or colourably altered from" the plaintiff's book (*b*); or, "from doing any other act or thing in invasion of the plaintiff's copyright in the said" book (*c*). Or, the injunction may be directed specially against the piratical parts, and generally against any unlawful copying from the plaintiff's work (*d*).

In *Dickens v. Lee* (*e*), where an injunction had been granted enjoining the defendant from "copying or imitating the whole or any part of the plaintiff's book," Knight Bruce, V.-C., struck out "or imitating," saying there was no precedent for such words, but without expressing an opinion whether an injunction would properly go that length. It is apprehended it could not, for it must be remembered that there may be imitations which are not piratical.

As to delivery
up of copies
where whole
work a piracy.

The court has power under its general jurisdiction to order delivery up for destruction of all articles created in violation of a plaintiff's right (*f*); but it will not make such an order unless the whole of the work complained of is an infringement of the plaintiff's rights. Where a defendant may possibly sever the passages extracted from the protected work from the rest of his work he should have the opportunity of so doing. The defendant will, however, have to state on oath what copies of his work exist, and extract from those copies which are in his

(*a*) *Kelly v. Hooper*, 1 Y. & C. Ch. 197.

(*b*) *Lewis v. Fullarton*, 2 Beav. 14; *Hogg v. Scott*, L. R. 18 Eq. 458.

(*c*) *Scott v. Stanford*, 36 L. J. (N.S.) Ch. 732.

(*d*) *Jarrold v. Houlston*, 3 K. & J. 723, and cf. Seton, 5th ed. pp. 571—576.

(*e*) 8 Jur. 185.

(*f*) *Hole v. Bradbury*, 12 Ch. D. 886; 48 L. J. Ch. 673; 28 W. R. 39; 41 L. T. 250.

possession or power, and deliver up to the plaintiff for cancellation all passages copied, taken or colourably imitated from the plaintiff's book; and further the defendant may be required to produce to the plaintiff for examination the copies after the pirated passages have been extracted, and the court will give liberty for the plaintiff to apply for a further order if they are dissatisfied with the result (a).

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Where part only a piracy cancellation of such parts.

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

Right to account incident to other relief.

Any party in any cause or matter may by *subpœna ad testificandum* or *duces tecum* require the attendance of any witness before an officer of the Court, or other person appointed to take the examination for the purpose of using

(a) *Warne & Co. v. Sechohm*, 39 Ch. D. 73.

(b) *Hogg v. Kirby*, 8 Ves. 215; *Baily v. Taylor*, 1 Russ. & My. 73; Taml. 295; *Sheriff v. Coates*, 1 R. & M. 159; *Kelly v. Hooper*, 1 Y. & Coll. 197; *Grierson v. Eyre*, 9 Ves. 341; *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 689; 2 Story's Eq. Jur. s. 933.

(c) 2 Hare, 543, 560; 12 L. J. (N.S.) Ch. 388; 7 Jur. 1104. See *Pike v. Nicholas*, L. R. 5 Ch. 255.

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his evidence upon any proceeding in the cause or matter, in like manner as such witness would be bound to attend and be examined at the hearing or trial; and any party or witness having made an affidavit to be used, or which shall be used, on any proceeding in the cause or matter, shall be bound, on being served with such subpoena, to attend before such officer or person for the purpose of cross-examination (a). However, no weight is to be attached to an affidavit where the opposite party has had no opportunity to cross-examine the witness (b).

Nature of
discovery
given.

Though the general rule of the court is that he who gives discovery at all must give full discovery, yet the court will take care that injury shall not be done to a defendant by compelling him to make discovery in a case where there is no real prospect of its being of material service to the plaintiff at the hearing. Therefore in a suit to restrain the alleged improper use by the defendants of the plaintiffs' trade marks where the defendants denied the plaintiffs' right to the exclusive use of the marks in question, it was held by the Lords Justices (reversing a decision of Vice-Chancellor Wickens) that the defendants, under an order for production of documents, were not bound to disclose the names of their customers, nor the prices at which they bought or sold the goods which they exported; but it was held that they must state the names of the places to which they exported goods, the name of the writer of any letter addressed to them by a former partner of their own, and, in any case in which they admitted that they used one of the marks claimed by the plaintiffs, the other marks which they used in combination therewith (c).

Where no
account
allowed.

There can be no account if the case for the injunction fails, or if at the hearing there is nothing on which an

(a) R. S. C., 1883, O. 37, r. 20; *Besemeres v. Besemeres*, Kay, App. xvii.; *Normanville v. Stanning*, 10 Hare, App. xx.; *Clarke v. Law*, 2 K. & J. 28; *Lloyd v. Whitty*, 19 Beav. 57; *Nicholls v. Ibbetson*, 7 W. R. 430; *Edwards v. Spraight*, 2 J. & H. 617; *Singer Sewing Machine Co. v. Wilson*, 2 H. & M. 584; Dan. Ch. Pr. 4th ed. 822; 6th ed., 619, 641, and Addenda; *Raymond v. Tapson*, 22 Ch. D. 430.

(b) *Wightman v. Wheelton*, 23 Beav. 397; 3 Jur. (N.S.) 124.

(c) *Carter v. Pinto Leite*, 20 W. R. 134.

injunction can operate (*a*), or in respect of acts unattended with profits (*b*). The rule applies even although it may appear that since the notice for an interim injunction the defendant has sold articles which the court would, upon that application, have restrained him from selling, had the facts and the law been at that time sufficiently ascertained (*c*).

It is not necessary specifically to ask for an account, for it may be ordered under the prayer for general relief. The accounts may have reference to past as well as future sales and may be ascertained from affidavits made by or on behalf of the defendants (*d*).

To what
account
limited.

The account is limited to the nett profits actually made and the moneys actually received by the wrongdoer (*e*).

It was held in an American case (*f*) that commissions on the sale of a pirated work, received by a bookseller from the publisher of it, were profits which the bookseller must account for to the proprietor of the copyright, where a decree for an account had been made. Curtis, J., in the case referred to, said: "If the proprietor will waive his action for damages, he may have an account of profits, upon the ground that the defendant has, by dealing with his property made gains which equitably belong to the complainant, and I perceive no sound reason for restricting those gains to the difference between the cost and the sale price of the map or book, or limiting the right to an account to those persons who have sold the work solely on their own account. He who sells on commission does in truth sell on his own account, so far as he is entitled to a percentage on the amount of the sales. What he so receives is the gross profit coming to him from the

(*a*) *Baily v. Taylor*, 1 R. & M. 73; *Price's Patent Candle Co. v. Bauwen's Candle Co.*, 4 K. & J. 727; see *Garth v. Cotton*, 3 Atk. 751; 1 Ves. 524, 546.

(*b*) *Lee v. Alston*, 1 Ves. Jun. 78; 1 Bro. C. C. 194; 3 Bro. C. C. 37; *Colburn v. Simms*, 2 Hare, 560; *Powell v. Aikin*, 4 K. & J. 343, 351.

(*c*) *Price's Patent Candle Co. v. Bauwen's Candle Co.*, *supra*.

(*d*) *Pike v. Nicholas*, 20 L. T. (N.S.) 909; *Kelly v. Hodge*, 29 L. T. (N.S.) 387.

(*e*) *Delfe v. Delamotte*, 3 K. & J. 581; 3 Jur. (N.S.) 933; and see *Pike v. Nicholas*, L. R. 5 Ch. 255.

(*f*) *Stevens v. Gladding*, 2 Curt. (Amer.) 608.

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proceeds of the sales, and what he so receives, diminishes the net profit of the one who employs him to sell. That part of the profits of the sales, being in the hands of the commission merchant, the consignor is not accountable for them. But why should not the commission merchant, who has them, account for them? He was liable to an action for damages for selling. That right is waived. I think he should pay over to the proprietor in lieu of damages, the gain he has made from the sales. It does not seem to me that the term 'profits' necessarily, or, when construed in reference to the subject matter, properly has so restricted a meaning as to exclude commissions received from the proceeds of sales of the property of the complainant."

If the account small, usually waived.

If the account is small it is usually waived (*a*), and if the defendant submits, the suit does not proceed to the hearing, but a decretal order is made, giving effect to the agreement between the parties. The defendant must, if required to do so for the purpose of the account or the inquiry as to damages, set out the price and profit and names of the purchasers of the pirated articles (*b*); and the plaintiff is entitled to continue the suit, until the discovery is given (*c*).

Points as to costs.

A person whose copyright has been infringed is not bound to rest satisfied with the promise of the defendant not to commit any further infringement, but he has a right to have an injunction (*d*), and is entitled to the costs of such injunction (*e*).

If the defendant do not offer to submit to the injunction and pay all the costs up to that time (*f*), or if, although he offer to submit to the injunction, he refuse to pay the costs or to give the plaintiff any of the other

(*a*) See *Fradella v. Weller*, 2 R. & M. 247.

(*b*) *Stevens v. Brett*, 12 W. R. 572; and with regard to patents, *Howe v. M'Kernan*, 30 Beav. 547; see *Delarue v. Dickenson*, 3 K. & J. 388.

(*c*) See *Colburn v. Simms*, 2 Hare, 543; *Kelly v. Hooper*, 1 Y. & C. C. 197.

(*d*) *Geary v. Norton*, 1 De G. & Sm. 9; *Losh v. Hague*, 1 Webs. 200; 2 Co. C. C. 59, n.

(*e*) *Geary v. Norton*, *supra*.

(*f*) *Potts v. Levy*, 2 Drew. 272.

relief to which he is entitled, the plaintiff is entitled to bring the suit to a hearing, and will have the costs of the suit (a). But if the defendant offer to submit to the injunction with costs, and to give the plaintiff all the other relief to which he may be under the circumstances entitled, and no account is sought, or the account is waived, the Court, though it may give judgment in the plaintiff's favour, will not give him the costs of the subsequent prosecution of the suit up to the hearing (b).

The tender must include the costs of the suit up to the time when the tender is made (c), and it may be said generally that any offer the defendant may make with regard to the payment of costs must have been substantially the whole of the costs which the Court finds the plaintiff to be entitled to at the trial. Short of that the offer may be evidence of good faith, but it is not such an offer as to interfere with the ordinary course with respect to costs (d). If both parties are in the wrong, the one claiming more than he is entitled to claim, and the other offering less than he was bound to offer, costs will not be given to either side (e).

A *bonâ fide* offer from the defendants before suit to give the plaintiff all the relief to which he is entitled, and which he ultimately obtains by the suit, may be a reason, as we have seen, for depriving him of the costs of it (f);

(a) *Fradella v. Weller*, 2 R. & M. 247; *Geary v. Norton*, 1 De G. & Sm. 12; *Kelly v. Hooper*, 1 Y. & C. C. C. 197; *Colburn v. Simms*, 2 Hare, 561; *Jamieson v. Teague*, 3 Jur. (N.S.) 1206; *Chappell v. Davidson*, 2 K. & J. 123; *Burgess v. Hill*, 26 Beav. 244; *Burgess v. Hately*, *Ib.* 249; *M'Andrew v. Bassett*, 33 L. J. (Ch.) 561.

(b) *Millington v. Fox*, 3 M. & C. 352; *Colburn v. Simms*, *supra*; *Nunn v. d'Albuquerque*, 34 Beav. 595; *Harvey v. Ferguson*, 15 Ir. Ch. 277; *Hudson v. Bennett*, 12 Jur. (N.S.) 519.

(c) *Fradella v. Weller*, *supra*; *Geary v. Norton*, *supra*; *Jamieson v. Teague*, *supra*; *Burgess v. Hill*, *supra*; *Remnant v. Hood*, 27 Beav. 74; *Moet v. Couston*, 33 Beav. 578; *Schlesinger v. Turner*, 63 L. T. 764; W. N. (1890) p. 224.

(d) *Schlesinger v. Turner*, *supra*.

(e) *Moet v. Couston*, *supra*; see *Rochdale Canal Co. v. King*, 16 Beav. 630; *Pearce v. Wycombe Railway Co.*, 17 Jur. 660; *Ainsworth v. Walmerley*, L. R. 1 Eq. 518.

(f) *Millington v. Fox*, *supra*; *Colburn v. Simms*, *supra*; *Chappell v. Davidson*, *supra*; *Williams v. Thomas*, 2 D. & Sm. 29, 37; see *Woodman v. Robinson*, 2 Sim. (N.S.) 204; *Nesbitt v. Berridge*, 32 Beav. 282.

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but in *Edelsten v. Edelsten* (a), however, Lord Westbury said he could not take notice of negotiations antecedent to the suit, save in case of bad faith, unless they amounted to a release or binding agreement with respect to the cause of action. A man, however, whose legal right has been invaded is under no obligation to make an application to the defendant before filing his bill for an injunction (b). The costs of the suit are often disposed of on an interlocutory application before judgment (c).

In *Cooper v. Whittingham* (d) Sir G. Jessel said that where a plaintiff came to enforce a legal right and there had been no misconduct on his part . . . the Court had no discretion and could not take away his right to costs, and Chitty, J., took the same view in *Upman v. Forester* (e). But in *Walter v. Steinkopff* (f) Mr. Justice North said he could not understand that view, it was in the teeth of the several Orders and Act of Parliament, which say that a judge has a discretion which he is to exercise, and in the recent case of *The American Tobacco Co. v. Guest* (g), Stirling, J., took the same view. Mr. Justice North, considering that in the case in question the defendants had been hardly dealt with by being pulled up all at once without notice for doing what they had been doing for twelve years past, decided that the defendants should pay all the costs of the action down to a certain day, and also such further costs as would have been properly incurred by the plaintiffs in proceeding upon a motion unopposed by the defendants to make the interlocutory order perpetual, leaving all other costs to be borne by the parties who incurred them.

In a case where the plaintiff after the hearing, but before judgment was delivered, became bankrupt, the bill

(a) 1 D. J. & S. 185, 203.

(b) *Burgess v. Hill*, 26 Beav. 244; *Burgess v. Hately*, *Ib.* 249; *Walter v. Steinkopff*, 36 Sol. Jour. 11 June, 1892, p. 556; 8 T. L. R. 633.

(c) Morg. & Dav. on Costs, 47—62; Morg. & Wurtz. on Costs, 73—89

(d) 15 Ch. D. 501.

(e) 24 Ch. D. 231.

(f) 36 Sol. Jour. 11 June, 1892, p. 556; 8 T. L. R. 633.

(g) 1892, 1 Ch. 630.

was dismissed, but on the defendant moving that the plaintiff might be ordered personally to pay the costs, Wood, V.C., refused to make any order, and his decision was upheld on appeal (a).

By the 21 & 22 Vict. c. 27, s. 2, the Court of Chancery was empowered to assess and award damages either in lieu of, or in addition to, an injunction (b); the Act is repealed by 46 & 47 Vict. c. 49, s. 3, but the jurisdiction appears to be retained by s. 5 (b), and at any rate the Court now has power to give alternative relief (c).

The rule laid down for estimating the damages sustained by a plaintiff in a case of piracy was thus laid down by James, V.C., "The defendant is to account for every copy of his book sold, as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he would have received from the sale of so many additional copies" (d).

We will conclude this subject with the words of Sir William D. Evans: "It is clear," says he, in the second volume of his 'Statutes' (e), "that the proceeding by injunction is the most ready and effectual remedy which can be resorted to on the part of the plaintiff, but that a great degree of caution in the application of that proceeding, in the first instance, is requisite for preventing injustice to the defendant, whose loss does not, from the nature of it, admit of reparation if the injunction should, upon further investigation, be found to have been erroneously applied; and the judges of courts of equity have in many cases expressed a strong sense of the importance of this principle."

(a) *Boucicault v. Delafield*, 10 Jur. (N.S.) 1063.

(b) *Tinsley v. Lacy*, 1 H. & M. 747; *Johnson v. Wyatt*, 2 De G. J. & S. 18; *Pike v. Nicholas*, L. R. 5 Ch. 260; *Cox v. Land and Water Journal Co.*, L. R. 9 Eq. 324; *Smith v. Chatto*, 31 L. T. (N.S.) 775.

(c) *Sayers v. Collyer*, 28 Ch. D. 103, 108.

(d) *Pike v. Nicholas*, *supra*.

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

CHAPTER IX.

CROWN COPYRIGHT.

Prerogative
copyright.

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

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

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

Nature of the
right.

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

tion he bought, and, therefore, it was concluded to be his property.

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

(a) “Where change of fav'rites made no change of laws,
And senates heard before they judged a cause” (?)—JOHN.

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

CAP. IX.

The Bible and Book of Common Prayer (a).

The Bible
and Common
Prayer Book.

For two hundred years and more the kings have in England granted patents to their printers (b). From the time of Henry VIII. have different persons enjoyed, by letters patent, the privilege of printing prerogative copies to the exclusion of all other persons.

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

Others again have been of opinion that it is to be referred to another consideration, namely, to the character

(a) See *Mayo v. Hill*, cited 2 Show. 260; *King's Printer v. Bell*, Mor. Dict. of Dec. 19—20, p. 8316; Chitty's Prerogative of the Crown, ch. xi. s. 3.

(b) The letters patent conferring the office of King's Printer (Scotland) bear that he shall have "solum et unicum privilegium imprimendi in Scotia Biblia Sacra, Nova Testamenta, Psalmorum libros, et libros Precum communium, Confessiones Fidei, Majores et Minores Catechismos, in lingua Anglicana."

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

(d) 'Patents and Copyrights,' p. 437.

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

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

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

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

In *Grierson v. Jackson* (c), upon an application for an

View taken
in Ireland.

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

(b) 2 Evans' 'Statutes,' 2nd Ed. p. 19.

(c) Irish T. R. 304.

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injunction against printing an edition of a Bible in numbers with prints and notes, Lord Clare, as Chancellor of Ireland, asked if the validity of the patent had ever been established at law, and said he did not know that the Crown had a right to grant a monopoly of that kind. In the course of the discussion he made the following observations: "I can conceive that the king, as head of the church, may say that there shall be but one man who shall print Bibles and Books of Common Prayer for the use of churches and other particular purposes, but I cannot conceive that the king has any prerogative to grant a monopoly as to Bibles for the instruction of mankind in the revealed religion; if he had, it would be in the power of the patentee to put what price he pleased upon the book, and thus prevent the instruction of men in the Christian religion. If ever there was a time which called aloud for the dissemination of religious knowledge it is this, and, therefore, I should with great reluctance decide in favour of such a monopoly as this, which must necessarily confine the circulation of the book."

View taken
in England.

This has not been the view taken of the subject in England, for in the case of the *Universities of Oxford and Cambridge v. Richardson* (a), an injunction upon motion was granted against the king's printer in Scotland, who had a patent for the sale of Bibles, printing or selling them in England, upon the ground that possession, under colour of title, was sufficient to injoin and to continue the injunction till it was proved at law that it was only colour and not real title. In the course of the case it appeared that, in the year 1718, Sir Joseph Jekyll, as Master of the Rolls, had granted an injunction in a similar case, which was supported on appeal before the Lord Chancellor; and also, that a decree of the Court of Session had, in the year 1717, been reversed by the House of Lords in favour of the right of the king's printer in England, confining the right of the Scotch printer to Scotland. With respect to the

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

precedent of the injunction, it is clear that there had been abundance of injunctions before upon private copyright, until the claim was finally put an end to by the decree of the Lords; and questions between rival patentees were not the most probable method of bringing into fair discussion the general rights of the subject to resist the claim of prerogative, root and branch (*a*). The Lord Chancellor, in his judgment, said, "My opinion is, that the public interest may be looked to upon a subject, the communication of which to the public in an authentic shape, if a matter of right, is also a matter of duty in the Crown, which are commensurate. It is not accurate to say, these privileges are not granted for the sake of unlimited sale, and for the sake of the universities, &c. They are, to a certain degree, like all other offices, calculated for that sort of advantage which will secure to the public the due execution of the duty; upon this principle proceed all the branches of our constitution (which does not adopt the wild theories that require the execution of a duty without a due compensation), that the duty is well secured in one way by giving a responsibility, in point of means, to the person to execute it. The reasoning which affects to depreciate monopoly, will perhaps tend to create it." There certainly is no great risk that false copies of the Bible would get into general circulation by an unlimited right of printing them. We do not find it materially the case in other works; and there are very few persons indeed who would admit that the beneficial circulation of any commodity in general, or of these writings in particular, can be promoted by means of an exclusive monopoly; and the principal object, both of the right and the duty, with respect to the particular subject, appears to be the benefit arising to the privileged individuals (*b*).

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

(*a*) 2 Evans' 'Statutes,' 2nd ed. p. 17.

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

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

Acts of Parliament and Matters of State.

The right in state documents.

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

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

The right seemed to have been in effect recognised and established in the case of *Millar v. Taylor (a)*, by the unanimous opinion of the judges, though they differed respecting the origin of it. This is certain respecting its origin, that it has ever been a trust reposed in the king, as executive magistrate, to promulgate to the people all those civil ordinances which are to be the rule of their civil obedience. There are traces of the ancient mode of promulgating the ordinances of the state yet remaining to us, suited to the gloominess of the times when few who heard them could have read them; the king's officers transmitted

(a) 4 Burr. 2303.

authentic copies of them to the sheriffs, who caused them to be publicly read in their county court (a). When the demand for authentic copies began to increase, and when the introduction of printing facilitated the multiplication of copies, the people were supplied with them by the king's patentee. From such source they were far more likely to be correct and accurate than if obtained from those unable to resort to the fountain head; and our courts of justice appeared to have so considered, when they established it as a rule of evidence, that Acts of Parliament printed by the king's printer should be deemed authentic, and received in evidence as such.

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

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

Perhaps the most important case on this head is that of *Roper v. Streater* (c), decided in 1672, the facts of which were these:—Roper bought of the executors of Justice Croke the third part of his reports, which he printed;

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

(b) *Atkyns's case*, Carter, 89; 1 Bl. 113; 6 Bac. Abr. 507; 10 Mod. 105.

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

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Colonel Streater had a grant for years from the Crown for printing all law books, and he reprinted Roper's work without permission ; on which Roper brought an action under the Licensing Act. Streater pleaded the king's grant, and on demurrer it was adjudged for the plaintiff against the validity of the patent, on these grounds ; that the patent tended to a monopoly ; that it was of a large extent ; that printing was a handicraft trade, and no more to be restrained than other trades ; that it was difficult to ascertain what should be called a law book ; that the words in the patent " touching or concerning the common or statute law," were loose and uncertain ; that if this were to be considered as an office, the grant for years could not be good, as it would go to executors and administrators : and that there was no adequate remedy in the way of redress in case of abuses by unskilfulness, selling dear, printing ill, &c. This judgment, however, was reversed on a writ of error in Parliament, for the following reasons : that the invention of printing was new ; that this privilege had been always allowed, which was a strong argument in its favour, although it could not be said to amount to a prescription, as printing was introduced within time of memory ; that it concerned the state, and was matter of public care ; that it was in the nature of a proclamation, which none but the king could make ; that the king had the making of judges, serjeants, and officers of the law ; that as to the uncertainty, these words in the patent were to be taken *secundum subjectam materiam*, and not to be extended to a book containing a quotation of law but where the principal design was to treat on that subject ; that as to its being an office, it was not so properly an office as an employment, which may well enough be managed by executors or administrators ; and that as to abuses, these, like all others, were punishable at common law, or the patent itself might be repealed by *sci. fac. (a)*.

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

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

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

Though a court of justice appears to have the sole power of authenticating the publication of its own pro-

As to the publication of proceedings in courts of justice.

(a) 1 W. Bl. 105 ; 2 Burr. 661 ; see 2 Bla. Com. 416 ; and 5 Bac. Abr. tit. Pre. F. 5.

(b) Pref. to Dougl. R.

(c) Burr. R. Pref. viii.

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ceedings, it does not necessarily follow that it has an exclusive right of publication.

Since the Year-Books, it seems that no judicial proceedings, with the exception of state trials, have been published under authoritative care and inspection, either by the House of Lords or by any court of judicature.

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.

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

When publication during trial prohibited.

(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. Mustyn*, L. R. 7 Eq. 55, note.

subject matter respecting which it was made was then in the course of judicature before them. The object for which it was made was already, as it appears to me, one within their jurisdiction, viz., the furtherance of justice in proceedings then pending before the Court; and it was made to remain in force so long, and so long only, as those proceedings should be pending before them. Now, I take it to be clear that a court of record has a right to make orders for regulating their proceedings and for the furtherance of justice in the proceedings before them, which are to continue in force during the time that such proceedings are pending. It appears to me, that the arguments as to a further power of continuing such orders in force for a longer period do not apply. It is sufficient for the present case, that the Court have that power during the pendency of the proceedings. This order was made to delay publication only so long as it was necessary for the purposes of justice, leaving every person at liberty to publish the report of the proceedings subsequently to their termination. I am therefore of opinion, that this was an order which the Court had the power to make."

A criminal information will lie for publishing an *ex parte* 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.

(a) *Rees 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.

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

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 *bondâ 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 *bondâ fide*, and not merely colourable or collusive (d).

Almanacs.

As to the
right in
almanges.

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

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

(a) 5 Ves. 709.

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

(c) 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.

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

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

In an action of debt by the *Company of Stationers against Seymour* (a), 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 that was printed before the Book of Common Prayer, the additions were regarded as immaterial.

So also was an injunction granted against Lee (b), 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* (c). 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* (d), 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* (e): "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'

(a) 1 Mod. 256.

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

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

(d) 2 Wm. Bl. 1004.

(e) 13 Ves. 508.

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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 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 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 (b).

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? (c) The claim has long been abandoned.

As to the
Latin
Grammar.

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

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

(c) 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.

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

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

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Copyrights
at present
possessed
by the
universities.

above enumerated are saved from the operation of the Copyright Act.

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 Report in 1878 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 harpsichord, called a *sonata*, the original composer had a copyright?" The opinion given was, that the same rules of law apply both to literary and musical compositions. It was said that the words of the Act of Parliament were very extensive: "Books, or other

(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 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 some time ago, 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.

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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 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.

Who is author.

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.

In an American case (d) we find an author defined as "one who by his own intellectual labour applied to the materials of his composition produces an arrangement or compilation new in itself." Thus if A. makes a pianoforte

(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.

(d) *Attwill v. Ferrett*, 2 Blatch. (Amer.) 39, 46.

score of the music of B.'s opera, A. is in law the "author" of the new arrangement (a). The pianoforte arrangement is regarded as a work separate from the opera itself and as the result of separate labour. So, too, if A. writes new words and accompaniment to an old non-copyright melody, the whole composition is regarded as a new one and deserving of copyright, A. being properly described as the author (b).

The same remarks apply to the case of writing libretti to the music of non-copyright operas, oratorios, or cantatas.

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 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.

Instrumental
music.

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 (c).

(a) *Wood v. Boosey*, 2 Q. B. 340.

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

(c) In equity, injunctions have been granted to stop the performance of printed dramatic works at the request of the authors of them: *Morris v.*

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Formerly
representa-
tion not
equivalent to
publication.

In the former case, the plaintiff was the author of a farce called 'Love à la Mode,' consisting of two acts, which was performed, 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 (a).

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 (b).

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 case, in 1870, before the Superior Court of New York (c), 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

American
law on this
subject.

Harris, Morris v. Kelly, 1 Jac. & W. 481; cited Godson on 'Patents and Copyrights,' 390.

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

(b) *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.

(c) *Palmer v. Dewett*, 23 L. T. Rep. (N.S.) 823.

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 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

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

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

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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 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

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

and abridged for the stage, was performed without the consent of the owner of the copyright, who applied for an injunction, it was laid down, that an action could not be maintained, "for publicly acting and representing the said tragedy, abridged in manner aforesaid" (a). 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, 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 water-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

The 3 & 4
Will. 4, c. 15,

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

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to amend the law relating to dramatic copyright.

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 (c), without the consent in writing of the author or other proprietor (d), at any place of dramatic entertainment (e), any such production, or any part thereof, every such offender should be liable for each and every such representation to the payment of an amount not less than 40s. or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages, to the author or other proprietor of such production so represented, to be recovered, together with double costs of suit.

Double costs were taken away in all cases by the 5 & 6 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 (f).

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

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

(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.

(c) *Russell v. Briant*, 19 L. J. (C.P.) 33; 14 Jur. 201; 8 C. B. 836; *Lyon v. Knowles*, 5 B. & S. 751; *Marsh v. Conquest*, 17 C. B. (N. S.) 418; *Monaghan v. Taylor*, 2 T. L. R. 685; *Duck v. Mayen*, 8 T. L. R. 339.

(d) *Eaton v. Lake*, 20 Q. B. D. 378.

(e) *Wall v. Taylor*, *Wall v. Martin*, 9 Q. B. D. 727; 11 Q. B. D. 102; *Duck v. Bates*, 12 Q. B. D. 79; 13 Q. B. D. 843.

(f) *Reeve v. Gibson*, [1891] 1 Q. B. 652.

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 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 re-
presentation
of manuscript
play.

It is doubtful whether, supposing a dramatic piece or musical composition in manuscript to have been registered

(a) See *Parsons v. Chapman*, 5 Car. & Payne, 33; *Monaghan v. Taylor*, 2 T. & R. 685.

(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*, 4 Q. B. D. 90, 483.

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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 publication in this country of a dramatic piece or musical composition as a book before it has been publicly represented or performed, does not deprive the author or his assignee of the exclusive right of representing it or performing it (b).

The remedies provided by the Act of Will. 4, not affected by the 5 & 6 Vict. c. 45.

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.

This was seen in a case which came before the Court of Exchequer in 1872. 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 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

(a) See *Boosey v. Fairlie*, 7 Ch. Div. 301, 316. It has been held in America that the representation of a dramatic work which the proprietor has never caused to be printed and has not obtained a copyright of, if made without the licence of the proprietor, is a violation of his right, and may be restrained by injunction, although such representation is from a copy obtained by a spectator attending a public representation by the proprietor for money, and afterwards writing it from memory. *Tompkins v. Halleck*, 19 Lathrop (Amer.) 32.

(b) *Chappell v. Boosey*, 21 Ch. D. 232.

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, 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:—

1. *The term of copyright.*—Section 3 of the Copyright Act, 1842, gives the copyright in a book where the same is published in the author's lifetime to him and his assigns from the date of publication for 42 years, or for the natural life of the author, and a further term of seven years from the time of his death, provided that the period shall in no case be less than 42 years. Thus the copyright must endure for 42 years, while it may continue for more. This term of copyright is by section 20 applied to the right of representation and performance. The period is from first public representation or performance. Taking these sections in conjunction with the provisions of the Dramatic Copyright Act (b), dramatic authors and musical composers are, as regards the duration of their rights, in a precisely similar position; and these rights are of two distinct kinds—copyright and performing rights—each of which may reside in different persons simultaneously, and may expire at different periods.

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

(b) 3 & 4 Will. 4, c. 15.

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Where the copyright in unpublished work dates from.

As to the consent of the author.

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 (a).

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 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 (b).

(a) *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.

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

Where there are several owners of a copyright, consent must be obtained from all, one co-owner cannot grant a licence 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 licence 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 (a).

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Consent where several owners of copyright.

It will be observed that the 3 & 4 Will. 4, c. 15, limits the unlawful representation to a "place of dramatic entertainment," whereas the 5 & 6 Vict. c. 45, s. 20, makes no mention of such a condition, nor is there any indication in the latter statute as to how much of the earlier is incorporated. The 20th section of the Act of 1842 simply extends the provisions of the Dramatic Copyright Act to musical compositions, while the 21st section provides that the proprietor of the right of representing dramatic pieces or musical compositions shall have all the remedies given and provided by the Dramatic Copyright Act.

Performance at a place of dramatic entertainment.

The question first arose in *Russell v. Smith* (b), 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

(a) *Powell v. Head*, 12 Ch. D. 686; 48 L. J. Ch. 731; 41 L. T. 70.

(b) 12 Q. B. 217.

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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 representations of a regular stage play (a). 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."

The question whether section 21 of the 5 & 6 Vict. c. 45, incorporates only the remedy given by the Dramatic Copyright Act or whether it also incorporates the condition or state of circumstances under which the right to the remedy arises, that is whether the unauthorized performance of a musical composition is unlawful wherever it takes place or only when at "a place of dramatic entertainment," was, however, raised and decided in the recent case of *Wall v. Taylor* (b). There the plaintiff had the exclusive right of singing a song entitled the 'Will o' the Wisp.' The song was sung without the consent of the plaintiff at a concert, and at a place not used on any other occasion as a

(a) In the same case Patteson, J., remarked that "the street where 'Punch' is performed is for the time being a place of dramatic entertainment." See *Duck v. Bates*, 12 Q. B. D. 79 ; 13 Q. B. D. 843 ; 49 L. T. 507 ; 32 W. R. 169.

(b) 9 Q. B. D. 727 ; 11 Q. B. D. 102 ; 47 L. T. 47 ; 51 L. J. (Q.B.) 547 ; 52 L. J. 213, 558 ; 31 W. R. 712. In *Duck v. Bates*, *supra*, it was thought that the *dicta* of Brett, M.R., in the above case were too wide.

“place of dramatic entertainment.” For the plaintiff it was said that the song was a “dramatic song” within the meaning of the 5 & 6 Vict. c. 45, and that it had been publicly performed or represented, and that therefore he was entitled to the penalty of 40s. On the other hand it was argued that, assuming the song was one to the performance of which the plaintiff had an exclusive right, yet inasmuch as it was sung at a place which was not a “place of dramatic entertainment,” the plaintiff was not entitled to recover any penalty, but only the amount of such damages as he had suffered. The Court held that the proprietor of the right of performance was entitled to the penalty given by the Dramatic Copyright Act even though the musical composition had not been represented at “a place of dramatic entertainment.”

In a case where the performance was in the room of a hospital by amateurs for the entertainment of the nurses and others connected with the institution, free, though the governors of the hospital paid for seats, yet the Court held that the room where the drama was represented was not a place of public entertainment, and consequently the performers were not liable to damages or penalties under the Acts (a).

In the case last referred to the Master of the Rolls said:—“It is not necessary that there should be profit made by the representation.” He considered that the place need not be habitually kept for the exhibition of dramatic entertainments. A representation in a nursery by children, or by grown-up persons in a drawing-room, is not an infringement because it is obviously domestic and private. So too, a “representation for the amusement of friends in an unfurnished house hired for the occasion.” The representation in that case is also “domestic and private.” There must be present a sufficient part of the public who would also go to a performance licensed

(a) *Duck v. Bates*, 12 Q. B. D. 79; 13 Q. B. D. 843; 49 L. T. 507; 32 W. R. 169; *Wall v. Taylor*, *Wall v. Martin*, 9 Q. B. D. 727; 11 Q. B. D. 102; 47 L. T. 47; 51 L. J. (Q.B.D.) 547.