THE

LAW OF COPYRIGHT,

IN WORKS OF LITERATURE AND ART:

INCLUDING THAT OF THE

DRAMA, MUSIC, ENGRAVING, SCULPTURE, PAINTING, PHOTOGRAPHY, AND DESIGNS.

TOGETHER WITH

INTERNATIONAL AND FOREIGN COPYRIGHT,

WITH THE STATUTES RELATING THERETO,

AND

REFERENCES TO THE ENGLISH AND AMERICAN DECISIONS.

BY

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

FOURTH EDITION.

BY

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THE LAW OF COPYRIGHT.

PREFACE TO THE FIRST EDITION.

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

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

W. A. COPINGER.

MIDDLE TEMPLE LANE, TEMPLE.
September 1870.

PREFACE TO THE FOURTH EDITION.

PRESSURE of other work unfortunately prevented the author from writing this edition of his well-known work on copyright; but the editor, whilst assuming full responsibility for the alterations made by him, gratefully acknowledges the ready assistance which has been extended to him by the author, both during the preparation of the work for the press and in revising the proof-sheets.

Some slight alterations in arrangement have been made in this edition, and the increasing importance of international copyright and the judicial decisions since the last edition in 1893 have necessitated a practical re-writing of the portion of the work dealing with this branch of the law of copyright.

Every endeavour has been made to render the foreign law as complete and up to date as possible. This portion of the editor's task has been greatly facilitated by the aid derived from that invaluable organ of the Copyright Union—Le Droit d'Auteur—of which he has made free use.

J. M. EASTON.

40 SOUTH KING STREET, MANCHESTER.
September 1904.

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ADDENDUM

Pp. 466, 618. Sweden has now joined the Copyright Union. She has acceded to the Berne Convention of 1886 and the "Interpretative Clause" signed at Paris May 4, 1896, but, like the sister kingdom of Norway, she has not acceded to the Additional Act of Paris, 1896. The accession of Sweden takes effect from August 1, 1904.

THE LAW OF COPYRIGHT.

PART I.

LITERARY COPYRIGHT.

CHAPTER I.

HISTORICAL VIEW OF THE COPYRIGHT LAWS.

Definition and nature of copyright.

COPYRIGHT may be defined as the sole and exclusive liberty of printing or otherwise multiplying copies of an original work or composition (*a*).

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

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

(*a*) *Per* Pollock, C.B., *Chappell* v. *Purday* (1845), 14 M. & W. 316. The term "copyright" may be understood in two different senses. The author of a literary composition, which he commits to paper belonging to himself, has an undoubted right at common law to the piece of paper on which his composition is written, and to the copies which he chooses to make of it for himself, or for others. If he lends a copy to another his right is not gone; if he sends it to another under an implied undertaking that he is not to part with it, or publish it, he has a right to enforce that undertaking. The other sense of the word is, the exclusive right of multiplying copies; the right of preventing all others from copying, by printing or otherwise, a literary work which the author has published. This must be carefully distinguished from the other sense of the word. (*Per* Baron Parke, in *Jefferys* v. *Boosey* (1854), 4 H. L. C. 920.) It is in the second sense of the word that copyright is defined by Davey, L. J., as "the right of multiplying copies of a published writing," *Walter* v. *Lane* (1900), A. C., at p. 550. In this case Halsbury, L.C., denied that originality is a condition precedent to obtaining protection under the Copyright Acts ((1900), A. C., at p. 548, and see *per* Davey, L. J., at p. 552): but there is probably a sense in which a work must be original. See chapter ii.

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

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

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

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

In later times the method of publication was usually by writing, or describing in characters those words in which an author had clothed his ideas. Characters are but the signs of words, and words the vehicle of sentiments. Here the value which distinguishes the writing arises merely from the matter it conveys. The sentiment is, therefore, the thing of value from which the profit must arise. No man has a right to give another's thoughts to the world, or to propagate their publication beyond the point to which the author has given consent. His reputation is concerned and he has a right to defend it. This is natural justice, and dictated by reason; consequently, as *Lex est ratio summa, quæ jubet quæ sunt utilia et necessaria et contraria prohibet* (*c*), we may obviously assume that though

(*a*) *Prologus ad 'Eunuchum':*

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

(*b*) Juvenal, *Sat.* vii. 87
(*c*) Co. Lit. 319 b. Jenk. Cent. 117.

copyright, as *a species of property*, was in a strictly accurate sense unknown to, or at least was not by precedent established at common law, yet, "the novelty of the question did not bar it of the common law remedy and protection" (*a*).

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

Property in literary compositions.

The necessary consequence of being a distinguishable property was its having a determinate owner. As property must precede the violation of property, so the rights must be instituted before the remedies for their violation; and the seeking for the law of the right of property in the law of procedure relating to the remedies is a mistake similar to supposing that the mark on the ear of an animal is the cause, instead of the consequence, of property therein. If the essential principle for one source of property be production, the mode of production is unimportant; the essential principle is applicable alike to the steam and gas appropriated in the nineteenth century, and the printing introduced in the fifteenth, and the farmers' produce of the earlier ages. The importance of the interest dependent on words advances with the advance of civilization. If the growth of the law be traced with respect to the words that make and unmake a simple contract, and with respect to the words that are actionable or justifiable as defamation, and with respect to the words that are indictable as seditious or blasphemous, it will be thought reasonable that there should be the same growth of the law in respect of the interest connected with the investment of capital in words. In the other matters the law has been adapted to the progress of society according to justice and convenience, and by analogy it should be the same for literary works, and they would become property with all its incidents, on the most elementary

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

(*b*) *De Jure Nat. et Gen.* lib. iv. c. iv. s. 11. *Vide ibid.* s. 6.

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principles of securing to industry its fruits and to capital its profits (*a*).

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

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

To this it was replied, that such definition of property was too narrow and confined; (for the rules attending property must ever keep pace with its increase and expansibility, and must be adapted to every particular condition;) that a distinguishable existence in the thing claimed as property, and an

(*a*) *Per* Mr. Justice Erle in *Jefferys* v. *Boosey* (1854). 4 H. L. C. 870.
(*b*) Bishop's 'Criminal Law.'

actual value in such thing to the true owner, are its essentials; and that the best rule of reason and justice seemed to be, to assign to everything capable of possession a legal and determinate owner. CAP. I.

No copyright in mere ideas.

Ideas, being neither capable of a visible possession nor of sustaining any one of the qualities or incidents of property, inasmuch as they have no bounds whatever, cannot be the subject of property. Their whole existence is in the mind alone; incapable of any other mode of acquisition or enjoyment than by mental possession or apprehension, safe and invulnerable from their own immateriality, no trespass can reach, no tort affect, no fraud or violence diminish or damage them (*a*). They are of a nature too unsubstantial, too evanescent, to be the subject of proprietary rights.

Copyright however in the material that has embodied the ideas.

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

Author's right to the first

"Ideas," says Mr. Justice Yates, "are free. But while the author confines them to his study, they are like birds in a

(*a*) Yates, J., in *Millar* v. *Taylor* (1769), 4 Burr. 2362; *Abernethy* v. *Hutchinson* (1825), 1 Hall & Tw. 28; S. C. in 3 L. J. (Ch.) (O. S.) 209, 213, 219: and see Sir G. Turner, V.-C., in *Morison* v. *Moat* (1851), 9 Hare, 257.

(*b*) The intellectual creations of the ancient Greeks and Romans have come to us through many centuries in better preservation than their great works of art: and while many of their stupendous monuments of stone and brass can no longer be distinguished, the identity of their intellectual labours remain unaffected by time.

(*c*) Mr. Justice Erle, in *Jefferys* v. *Boosey* (1854), 4 H. L. C. 869.

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publication of his own manuscript.

cage, which none but he can have a right to let fly; for, till he thinks proper to emancipate them, they are under his own dominion. It is certain every man has a right to keep his own sentiments, if he pleases; he has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends. In that state, the manuscript is, in every sense, his peculiar property: and no man can take it from him or make any use of it which he has not authorized, without being guilty of a violation of his property. And as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication: and whoever deprives him of that priority is guilty of a manifest wrong, and the court have a right to stop it" (*a*).

Thus we see that every man has the right at common law to the first publication of his own manuscript, it cannot without his consent be even seized by his creditors as property (*b*). He has, in fact, supreme control over his own productions, and may either exclude others from their enjoyment, or may dispose of them as he pleases. He may limit the number of persons to whom they shall be imparted, and impose such restrictions as he pleases upon their use (*c*). He may annex conditions, and proceed to enforce them, and for their breach he may claim compensation (*d*).

Suppose, therefore, that a man, with or without leave to peruse a manuscript work, transcribes and publishes it, the offence would not be within the Copyright Acts: it would not be larceny, nor trespass, nor a crime indictable (the physical property of the author, the original manuscript, remains), but it would be a gross violation of a valuable right. Again,

(*a*) Yates, J., in *Millar* v. *Taylor* (1769), 4 Burr. 2378: *Forrester* v. *Walker* (1711), cited 2 Bro. P. C. 138: *Manley* v. *Owen* (1735), cited 4 Burr. 2329: *Webb* v. *Rose* (1732), 4 Burr. 2330: *Southey* v. *Sherwood* (1817), 2 Mer. 435: *Wheaton* v. *Peters* (1834), 8 Peters, S. C. R. (Amer.) 591: Eden on Injunc. 285: 2 Story, Eq. Jur. s. 943: Curtis on Copy. 81, 150, 159: *Woolsey* v. *Judd*, 4 Duer (Amer.) 385.

(*b*) See *Little* v. *Hall*, 18 How. (Amer.) 170: *Bartlett* v. *Crittenden* (1849): 4 McLean (Amer.) 300: S. C. 5 *ibid.* 32: *Webb* v. *Rose*, *supra*: *Pope* v. *Curl* (1741), 2 Atk. 342: *Manley* v. *Owen*, *supra*: *Macklin* v. *Richardson* (1770), Amb. 694: *Donaldson* v. *Becket* (1774), 4 Burr. 2408: *Abernethy* v. *Hutchinson* (1825), 1 Hall & Tw. 28: *Prince Albert* v. *Strange* (1849), 2 De G. & Sm. 652: 1 Mac & G. 25: *Turner* v. *Robinson* (1860), 10 Ir. Ch. 121, 510: *Wheaton* v. *Peters*, *supra*. See *Dudley* v. *Mayhew*, 3 Comst. (Amer.) 12: *Clayton* v. *Stone*, 2 Paine (Amer.) 383: *Jones* v. *Thorne*, 1 N. Y. Leg. Obs. 109: *Parton* v. *Prang*, 3 Cliff. (Amer.) 537: *Carter* v. *Bailey*, 64 Me. (Amer.) 458: *Bouricault* v. *Hood*, 16 Amer. Law Reg. 529: *Keene* v. *Wheatley*, 23 Law Rep. 140: *Roberts* v. *Dyer*, *ibid.* 396: *Stowe* v. *Thomas*, 2 Amer. Law Reg. 228: *Woolsey* v. *Judd*, *supra*: *Beckford* v. *Hood* (1798), 7 T. R. 620: 4 R. R. 527: *Palmer* v. *Dewitt* (1870), 23 L. T. N. S. 823.

(*c*) *Kenrick* v. *Danube Collieries and Minerals Co.* (1891), 39 W. R. 173.

(*d*) *Exchange Telegraph Co.* v. *Central News* (1897), 2 Ch. 48: *Exchange Telegraph Co.* v. *Gregory & Co* (1896), 1 Q. B. 147.

suppose the original or a transcript be given or lent for a man to read, and he were to publish it, such publication would be a violation of the author's common law right to the copy (*a*).

Lord Clarendon's 'History.'

In the case of the *Duke of Queensberry* v. *Shebbeare* (*b*), an injunction was granted against the representatives of a person of the name of Gwynne, restraining them from printing the second part of Lord Clarendon's history, a copy of which had been lent to Gwynne, the Court being of opinion that Gwynne might make every use of it except the profit of multiplying in print. But where the plaintiff, as residuary legatee under the will of Miss Mitford, claimed to be entitled to an account against the defendant Bentley for the profits of the publication of the letters and papers of the testatrix, without the plaintiff's authority; and it appeared that after the date of her will, Miss Mitford had addressed an unattested letter to her executor, W. Harness, saying, that in case anybody should print her letters or life, she wished that a part at least of the produce should go to the plaintiff; and some years afterwards Harness arranged with one of the defendants to edit the said letters and papers, and requested him to pay £20 to the plaintiff, in compliance with Miss Mitford's wish, and the editor entered into an agreement with Bentley for the publication of a work containing the letters and papers which he had edited, and offered the plaintiff the sum of £20, which was not accepted, the Master of the Rolls held that the letter of Miss Mitford to Harness was tantamount to a gift to him of her letters and papers, and that on Bentley offering and undertaking to pay the plaintiff the sum of £20, before offered by the editor, the bill must be dismissed, but without costs (*c*).

(*a*) "The nature of a right of an author in his works is analogous to the rights of ownership in other personal property, and is far more extensive than the control of copying after publication in print, which is the limited meaning of copyright in its common acceptation, and which is the right of an author, to which the statute of Anne relates. Thus, if after composition the author chooses to keep his writings private, he has the remedies for wrongful abstraction of copies analogous to those of an owner of personalty in the like case. He may prevent publication: he may require back the copies wrongfully made: he may sue for damages if any are sustained: also if the wrongful copies were published abroad, and the books were imported for sale without knowledge of the wrong, still the author's right to his composition would be recognised against the importer, and such sale would be stopped. . . . Again, if an author chooses to impart his manuscript to others without general publication, he has all the right for disposing of it incidental to personalty. He may make an assignment either absolute or qualified in any degree. He may lend, or let, or give, or sell any copy of his composition, with or without liberty to transcribe, and if with liberty of transcribing, he may fix the number of transcripts which he permits. If he prints for private circulation only, he still has the same rights, and all these rights he may pass to his assignee. About the rights of the author before publication at common law, all are agreed." Erle, J., *Jeffreys* v. *Boosey* (1854), 4 H. L. C. 867: see *Parton* v. *Prang*, 3 Cliff. (Amer.) 518.

(*b*) (1758) 2 Eden, 329.

(*c*) *Sweetman* v. *Bentley*, W. N. (1871) 162.

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'Precedents of Conveyancing.'

'Love à la mode.'

The statutes do not affect right before publication.

Prince Albert's case.

In the case of *Webb* v. *Rose* (*a*) the plaintiff had his 'Precedents of Conveyancing' stolen out of his chambers and printed; and in the case of *Forrester* v. *Walker* (*b*) he had his notes copied by a clerk of a gentleman to whom he had lent them, and printed. In *Macklin* v. *Richardson* (*c*) the defendant had employed a short-hand writer to take down the farce of 'Love à la mode,' upon its performance at the theatre, and inserted one act in a magazine, giving notice that the second act would be published in the magazine of the following month. In all these cases the Court granted injunctions (*d*).

The statutes with reference to copyright do not in any manner affect the common law ownership of literary compositions before publication, and therefore until publication an author and his assignees have a proprietary right in his production, of which he is not deprived by the statute, and which the court will protect against invasion (*e*). The copyright laws are merely ancillary to the common law rights of authors (*f*). They continue such rights after publication in print, but in no way impair them, so long as the literary composition remains in manuscript, or is not printed.

These principles were clearly developed in Prince Albert's case (*g*), a case possessed of peculiar interest from the high position of the parties. It appeared that her late Majesty Queen Victoria and the plaintiff had occasionally, for their amusement, made drawings and etchings, being principally of subjects of private and domestic interest to themselves, and that they had made impressions of those etchings for their own use, and not for publication; that, for greater privacy, such impressions had been, for the most part, made by means of a private press kept for that purpose, and the plates themselves had been ordinarily kept by her Majesty under lock, and the impressions had been placed in some of the private apartments of her Majesty at Windsor, and in such apartments only; that the defendants Strange and Judge had in some manner obtained some of such impressions, which had been surreptitiously taken

(*a*) (1732) cited Ambl. 695. (*b*) (1711) *ibid.*

(*c*) (1770) Ambl. 694.

(*d*) See also *Turner* v. *Robinson* (1860), 10 Ir. Ch. Rep. 121, 510: *Southey* v. *Sherwood* (1817), 2 Mer. 135: *Gee* v. *Pritchard* (1818), 2 Swans. 402: 19 R. R. 86.

(*e*) *Palmer* v. *Dewitt* (American case) (1870) 23 L. T. 823: *Exchange Telegraph Co.* v. *Gregory* (1895), 1 Q. B. 147: *Press Publishing Co.* v. *Monroe*, 38 U. S. App. 110 (2nd Cir.): *Jewellers' Mercantile Agency* v. *Jewellers' Weekly Publishing Co.* (1898), 155 N. Y. Rep. (Amer.) 241.

(*f*) Mr. Edward Jenkins, M.P., in his separate report as a member of the copyright commission, says, "The statute law *creates*, it does not *recognise*, copyright," but it is conceived that this is a position which could not be supported.

(*g*) *Prince Albert* v. *Strange* (1849), 1 Hall & Tw. 1: 1 Mac. & Gor. 25, 18 L. J. (N. S.) Ch. 120: 13 Jur. 15, 109, 307.

from some of such plates, and had thereby been enabled to form, and had formed, a gallery or collection of such etchings, of which they intended to make a public exhibition without the permission of her Majesty and the plaintiff, or either of them, and against their will; that the defendants had compiled and prepared a work, which had been printed and published by the defendant Strange, of which the title-page or cover was as follows:—'A Descriptive Catalogue of the Royal Victoria and Albert Gallery of Etchings.' "Every purchaser of this catalogue will be presented (by permission) with a facsimile of the autograph of either her Majesty or of the Prince Consort engraved from the original, the selection being left to the purchaser, price sixpence:" that this work had been compiled, printed, and published without the consent of her Majesty and the plaintiff, or either of them, and against their will; that, in fact, among the etchings were portraits of the plaintiff, the Prince of Wales, the Princess Royal, and other members of the Royal Family, and personal friends of her Majesty, from life, and afterwards transferred to copper and etched by her Majesty and the plaintiff, and among such etchings were portraits of their favourite dogs, taken by them from life, and etchings from old and rare engravings in the possession of her Majesty, and several from such original designs as in the catalogue mentioned; and among such etchings there were several portraits of the Princess Royal, and such scenes in the Royal nursery as in the said catalogue mentioned: and that the said descriptive catalogue comprised sixty-three several etchings; that the catalogue could not have been made except from impressions surreptitiously obtained; that the impressions were intended for private use, and not for publication, and very few had been given away, and those only to private friends. The bill then, as amended, charged that certain of the plates were given to Brown, a printer, at Windsor, for the purpose of printing off certain impressions thereof for her Majesty and the plaintiff, and that Brown employed therein a person of the name of Middleton, who, without Brown's consent or knowledge, and in violation of the confidence reposed in him, took impressions thereof for himself; and that Judge had bought or in some manner obtained the same from Middleton. It was then prayed that the defendants might be ordered to deliver up to the plaintiff all impressions and copies of the several etchings respectively made by the plaintiff; and that they, their servants, &c., might be restrained by injunction from exhibiting the said gallery or collection of etchings, or from

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making engravings or copies of them, or in any manner publishing them, or from parting with or disposing of them, and also from selling, publishing, or printing, the descriptive catalogue in the bill mentioned or any work being or purporting to be a catalogue of the said etchings, and that the copies of the catalogue in the possession of the defendants might be given up to the plaintiff. An injunction was immediately granted against Strange until he had answered the bill, or the court should make order to the contrary, which injunction was afterwards extended to the other defendants. Strange subsequently put in an answer denying that he had in any manner, either surreptitiously or otherwise, obtained any impressions of the etchings or copies of them. He stated that he believed that Judge purchased certain impressions of the etchings from Middleton; that Judge had proposed to him to exhibit them if her Majesty and the Prince did not object; and that he then believed that the impressions had not been improperly obtained; that Judge afterwards wrote the catalogue, which Strange printed, but struck off fifty-one copies only, and then broke up the type; that this catalogue had never been exposed for sale, and that as soon as he learnt that the exhibition was disapproved of by the Queen and the Prince, he determined to abandon the scheme, and had offered to give up all copies of the catalogue in his possession if the bill were dismissed against him and his costs paid, but that the solicitor for the plaintiff refused to pay the defendant's costs. He insisted by his answer that, as a matter of strict right, he was entitled to publish the catalogue; and so far as the injunction related to the publication of the catalogue he moved to dissolve it before Vice-Chancellor Knight Bruce. It was contended by the defendants that a man acquiring knowledge of another man's property without his consent, is not by any rule or principle which a Court of Justice can apply—however secretly that other man may have kept or endeavour to keep his property—forbidden, without consent, to communicate or publish that knowledge to the world, to inform the world what the property is, or to describe it publicly, whether orally or in print or writing. That there were distinct properties, independent of each other, in the owner of portraits; first, there was the right of property in the canvas; secondly, in the face that adorned the canvas; thirdly, the knowledge of the existence of what he possessed. That supposing that the owner of a collection of pictures allowed the public on certain days to view his collection, and by this means one of the visitors acquired a knowledge of the

paintings, the same as the owner, that such person had in the absence of contract to the contrary a right to make use of that knowledge. It was admitted that he might be restrained from using the form, but contended that he could not be restrained from describing the attributes created by the form. That there was no greater right of property in the knowledge, in the owner of the collection, than in any stranger who might have had access to them. But both the Vice-Chancellor Knight Bruce in the first instance, and Lord Cottenham on appeal, refused to give affect to this argument. The former saying (*a*), "The author of the manuscripts, whether he is famous or obscure, high or low, has a right to say of them, whether light or heavy, saleable or unsaleable, that they shall not, without his consent, be published; and I think to use a dishonest knowledge of them, for the purpose of composing and publishing, and so to compose and publish a catalogue of them, amounts to a publication of them within the principle and the rule. Assuming the law to be so, what is its foundation in this respect? It has not reference to any considerations peculiarly literary. Those with whom our common law originated had not, probably, among their many merits, that of being patrons of letters, but they knew the duty and necessity of protecting property, and, with that general object, laid down rules providently expansive—rules capable of adapting themselves to the various forms and modes of property that peace or cultivation might discover or introduce. The produce of mental labour, thoughts, and sentiments recorded and preserved by writing, became, as knowledge went onwards and the culture of man's understanding advanced, a kind of property which it was impossible to disregard. . . . Upon the principle, therefore, of protecting property, it is that the common law, in cases not aided nor prejudiced by the statute, shelters the privacy of thoughts and sentiments committed to writing, designed by the author to remain not generally known. This has been, in effect, judicially declared, not by any judge more distinctly than by Lord Eldon, on several occasions, particularly in Mr. Southey's case. He says, 'It is to protect the exclusive property of the writer that injunctions are granted.' And again: 'I have examined the cases I have been able to meet with containing precedents for injunctions, and I find that they all proceed upon the ground of title to property in the plaintiff.' Such being, as I believe, the nature and foundation of the common law as to manuscripts, independently of Parliamentary additions and subtractions, its

(*a*) 13 Jur. 57.

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operation cannot, of necessity, be confined to literary subjects; that would be to limit the rule by the example. Wherever the produce of labour is liable to invasion in an analogous manner, there must be, I suppose, a title to analogous protection or redress. Such I consider the case of mechanical works or works of art executed by a man for his private use. Whatever protection those, or some of those, may have by the Act of Parliament, they are not, I apprehend, deserted by the common law. The principles and rules which it applies to literary compositions and manuscripts must, to a considerable extent, be applicable to these also." And the latter, assuming the right of property, says (*a*): "If, then, such right and property exist in the author of such works, it must so exist exclusively of all other persons. Can any stranger have any right or title to, or interest in, that which belongs exclusively to another?—and yet this is precisely what the defendant claims, although, by a strange inconsistency, he does not dispute the general proposition as to the plaintiff's right and property; for he contends that, admitting the plaintiff's right and property in the etchings in question, and, as incident to it, the right to prevent publication or exhibition of copies of them, yet he insists that some persons having had access to certain copies, and having, from such copies, composed a description and list of the originals, he, the defendant, is entitled to publish such list and description —that is, that he is entitled, against the will of the owner, to make such use of his exclusive property. It being admitted that the defendant could not publish a copy—that is, an impression—of the etchings, how, in principle, does the case of a catalogue, list, or description differ? A copy or impression of the etchings could only be a means of communicating knowledge and information of the original; and does not a list and description do the same? The means are different, but the object and effect are similar: it is to make known to the public, more or less, the unpublished works and compositions of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others. Cases of abridgments, translations, extracts, and criticisms of published works have no reference whatever to the present question. They all depend on the extent and right under the Acts with respect to copyright, and have no analogy to the exclusive right of the author in unpublished compositions, which depend entirely on the common law right of property. . . . Upon the

(*a*) 13 Jur. 112.

first question, therefore—that of property—I am clearly of opinion that the exclusive right and interest of the plaintiffs in the compositions and works in question being established, and there being no right or interest whatever in the defendant, the plaintiff is entitled to the injunction of this Court to protect him against the invasion of such right and interest by the defendant, which the publication of any catalogue would undoubtedly be."

Publication in breach of confidence.

The Courts frequently restrain the publication of unpublished matter on the ground of breach of confidence or of an implied contract. If a person lends his manuscript to another there will generally be implied a contract that the latter shall not publish it (*a*). A servant may not publish information which he has been employed to obtain for his master (*b*), nor use for his own purposes copies of documents belonging to his master (*c*), for to do so would be a breach of the confidence reposed in him. A pupil reading in a barrister's chambers may be allowed to take copies of precedents for his own use, but not for publication (*d*). In the case of *Gilbert* v. *Star Newspaper Co.* (*e*), Mr. W. S. Gilbert obtained an *ex parte* injunction restraining the publication of the plot of his play, 'His Excellency,' then being rehearsed, but not yet publicly performed, on the ground that the defendants had obtained their information with the knowledge that it was given them in breach of confidence. Nevertheless, a common law right to copyright in unpublished matter undoubtedly exists.

What amounts to publication at common law.

What amounts to publication sufficient to defeat the common law right is a question of some nicety. The property which a composer of a piece of music ordinarily has in his composition is the pecuniary value which it has to him, and not merely the amount of fame he may acquire; and such pecuniary value is necessarily and wholly dependent upon the means which he may lawfully employ to bring his production before the public, and the approval of the public of his work; and there is no other property in that description of literary composition.

"When a right of property in the invention or creation of

(*a*) *Duke of Queensberry* v. *Shebbeare* (1758), 2 Eden, 329: and see as to letters, chap. ii. post.

(*b*) *Lamb* v. *Evans* (1893), 1 Ch. 218; *Merryweather* v. *Moore* (1892), 2 Ch. 518; *Robb* v. *Green* (1895), 2 Q. B. 315.

(*c*) *Louis* v. *Smellie* (1895), W. N. 115; 11 Times L. R. 515: *Tuck* v. *Priester* (1887), 19 Q. B. D. 629.

(*d*) *Abernethy* v. *Hutchinson* (1825), 3 L. J. (O. S.) (Ch.) 209: *Lamb* v. *Evans* (1893), 1 Ch. 218, 231.

(*e*) (1891) 11 Times L. R. 515, cf. *Exchange Telegraph Co.* v. *Central News* (1897), 2 Ch. 48.

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an author is recognised as an inherent right by the common law," says Mr. Judge Monell in an American case (*a*), "it assumes that the thing to be secured and protected is of value to the owner. The law does not regard as property a thing entirely worthless. If a literary composition, therefore, derives its value from, and becomes property because of, the use which can be made of it before the public, and such value is increased or diminished in proportion to the extent of its use, then it becomes very important to know where and when the author's literary property in it terminates. To give it value, or to make it property, recognised by the common law, the author must be allowed to use it before the public; and if, having submitted it once to a public hearing, it is to be deemed a publication, so as to take away the proprietary right, and to deprive the author of the benefit of copyright laws, then, obviously, the common law means nothing, and there is no such thing as property in literary work. Can it be said that once delivering a lecture upon a scientific or literary subject, before a public audience, will for ever thereafter deprive the author of his property in the ideas invented or created, and which represent, by a combination of words his meaning? If so, then any one who can obtain the manuscript, or access to it, or who, by employing the art of stenography, or by the exercise of memory, can carry it out of a public lecture-room, may, without the consent or knowledge of the author, appropriate and use, for his own emolument, the literary production of another person. I cannot believe there is so little foundation for, or so narrow a limit to, the proprietory rights of an author in his literary labours. I believe the law intended to secure to him the *beneficial* results of his labours, and to protect him from any piratical invasion of his rights, until he has done some act inconsistent with an exclusive ownership, and which shall amount, in judgment of law, to a publication. There can be no fixed rule determining when an author has surrendered his literary property."

What does not amount to publication.

The publication of a work for private purposes and private circulation is not a publication sufficient to defeat the common law right of an author (*b*). Accordingly, it has been determined that a copyright in a piece of music is not lost, although

(*a*) *Palmer* v. *Dewitt* (1870), 23 L. T. 823, 325.

(*b*) *White* v. *Geroch* (1819), 1 Chitt. 21, 2 B. & Ald. 298, 22 R. R. 786: *Prince Albert* v. *Strange* (1849), 2 De G. & Sm. 686: 1 Mac. & Gor. 42: 1 Hall & Tw. 1: *Jefferys* v. *Boosey* (1851), 4 H. L. C. 816. Publication as a serial in a periodical is equivalent to publication in book form, *Holmes* v. *Hurst* (1898), 171 U. S. Rep. 82: *Mifflin* v. *R. H. White & Co.* (1902), 190 U. S. Rep. 260: *Mifflin* v. *Dutton ib.* 265.

it had been published in manuscript a year before being printed. The words "printed and published," used in the statutes, have reference only to the time at which the author's exercise of the right is to be dated; and therefore, the circumstance of an author having previously published in manuscript any composition which is afterwards printed, only varies the period of time from which the term of protection is to be calculated. The delivery of a lecture to an audience of persons admitted on payment of a fee, is not deemed a publication (*a*); neither is the exhibition of a picture at a public exhibition or gallery, where copying is expressly or impliedly forbidden, nor the exhibition of a picture for the purpose of obtaining subscribers to an engraving (*b*).

The effect of publication.

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

Primary recognition of copyright.

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

The original charter of the Stationers' Company.

The original charter of the Stationers' Company was granted by Philip and Mary in 1556. It was the declared object of the Crown at that time to prevent the propagation of the reformed religion, and it seems to have been thought that this could most effectually be brought about by imposing the

(*a*) *Abernethy* v. *Hutchinson* (1825). 3 L. J. (O. S.) (Ch.) 209: 1 H. & T. 28; *Nicols* v. *Pitman* (1884). 26 Ch. Div. 374: *Caird* v. *Sime* (1887). 12 App. Cas. 326.

(*b*) *Turner* v. *Robinson* (1860). 10 Ir. Ch. 510. But see *Dalglish* v. *Jarvie* (1850), 2 Mac. & Gor. 231. 2 H. & T. 137, and 25 & 26 Vict. c. 68.

(*c*) Author of "The Religion of Nature Delineated," p. 136.

(*d*) Maugham, Lit. Prop.

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severest restrictions on the press. About this period there are several decrees and ordinances of the Star Chamber regulating the manner of printing, the number of presses throughout the kingdom, and prohibiting all printing against the force and meaning of any of the statutes or laws of the realm. Until the year 1640 the Crown through the instrumentality of the Star Chamber, exercised this restrictive jurisdiction without limit, enforcing by the summary powers of search, confiscation and imprisonment, its decrees, without the least obstruction from Westminster Hall or the Parliament in any instance.

In 1556, by a decree of the Star Chamber, it was forbidden, amongst other things, to print contrary to any ordinance, prohibition, or commandment in any of the statutes or laws of the realm, or any injunction, letters-patent, or ordinances set forth, or to be set forth by the queen's grant, commission, or authority.

By another decree, dated June 23rd. 1585, every book was required to be licensed, and all persons were prohibited from printing "any book, work, or copy against the form or meaning of any restraint contained in any statute or laws of this realm, or in any injunction made by her Majesty, or her Privy Council: or against the true intent and meaning of any letters-patent, commissions or prohibitions under the great seal, or contrary to any allowed ordinance set down for the good government of the Stationers' Company."

In 1623, a proclamation was issued to enforce this decree; reciting that it had been evaded, among other ways "by printing beyond sea such allowed books, works, or writings as have been imprinted within the realm, by such to whom the sole printing thereof by letters-patent or lawful ordinance or authority doth appertain."

In 1637, the Star Chamber again decreed that "no person is to print or import (printed abroad) any book or copy which the Company of Stationers, or any other person, hath or shall, by any letters-patent, order or entrance in their register book, or otherwise, have the right, privilege, authority, or allowance, solely to print" (*a*).

(*a*) 1 Burr. 2312. "It is natural to suppose," says Mr. Hallam (1 Const. History 238), "that a government thus arbitrary and vigilant must have looked with extreme jealousy on the diffusion of free inquiry through the press. The trades of printing and bookselling, in fact, though not absolutely licensed, were always subject to a sort of peculiar superintendence. Besides protecting the copyright of authors, the council frequently issued proclamations to restrain the importation of books, or to regulate their sale. It was penal to utter, or so much as to possess, even the most learned works on the Catholic side: or, if some connivance was usual in favour of educated men, the utmost strictness was used in suppressing that light infantry of literature—the smart and vigorous pamphlets with which the two parties arrayed against the Church assaulted her opposite flanks. Stow, the

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

In 1640, however, the Star Chamber was abolished; the King's authority was set at nought: all the regulations of the press, and restraints previously imposed upon unlicensed printers by proclamations, decrees of the Star Chamber, and charter powers given to the Stationers' Company, were deemed and certainly were illegal. The licentiousness of libels induced Parliament to make an ordinance which prohibited printing unless the book was first licensed. The ordinance prohibited printing without the consent of the owner, or importing (if printed abroad), upon pain of forfeiting the same to the *owner or owners of the copies* of the said books, &c. This provision necessarily presupposed the property to exist; it would have been nugatory if there had been no admitted owner. An owner could not at that time have existed otherwise than by common law. In 1649 the long Parliament made another ordinance: and in 1662 was passed the Licensing Act (13 & 14 Car. 2, c. 33), which interdicted the printing of any book unless first licensed and entered in the registry of the Stationers' Company. It ordered that no person should presume to print "any heretical, seditious, schismatical or offensive books or pamphlets, wherein any doctrine or opinion shall be asserted or maintained which is contrary to the Christian faith, or the doctrine or discipline of the Church of England, or which shall, or may tend to be to the scandal of religion or the church, or the government or governors of the church, state, or commonwealth, or of any corporation or particular person

The Licensing Act of Car. 2.

well-known chronicler of England, who lay under a suspicion of an attachment to popery, had his library searched by warrant, and his unlawful books taken away: several of which were but materials for his history. Whitgift, in this as in every other respect, aggravated the rigour of preceding times. At his instigation, the Star Chamber in 1585 published ordinances for the regulation of the press. The preface to these recites 'enormities, and abuses of disorderly persons professing the art of printing and selling books,' to have more and more increased, in spite of the ordinances made against them, which it attributes to the inadequacy of the penalties hitherto inflicted. Every printer, therefore, is enjoined to certify his presses to the Stationers' Company, on pain of having them defaced, and suffering a year's imprisonment. None to print at all, under similar penalties, except in London, and one in each of the two universities. No printer who has only set up his trade within six months to exercise it any longer, nor any to begin it in future until the excessive multitudes of printers be diminished and brought to such a number as the Archbishop of Canterbury and Bishop of London, for the time being shall think convenient: but whenever any addition to the number of master printers shall be required, the Stationers' Company shall select proper persons to use that calling, with the approbation of the ecclesiastical commissioners. None to print any book, matter, or thing whatsoever, until it shall have been first seen, perused, and allowed by the Archbishop of Canterbury or Bishop of London, except the Queen's printers, who shall require the licence only of the chief justices. Every one selling books printed contrary to the intent of this ordinance, to suffer three months' imprisonment. The Stationers' Company empowered to search houses and shops of printers and booksellers, and to seize all books printed in contravention of this ordinance, to destroy and efface the presses, and to arrest and bring before the council those who shall have offended therein."

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or persons whatever." It further prohibited the publication of unlicensed books, prescribed regulations as to printing, and empowered the King's messengers, and the master and wardens of the Stationers' Company, to seize books suspected of containing matters hostile to the Church or Government. It was necessary to print in the beginning of every licensed book the certificate of the licenser to the effect that the books contained nothing "contrary to the Christian faith, or the doctrine or discipline of the Church of England, or against the state and government of this realm, or contrary to good life or good manners, or otherwise, as the nature and subject of the work shall require." To prevent fraudulent changes in a book after it had been licensed, a copy was required to be deposited with the licenser when application was made for a licence.

The Act further prohibited any person from printing or importing without the consent of the owner, any book which any person had the sole right to print by virtue of letters-patent, or "by force or virtue of any entry or entries thereof duly made or to be made, in the register book of the said Company of Stationers, or in the register book of either of the universities." The penalty of piracy was forfeiture of the book and six shillings and eightpence for each copy: half to go to the king, and half to the owner.

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

The ordinance of 1643 prohibited the printing or importing of any book that had been lawfully licensed and entered in the register of the Stationers' Company, "for any particular member thereof, without the licence and consent of the owner." The penalty prescribed was forfeiture of the book to the owner, "and such further punishment as shall be thought fit." This clause was repeated in the ordinances of 1647, 1649, and 1652.

It has been questioned whether these clauses were applicable to any than members of the Stationers' Company—in fact, whether they were more than by-laws for the regulation of the members *inter se*. but it is doubtful whether any such restriction can be put upon their scope.

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

Ordinance of the Stationers' Company in 1681.

In 1681, all legislative protection having ceased, the Stationers' Company adopted an ordinance or by-law, which recited that several members of the company had *great part of their estates in copies*, that by ancient usage of the company, when any book or copy was duly entered in their register to any member, such person had always been reputed and taken to be the proprietor of such book or copy, and ought to have the sole printing thereof. The ordinance further recited that this privilege and interest had of late been often violated and abused; and it then provided a penalty against such violation by any member or members of the company, where the copy had been duly entered in their register. The true view of this ordinance would seem to be, that the members of the Stationers' Company, finding their estates in copies, which belonged to them by the common law, no longer under the protection of the Licensing Act (the repeal of which had incidentally withdrawn the protection that had always been inserted in it, though it had necessarily no connection with the system of licensing), undertook to provide for the failure of legislation, as far as they could, by an ordinance applicable of course to their own members only. The ordinance is not to be cited as any other proof of what the common law right was than that it shows, in connection with other historical proof, what it was then supposed to be. It was much the same as if an association of persons were to agree that any one of their number should pay a penalty for violating the acknowledged rights of property of any other person in the association, provided such rights were duly entered in their common records. It would not be an attempt to create the right, but it would justly be

(*a*) *Powder* v. *Bradyl*, Lilly's 'Entries,' 67; see Carter, 89; 1 Burr. 2317; Skinner, 231; 1 Mod. 257.

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regarded as an acknowledgment of the existence of such a right (*a*).

A by-law of the Stationers' Company in 1694.

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

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

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

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

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

In response to these applications, in the year 1709 the Act 8 Anne, c. 19, was passed. It recites that printers, booksellers, and other persons had of late frequently taken the liberty of printing, reprinting, and publishing books and other writings

(*a*) Curtis on Copy. p. 38.

(*b*) In this year expired finally the Licensing Act of 13 & 14 Car. 2, which had been revived by 1 Jac. c. 7, and continued by 1 W. & M. c. 21.

(*c*) 4 Burr. 2318.

without the consent of the authors or proprietors, to their very great detriment, and too often to the ruin of them and their families. For preventing, therefore, such practices for the future, and for the encouragement of learned men to compose and write useful books, it was enacted, that the authors of books already printed who had not transferred their rights, and the booksellers or other persons who had purchased or acquired the copy of any books in order to print or reprint the same, should have the sole right and liberty of printing them for a term of twenty-one years from the 10th of April, 1710, and no longer; and that authors of books not then printed, should have the sole right of printing for fourteen years and no longer. It also provided that any person who should publish, import, or sell piratical copies should forfeit such copies to the owner of the copyright, to be by him destroyed, and pay one penny for every sheet found in his possession. One half of this penalty was to go to the Queen and the remainder to any person who should sue for it. There was a proviso, however, which permitted the importation and sale of "any books in Greek, Latin, or any other foreign language, printed beyond the seas." That no person might offend against the Act through ignorance, it was provided that no book should be entitled to protection unless the title to the copy had been entered before publication in the register book of the Stationers' Company, which book should be kept open for inspection at any time without fee. The Act further required that nine copies of each book should be delivered to the warehouse-keeper of the said company for the use of the royal library in London, the Universities of Oxford and Cambridge, the four Universities in Scotland, Sion College in London, and the library of the Faculty of Advocates in Edinburgh, inflicting a penalty in default of such delivery, besides the value of the said printed copies, of the sum of £5 for every copy not so delivered (*a*). If any bookseller or printer should offer for sale a book at such a price or rate as should be conceived by any person to be too high or unreasonable, the price might be reduced and fixed at a reasonable figure by the Archbishop of Canterbury, the Chancellor or Lord Keeper of the Great Seal, the Bishop of London, the Chief Justices of the Queen's Bench and Common Pleas, or other designated officials (*b*).

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

(*b*) This provision was repealed by the 12 Geo. 2. c. 36.

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The Act prohibited any one from importing a book which had been printed without the written consent of the owner of the copyright. And lastly it provided, that after the expiration of the said term of fourteen years the sole right of printing or disposing of copies should return to the authors thereof, if they were then living, for another term of fourteen years. Thus by the Act of Anne, two classes of books were protected, first, those already published, in which copyright was acknowledged for twenty-one years; second, those not then published, for which a term of fourteen years was secured, with a further term of fourteen years in the event of the author being then living.

The common law right to old copies.

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

Injunctions issued in support of this right.

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

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

In 1739 Lord Hardwicke granted a fourth injunction to restrain the defendant from printing Milton's 'Paradise Lost.' The plaintiffs derived their title under an assignment of the copy from the author in 1667. This injunction was also acquiesced under (*c*). In 1751 Milton's poem again came before Lord Hardwicke, in the form of an application for an injunction to restrain the defendants printing the same with the notes of Dr. Newton and other commentators, all of which belonged to the plaintiffs. The bill, as in the former applica-

(*a*) (1735) Cited 4 Burr. 2325; 3 Swans. 673: 1 W. Bl. 331; see 2 Eden. 328.
(*b*) (1735) Cited 4 Burr. 2325.
(*c*) *Tonson* v. *Walker* (1739), 3 Swans. 676: 4 Burr. 2325, 2327, 2379, 2380: 1 W. Bl. 345: 2 Eden. 328: 1 Cox. 285.

tion, derived a title to the poem from the author's assignment in 1667, and a title to the life by Fenton, published in 1727, to Bentley's notes, published in 1732, and to Dr. Newton's notes, published in 1749. The defendants put in an answer, and set up notes of their own, of which it appeared there were twenty-eight, while the notes of the other commentators belonging to the plaintiffs, and included in the defendants' edition, numbered 1500. Lord Hardwicke gave judgment in 1752, and held that the plaintiffs' notes were within the protection of the statute; and as to the poem, although he said that the general question had never been determined, and there was a doubt, yet he granted the injunction until the hearing (*a*).

Principle on which the injunctions were issued.

All these injunctions were issued and acquiesced in under the presumption that at common law copyright was perpetual, and that such common law right remained unaffected by the statute of Anne; had there been a reasonable doubt in the minds of the judges the injunctions would have been improper (*b*), for no reparation could be afforded to the defendants for the damage sustained thereby, in the case of their being unimpeachable in respect of the piracies complained of. Speaking of these injunctions, Lord Mansfield said, "I look upon them as equal to any final decree" (*c*).

The celebrated cases of *Millar* v. *Taylor*, *Donaldson* v. *Becket*.

The common law right was at length disputed and fully discussed in the celebrated case of *Millar* v. *Taylor* (*d*). The work in controversy was Thomson's 'Seasons,' and the copyright secured by the statute of Anne had expired. The action was brought in 1766, and was decided by the Court of King's Bench 1769, judgment being given for the plaintiff on the ground that the common law right to copyright was unaffected by the statute of Anne. However, in a case (*e*) determined on the authority of the last mentioned decision, the defendant appealed to the House of Lords, on which occasion the following questions were propounded to the judges:

(*a*) *Tonson* v. *Walker* (1752). 3 Swans. 672; 4 Burr. 2325, 2327, 2379, 2380; 1 W. Bl. 345; 2 Eden. 328; 1 Cox. 285.

(*b*) *Hill* v. *The University of Oxford* (1684). 1 Vern. 275; *Grierson* v. *Jackson*, Ir. Term R. 304; *Univers. of Oxf. and Cam.* v. *Richardson* (1802). 6 Ves. 689; *Bruce* v. *Bruce* (1806), cited 13 Ves. 505; *Harmer* v. *Plane* (1807). 14 Ves. 130; *Hogg* v. *Kirby* (1803). 8 Ves. 221. And see Lord Erskine in *Gurney* v. *Longman* (1806), 13 Ves. 505; *The Assignees of Robinson* v. *Wilkins* (1807), cited 8 Ves. 224.

(*c*) *Millar* v. *Taylor* (1769). 4 Burr. 2399. (*d*) 4 Burr. 2303.

(*e*) *Donaldson* v. *Becket* (1774), 4 Burr. 2408: 2 Bro. Parl. Cas. 129. Lord Kenyon expressed a decided opinion that no such right existed: *Beckford* v. *Hood* (1798). 7 T. R. 620. Lord Ellenborough inclined to the same view: *Cambridge Univ.* v. *Bryer* (1812). 16 East, 317; and a majority of the judges in *Wheaton* v. *Peters*, 8 Peters (Amer.) 591, arrived at the same conclusion. See *Jefferys* v. *Bousey* (1854), 4 H. L. C. 815.

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

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

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

4th. Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity by the common law?

5th. Whether this right is in any way impeached, restrained, or taken away by the statute, 8th Anne.

Eleven judges delivered their opinions *seriatim*; ten to one for the affirmative on the first question; eight to three for the negative on the second question: six to five for the affirmative on the third question; seven to four for the affirmative on the fourth question; and six to five for the affirmative on the fifth question; so that it was declared that, although an author had by common law an exclusive right to print his works, and does not lose it by the mere act of publication, yet the statute of Anne had completely deprived him of the right. It was notorious that Lord Mansfield concurred with the ten upon the first question, with the eight upon the second, with the five upon the third, with the seven on the fourth, and with the five on the fifth; but it being very unusual (from reasons of delicacy) for a peer to support his own judgment upon an appeal to the House of Lords, he did not speak (*a*).

(*a*) For a fuller report of the case of *Donaldson* v. *Beckett*, see Hans. Parl. Hist., vol. xvii., col. 953. In Scotland this question had been tried as early as 1748, and decided against the author's right: *Midwinter* v. *Hamilton*, June 7, 1748; Mor. Diet. of Dec. 19, 20, 8305. On appeal the case went off upon informality in the original summons: Feb. 11, 1751: 1 Cr. & St. 188. The same decision was pronounced in *Hinton* v. *Donaldson*, July 28, 1773, Mor. Diet. of Dec. 19, 20, 8307; 5 Brown's Sup. 508, 5 Pat. 509 n.; and in *Cadell & Davies* v. *Robertson*, Dec. 18, 1804, Mor. Diet. of Dec., App., Lit. Prop. 5, as delivered in the House of Lords, July 16, 1811 (5 Paton. 193), the author's right was held to depend entirely on the Act of Queen Anne: Bell's Com. See *Payne* v. *Anderson*, Mor. Dic. of Dec., vols. 19, 20, p. 8316; and *Cadell* v. *Anderson*, Mor. Diet. of Dec. 19, 20, 834, cited Philips on Copy, 43.

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The case of *Jefferys* v. *Boosey*.

The more general opinion is certainly now against the common law right after publication. For though in the case of *Jefferys* v. *Boosey* (*a*), the decision of the question was not necessary to the point at issue, yet it being somewhat implicated, many of the judges pronounced their opinion with reference to the right. Of the ten common law judges who delivered their opinions, Erle, J., believed in the existence of the common law right: but Parke, B., Pollock, C.B., and Jervis, C.J., announced the contrary opinion: while Crompton, Williams, Wightman, Maule, Coleridge, and Alderson, expressed no opinion on the point. Lords Cranworth, Brougham, and St. Leonards were unanimous against the right, the last saying: "Upon the claim of common law right, I confess I never have, at least for many years, been able to entertain any doubt. It is a question which I have often, in my professional life, had occasion to consider, and upon which I have arrived, long since, at the conclusion, that no common law right exists after publication. I never could, in my own mind, distinguish between the right to an invention after the publication of that invention, and the right to the description of that invention after the publication of that description. If a mechanical genius should invent a machine of the greatest importance to mankind, it is admitted, nobody attempts to insist or to argue otherwise, and it has always been considered as settled, that after he has disposed of even a single copy of it, it may, so far as the common law is concerned, be copied and made use of without restriction by the purchaser, or by any person who properly obtains possession of it. Now, I do not see how you are to estimate differently different kinds of genius; or how you can say that a man who invents a machine of the greatest importance to the State, shall not have any right the moment he disposes of a single copy of that article, but that a man whose mind brings forth a certain collection of words, shall be entitled to an absolute property in it in all time, even after he has published it, and let the world at large have it. It appears to me, therefore, and always has so appeared, that there is no such common law right either in the one case or in the other: and I agree with my noble and learned friend who has last addressed your lordships, that the patent law is decidedly against the common law right in this particular instance, because it shows that the inventor had not the right. . . . Now, when we are talking of the right of an author, we must distinguish (as has been already very accurately done)

(*a*) (1854). 4 H. L. C. 815.

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Notwithstanding the admission that the general current of opinion is against the common law right, there can be no doubt that until 1774, when the case of *Donaldson* v. *Becket* was decided, the universal opinion was the other way, and it has the support of some of the ablest judges who ever adorned the Bench.

The point came before the court in a subsequent case (*a*) in which Dr. Reade claimed damages for the infringement of his novel, 'It is Never too Late to Mend.' Mr. Justice Williams in delivering the judgment of the court, said: "The main reliance of the plaintiff was placed on the general ground that even if his statutable right had not been infringed, yet that as an author, he had a copyright at common law, concurrently with, but more extensive than, his right under that statute, and that such common law right had been invaded by the act of the defendant.

"Now, it is not necessary, in order to decide the present case, to consider the question upon which so much learning has been exhausted: viz., whether anterior to the statute of Anne there existed a copyright at common law in published books, more extensive in its nature and duration than the right conferred or expressed by that statute. There can, we think, be no doubt that the weight of authority in the time of Lord Mansfield was in favour of the existence of such a right, although the doctrine has found less favour in modern times: but the continued existence of any such right, after the passing of the statute of Anne, was distinctly denied by the majority of the judges in *Donaldson* v. *Becket* (*b*), and the case itself expressly decides that no such right exists after the expiration of the period prescribed by the Act.

(*a*) *Reade* v. *Conquest* (1861), 9 C. B. N. S. 768: 9 W. R. 131. See *Warne* v. *Seebohm* (1888), 39 Ch. Div. 73.

(*b*) 4 Burr. 2408: 2 Bro. P. C. 129.

"The question therefore seems to us narrowed to this, viz., whether the statute of Anne having expressly put an end to such a right if it ever existed after the period it prescribes, has yet preserved it during the currency of such period. That it has done so is a proposition which we think it difficult for the plaintiff to maintain. That a common law right of action attaches upon the invasion of the copyright created by statute, was decided in the case of *Beckford* v. *Hood* (*a*), and followed in several other cases, but we are not aware of any case since *Millar* v. *Taylor* (*b*) was overruled by the House of Lords, which decides and recognises that an author of a published work has any other than the statutable copyright therein.

"In the case of *Murray* v. *Elliston* (*c*), (before the 3 & 4 Will. 4, c. 15) Lord Byron's tragedy of 'Marino Faliero,' the copyright of which belonged to the plaintiff, had been abridged by curtailing the dialogues and soliloquies, and publicly represented in that form by the defendant at Drury Lane Theatre for profit, the advertisements describing it as Lord Byron's tragedy. A bill for an injunction having been filed, a case was sent for the opinion of the Court of Queen's Bench, whether the plaintiff could maintain an action against the defendant under the circumstances. The argument for the plaintiff there was put upon the same ground as in the present case, but the court certified that no action would lie, a decision which appears in point against the plaintiff upon this record.

"That much might be urged in favour of the common law right if the question were *res integra* cannot be doubted by any one who has read the learned judgments of the majority of the court in *Millar* v. *Taylor*, and (on the part of my brother Keating and myself, I must be allowed to add) of Mr. Justice Erle in the case of *Jefferys* v. *Boosey* (*d*). But it was the opinion of a large majority of the judges and law lords in that case, that the time was past when the question was open to discussion, and that it must now be considered to be settled, that copyright in a published work only exists by statute.

"The learned counsel for the plaintiff in his argument cited a case of *Turner* v. *Robinson* (*e*), in which it was supposed that the Master of the Rolls in Ireland had taken a view favourable to the plaintiff's claim in the present case. Upon looking to the report, however, it will be found that the opinion of that

(*a*) (1798), 7 T. R. 620.
(*b*) (1769), 4 Burr. 2303.
(*c*) (1822), 5 Barn. & Ald. 657 : 24 R. R. 519.
(*d*) (1854), 4 H. of Lords Cas. 876.
(*e*) (1860), 10 Ir. Ch. Rep. 121 : on appeal 510.

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learned judge is directly opposed to such a claim. In that case the plaintiff had applied for an injunction to prevent the defendant from pirating an original picture of 'The Death of Chatterton,' of which the plaintiff was proprietor, by means of stereoscopic apparatus. The Master of the Rolls being of opinion upon the facts that there had been no publication of the picture, and that the imitation was a piracy, granted the injunction, but his opinion upon the point involved in the claim of the plaintiff upon this record was thus expressed:—'It is not necessary,' said that learned judge, 'to go through the authorities collected in the cases to which I have referred (*a*), as I apprehend it is clear that by the common law copyright or protection exists in favour of works of literary art or science to this limited extent only, that while they remain unpublished no person can pirate them, but that after publication they are by common law unprotected. There has been much difference of opinion on the subject among the judges in England, but the law is now considered to be as I have stated it.' The opinion of the Master of the Rolls in Ireland may therefore be added to the weight of authority in this country in favour of the position, that copyright or protection to the works of literature after they have been published, exists only by statute."

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

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

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

The present Literary Copyright Act, 1842.

All these Acts have been repealed by the Copyright Act, 1842 (*d*), on which the law of literary copyright now depends.

(*a*) *Prince Albert* v. *Strange* (1849). 1 McN. & Gor. 25: 1 Hall & Twells, 1: *Jefferys* v. *Bousey* (1854). 4 H. of Lords Cas. 815.

(*b*) *Vide post*, chap. x.

(*c*) An author whose works had been published more than twenty-eight years before the passing of this statute was held not to be entitled to the copyright for life: *Brooke* v. *Clarke* (1818). 1 B. & Ald. 396.

(*d*) 5 & 6 Vict. c. 45. See Short Titles Act, 1892.

To Mr. Serjeant Talfourd is due the honour of obtaining this piece of legislative justice. From 1837 to 1842, in spite of the opposition of Macaulay, he used his best endeavours and expended his most eloquent strains to accomplish its passing. In contending for an extension of the period during which protection was afforded to literary works, he bursts forth:—"There is something peculiarly unjust in bounding the term of an author's property by his natural life, if he should survive so short a period as twenty-eight years. It denies to age and experience the probable reward it permits to youth—to youth, sufficiently full of hope and joys to slight its promises. It gives a bounty to haste, and informs the laborious student, who would wear away his strength to complete some work which 'the world will not willingly let die,' that the more of his life he devotes to its perfection, the more limited shall be his interest in its fruits. It stops the progress of remuneration at the moment it is most needed; and when the benignity of nature would extract from her last calamity a means of support and comfort to the survivors—at the moment when his name is invested with the solemn interest of the grave—when his eccentricities or frailties excite a smile or a shrug no longer—when the last seal is set upon his earthly course, and his works assume their place among the classics of his country—your law declares that his works shall become your property, and you requite him by seizing the patrimony of his children."

Subsequent efforts at legislation.

Except for the International Copyright Acts, there has been no Act of Parliament dealing with literary copyright since the year 1842, though there have been statutes relating to artistic and musical copyright. In the year 1875 a Royal Commission was appointed to inquire into the working of the Copyright Acts generally, and the Commissioners, after taking evidence, made a valuable Report in the year 1878, suggesting various amendments of the law, but, so far as literary copyright is concerned, none of these suggested amendments have yet passed into law. In the year 1900 a Bill (commonly known as Lord Monkwell's Bill or Lord Thring's Bill) was introduced into the House of Lords and referred to a Select Committee, which, after taking evidence, reported the Bill to the House with suggested amendments: but nothing further has been done.

CHAPTER II.

WHAT MAY BE THE SUBJECT OF COPYRIGHT.

The subject of copyright.

THERE can be no copyright in an intellectual creation however defined in the author's mind, unless embodied in written or spoken language, then only can it possess the attributes of property.

The copyright is not merely in the form of words which are expressive of the intellectual creation, but in the intellectual conception which is so expressed.

Whether work must be original.

It has been sometimes assumed that in order to acquire a copyright in a work it is necessary that it should be original, in the sense of being novel. Thus, Mr. Curtis (*a*) lays it down that an author seeking to protect his work must show something "to have been produced by himself: whether it be a purely original thought or principle unpublished before, or a new combination of old thoughts, and ideas, and sentiments, or a new application or use of known and common materials, or a collection, the result of his industry and skill. In whatever way he claims the exclusive privilege accorded by these laws, he must show something which the law can fix upon as the product of his, and not another's, labour" (*b*). The Copyright Act, 1842, however, says nothing about originality (*c*). It recites that "it is expedient . . . to afford greater encouragement to the production of literary works of lasting benefit to the world" (*d*), and, by section 3, the copyright is vested in the "author," but "copyright" itself is defined by section 2 as the "sole and exclusive liberty of printing or otherwise multiplying

(*a*) "Copyright," chap. 5.

(*b*) See also *Chappell* v. *Purday* (1845), 14 M. & W., p. 316: *Dick* v. *Yates* (1881), 18 Ch. D. 77: *Caird* v. *Sime* (1887), 12 A. C. 326, 343: *Leslie* v. *Young* (1894), A. C. 335.

(*c*) The Fine Arts Copyright Acts, 1862. Sec. 1, on the other hand, confers copyright upon the author of "every *original* painting, drawing and photograph."

(*d*) The preamble is clearly part of a Statute, see Hardcastle on Statutory Law, pp. 207 *et seq.* "Two propositions are quite clear, one that a preamble may afford useful light as to what a Statute intends to reach, and the other that if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment." *Per* Halsbury, L. C., *Powell* v. *Kempton Park* (1899), A. C. 143, 157.

copies" of every "volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published."

Reports of Lord Rosebery's speeches.

In the much discussed case of *Walter* v. *Lane* (*a*), the point arose whether a reporter is entitled to copyright in his verbatim report of a public speech. The plaintiffs were the proprietors of the 'Times', and the defendant published a book called 'Appreciations and Addresses delivered by Lord Rosebery,' which contained practically verbatim copies of the reports in the 'Times' of five speeches delivered by Lord Rosebery during the years 1896 and 1898. The reports of these speeches had been obtained in the usual way by the 'Times' sending their reporters to the meetings, the speeches being taken down verbatim in shorthand and transcribed. The defendant admitted that he had used in preparing his work cuttings from the 'Times,' and in four cases the speeches appeared in his book without any alteration whatever. Lord Rosebery made no claim to copyright in any of the speeches, and the 'Times' brought their action claiming a declaration that they were entitled to the copyright of the reports in question and an injunction to restrain the defendant from further publishing any book containing copies of them. North, J., granted an injunction, but, upon appeal, the Court of Appeal reversed his decision, holding that the Copyright Act was passed to protect authors, not reporters, and that shorthand reporters are not authors. "If," said Lindley, J., "the reporter of a speech gives the substance of it in his own language: if, although the ideas are not his, his expression of them is his own and not the speaker's, with immaterial differences, the reported speech would be an original composition, of which the reporter would be the author, and he would be entitled to copyright in his own production. . . . But we have not to deal with speeches re-cast by the reporter. He has reproduced to the best of his ability, not only the ideas expressed by the speaker, but the language in which the speaker expressed those ideas. In other words, we are dealing with the most accurate report of the speaker's words which the reporter could make. No doubt it requires considerable education and ability to make a good report of any speech. But an accurate report *is not an original composition*, nor is the reporter of a speech the author of what he reports" (*b*).

The plaintiffs thereupon appealed to the House of Lords, and were successful in obtaining a reversal of the decision of

(*a*) (1900). A. C. 539; 69 L. J. Ch. 699; 81 L. T. 571: 18 W. R. 228.
(*b*) (1899). 2 Ch. 749. 772.

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the Court of Appeal. In the course of his judgment in the House of Lords, Lord Halsbury, L.C., made the following remarks: "I observe that the Court of Appeal introduces the words 'original composition' as if those were the words of the statute; and at another part of the judgment it is said that 'the report and the speech reported are, no doubt, different things, but the author or publisher of the report is not the author of the speech reported, which is the only thing which gives any value or interest to the report.' The sentence is a little difficult to construe, but, as I understand it, it means to convey that the thing to which the statute gives protection must be of some value or interest. Again, I am compelled to point out that such words are not to be found in the statute. The producer of this written composition is, to my mind, the person who is the author of the book within the meaning of the statute, and, as I have pointed out, the words 'original composer' are not to be found in the statute at all; and, as I understand, the judgment of the Court of Appeal is entirely based on the thing protected being an original composition in the sense that the person who claims the protection of the statute must not have obtained his words or ideas from somebody else, but must be himself an original author in the sense in which that word is generally used in respect of literary composition" (*a*). Later on he says: "Though I think in these compositions there is literary merit and intellectual labour, yet the statute seems to me to require neither, nor originality either in thought or in language . . . I do not find the word 'original' in the statute, or any word which imports it, as a condition precedent, or makes originality of thought or idea necessary to the right." In the Lord Chancellor's view copyright "is given by the statute to the first producer of a book, whether that book be wise or foolish, accurate or inaccurate, of literary merit or of no merit whatever" (*b*). Likewise Davey, L.J., did not think "the fact that the subject-matter of the report had been made public property, or that no originality or literary skill was demanded for the composition of the report, have anything to do with the matter, . . . but it is a sound principle that a man shall not avail himself of another's skill, labour, and expense by copying the written product of it" (*c*).

Effect of decision in *Walter* v. *Lane*.

The effect of this decision has been sometimes misconceived. The Court did not decide that the reporter had copyright in Lord Rosebery's speech, but in the *report* of it. Any other

(*a*) (1900), A. C., pp. 546, 547. (*b*) *ib.* p. 549.
(*c*) *ib.* p. 552. *Collis* v. *Cater* (1898), 78 L. T. 613.

person present at Lord Rosebery's meeting might have taken his speech down in shorthand and obtained copyright in his individual report, but no person was entitled to annex the result of the 'Times' reporter's labour. Indeed it would appear that copyright is conferred not so much on expression or substance as upon the skill, labour, and expense bestowed by the compiler. The report was not original in the sense that the words and sentiments were new, but it was original, and the reporter was an author in the sense that, without him, the report would have had no existence.

Can a mere copyist have copyright?

In this last sense originality is, perhaps, necessary in order to obtain copyright. A mere copyist of a written document, in which no copyright exists, has no right to protect his copy (*a*); but even in such a case the Court would, it is conceived, protect a copyist, who had obtained his copy under circumstances involving peculiar labour or expense, from infringement by a person who had not taken the trouble to go to the original sources.

Letters of Dorothy Osborne.

In a recent case of *Perry* v. *Moring* (*b*) the plaintiff published a book entitled 'Letters from Dorothy Osborne to Sir William Temple, 1652–54." These letters were, at the time when the plaintiff issued his book, in a private collection, whilst most of them were undated and in old English spelling. The plaintiff had had these letters copied, translated them into modern English spelling, arranged them in the order of date in which he considered they had been written, and published them with notes. Subsequently, the original MSS. were bought by the British Museum authorities, and it was in evidence that they claimed no copyright in these originals. The defendants then published an edition of these same letters, and in their edition the letters were placed in practically the same order as in the plaintiff's. The plaintiff moved for an interlocutory injunction restraining the infringement of his copyright (*c*), and, on the defendants admitting that they had sent the plaintiff's book to their printers, and had the text of the letters printed direct from this, without having taken the trouble to get the letters copied from the originals in the British Museum, the Judge expressed such a strong opinion that this method could not be defended, that the defendants submitted to an injunction and

(*a*) See *per* James L.J., *Walter* v. *Lane* (1900), A. C. at p. 551: *Leslie* v. *Young* (1894), A. C. 335: *a fortiori* if the copy is a piracy. *Gary* v. *Faden* (1799), 5 Ves. 24.

(*b*) 3rd April, 1903, before Farwell, J.

(*c*) The plaintiff complained of infringement in respect of (1) Notes: (2) Arrangement: (3) Text: and (4) Title. The defendants admitted infringement in the matter of the text and it became unnecessary to go into the other matters.

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an inquiry as to damages, and to treat the motion as the trial of the action (*a*).

Copyright may exist in a new arrangement or in novel additions.

Copyright may be claimed by an author of a book who has taken existing materials, from sources common to all writers, and arranged and combined them in a new form, and given them an application unknown before. For in making the selection, arrangement, and combination, he has exercised skill and discretion, and in producing thereby something that is new and useful he is entitled to the exclusive enjoyment of his production.

Books made and composed in this manner are therefore the proper subjects of copyright; and the author of such a book has as much right in his plan, arrangement, and combination of the materials collected and presented, as he has in his thoughts, sentiments, reflections and opinions, or in the modes in which they are therein expressed and illustrated; but he cannot prevent others from using the old material employed in such combination for a different purpose (*b*).

'Gray's Poems.'

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

Accounts of natural curiosities, &c.

If a person compiles an account of natural curiosities or of works of art, or of mere matters of statistical or geographical information, his own description may be the subject of copyright (*d*). It is equally competent, however, for any person to

(*a*) Cf. *Kelly* v. *Morris* (1866), L. R. 1 Eq. 697; *Morris* v. *Ashbee* (1868), L. R. 7 Eq. 34: *Lamb* v. *Evans* (1893), 1 Ch. 218.

(*b*) Clifford, J., *Laurence* v. *Dana*, 2 Am. L. T. R. (N.S.) 423.

(*c*) *Mason* v. *Murray*, cited 1 East, 360; *Moffatt & Paige* v. *Gill* (1902), 84 L. T. 452; 49 W. R. 438; on app. 86 L. T. 465; 50 W. R. 528.

(*d*) In like manner, the Court of Cassation, in France, decided that a *compilation* may be the subject of copyright, under the law of July 19, 1793. The book was a devotional work, consisting of extracts from the devotional writings of eminent churchmen, arranged in a particular manner, with reference to the festivals of the Church. The correctional tribunal at Lyons decided that the law of July 19, 1793, extended the privileges of authorship only to those who can strictly be called authors—to those who could claim the first conception of a work of literature or art—and not to one who had only copied from the works of others. They held that the compiler of this book had only copied passages from the works of others, with slight verbal alterations and additions, and that neither these nor the plan and arrangement of the book gave it the character of a new work, because the greater part of it, which was copied, and was therefore *publici juris*, drew to itself the lesser part, which was really new, and attached to it the same condition of publicity. From this decree the proprietor appealed to the Court of Cassation: and M. Merlin, arguing against the decree, contended that the law applied not merely to works the fruit of the conceptions of genius, but also to the productions of intelligence: and that the decree confounded a compilation which is the fruit of taste, intelligence, and exquisite and ingenious combination and arrangement, with a compilation which implied nothing but an expenditure of time and research, and an indefatigable

compile and publish a similar work; but it must be made substantially new and original, like the first work, by resort to the original sources, and must not be simply a copy or adaptation from the other, under the impression that the subject is common (*a*).

If a man makes an actual survey of certain roads, and depicts such roads on a map, though his map might, and probably would, correspond with many which had previously been published, it would be hard to say that it was not a new work. In such a case it is not a question of the mind, like the 'Essay on the Human Understanding': it lies *in medio*; every man with eyes can trace it, and the whole merit depends upon the accuracy of the observation; every description will therefore be in a great measure original (*b*). If this be so, every edition will be a new work if it differs as much from the last edition as it does from the last precedent work; either all are original works or none of them. It is an extremely difficult thing to establish identity in a map or a mere list of distances; but there may be originality in casting an index, or pointing out a ready method of finding a place in a map (*c*).

Receipt books.

The composing receipts or arranging them in a book will give a copyright to the compiler; but the mere collecting them and handing them over to a publisher will not (*d*); nor will the mere copying that which is public property, for there is nothing in such case to represent authorship on the part of the editor (*e*). However, if there be some new arrangement or classification of the subject, or the copy be at all varied, patience in copying word for word. He maintained that under this decree the Pandects of Pothier would be no subject of property, but would be open to the first occupant. The court held that the law extends to selections, compilations, and other works of that nature, when they require in their execution, discernment, taste, learning, and intelligent labour: when, in short, instead of being simply copies from one or more other books, they are at the same time the product of conceptions foreign and of conceptions peculiar to the author, in the union of which the matter receives a new form and a new character. The work in question possessed these characteristics, and the decree of the court of first instance was therefore annulled: Merlin, Rep. de Jurisp. tit. Contrefaçon, tom. 3, pp. 701, 708, cited Curtis on Copyright, p. 181.

(*a*) *Hogg* v. *Kirby* (1803), 8 Ves. 215, 7 R. R. 30; *Hotten* v. *Arthur* (1863), 1 H. & M. 603; 32 L. J. (Ch.) 771; 11 W. R. 934; 9 L. T. (N. S.) 199; and in a Scotch case it was held that the directors of the Customs Annuity and Benevolent Fund have a copyright or right of property in the publication 'The Clyde Bill of Entry and Shipping List,' entitling them to protection against piracy: *Walford* v. *Johnston*, 3rd June, 1846; 20 Sess. Cas. 1160. See *Maclean* v. *Moody*, 23 June, 1858, 20 Sess. Cas. 1151.

(*b*) See Lord Jeffrey's observations in *Alexander* v. *Mackenzie* (1847), 9 Sess. Cas. (N.S.) 758; *Blunt* v. *Patten*, 2 Paine (Amer.) 393.

(*c*) *Carman* v. *Bowles* (1786), 2 Bro. C. C. 80; *Taylor* v. *Bayne*, Mor. Dict. of Dec. in Ct. Sess. vols. 19, 20, 8308; *ibid.* App. pt. 1, 7; *Alexander* v. *Mackenzie*, *supra*.

(*d*) *Rundal* v. *Murray* (1821), Jac. 311, 22 R. R. 75, *per* Lord Eldon; *Matthewson* v. *Stockdale* (1806), 12 Ves. 270.

(*e*) But see *Walter* v. *Lane* (1900), A. C. 539.

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then a copyright may exist in it, provided the variation be not merely colourable (*a*).

Similitude between maps.

Thus, where the defendant had used four charts published by the plaintiff in making one large map, but there were very important differences between them, much in favour of the defendants, and the evidence showed the plaintiff's charts to be founded on a wrong principle, Lord Mansfield left it to the jury to say whether the alteration was colourable or not (*b*). And in *Matthewson* v. *Stockdale* (*c*) Lord Eldon said, "I admit that no man can monopolise such subjects as the English Channel, the Island of St. Domingo, or the events of the world; and every man may take what is useful from the original work, improve, add, and give to the public the whole, comprising the original work, with the additions and improvements" (*d*).

Component parts of a compilation not protected apart from the arrangement.

Protection is not given to the component parts of a compilation independently of their arrangement and combination. Of the component parts the compiler is not the author, and he could not acquire an exclusive right to that which is common to all, neither can the arrangement or combination apart from the materials arranged or combined be the subject of protection (*e*). The copyright vests in the materials as arranged and combined, not in the form or the substance apart the one from the other, but in the union of the two (*f*).

Mathematical tables.

It follows from what has been said above, that a person may have copyright in mathematical tables *actually calculated by himself*, although on a fresh calculation the same tables would result from the same *data* and the same principles, and although they may have previously been published before his appeared (*g*).

Selections of poems, &c.

Selections of poems or prose compositions, and collections of proverbs, maxims, quotations, hymns, &c., may be the subjects of copyright (*h*).

Copyright is in a book.

The Act of 1842 confers copyright upon every "book," and

(*a*) *Matthewson* v. *Stockdale*, *supra*: *Barfield* v. *Nicholson* (1824), 2 Sim. & Stu. 1; 25 R. R. 144.

(*b*) *Sayre* v. *Moore* (1785), 1 East. 361. n.

(*c*) (1806), 12 Ves. 275: *Wilkins* v. *Aikins* (1810), 17 Ves. 422.

(*d*) And see Sir L. Shadwell in *Martin* v. *Wright* (1833), 6 Sim. 298. This case can scarcely be reconciled with other decisions: see *Maxman* v. *Tegg* (1826), 2 Russ. 385, 26 R. R. 112, and Mr. Justice Story in *Emerson* v. *Davies*, 2 Story, 768, 797.

(*e*) Thus a subsequent writer cannot be held to have infringed a book where he has not borrowed any of the materials of which his book is composed, but has simply adopted the same arrangement.

(*f*) *Lamb* v. *Evans* (1892), 3 Ch. 462: (1893), 1 Ch. 218; *Moffatt & Paige* v. *Gill* (1902), 86 L. T. 165, 50 W. R. 528.

(*g*) *Bailey* v. *Taylor* (1829), 3 L. J. (O. S.) Ch. 66: 1 Russ. & My. 73.

(*h*) *Macmillan* v. *Suresh* (1890), 17 Indian L. R. (Calcutta), 951.

"book" is defined as meaning and including "every volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published," and the question whether copyright can be obtained for a particular publication depends upon whether it can be brought within this definition and not upon literary merit (*a*).

There can be no copyright in specifications of patents (*b*), but there may be in a mining report (*c*), or in a list of registered bills of sale and deeds of arrangement extracted from official sources (*d*), or in a list of foxhounds and hunting days (*e*).

Tradesmen's Catalogues.

The decisions of the Courts have been increasingly favourable to tradesmen's catalogues. In the case of *Hotten* v. *Arthur* (*f*), Sir W. Page Wood, V.-C., restrained the infringement of a bookseller's catalogue containing a description of the books offered for sale, with short anecdotes relating to them.

Grace v. *Newman.*

This case was followed by Sir Charles Hall, V.-C., in *Grace* v. *Newman* (*g*). The plaintiff there was a "cemetery stone and marble mason," and had published a book containing, with some letterpress, lithographic sketches of monumental designs taken from tombstones in cemeteries. The publication was intended to serve as an advertisement of the plaintiff's business, and to enable customers to whom it was given to select designs to be executed by the plaintiff, yet the court held it to be a proper subject of copyright.

Cobbett v. *Woodward.*

In the case of *Cobbett* v. *Woodward* (*h*), the plaintiff was an extensive dealer in upholstery and house furniture, and had published and registered an illustrated guide for furnishing houses, and circulated it as an advertisement of his business. The defendant, who was engaged in the same line of business, copied fifty-five of the illustrations and a large portion of the text. In defence it was contended that the plaintiff's book was a mere advertisement, and was, therefore, not within the Copyright Act. The court held that the drawings in the plaintiff's book were not entitled to protection, on the ground that they were mere advertisements. With regard to the

Illustrated furniture guide, copyright in.

(*a*) *Walter* v. *Lane* (1900), A. C. 539.
(*b*) *Wyatt* v. *Barnard* (1814), 3 V. & B. 77.
(*c*) *Kenrick* v. *Danube Collieries* (1891), 39 W. R. 173.
(*d*) *Trade Auxiliary Co.* v. *Middlesbrough, &c.* (1889), 40 Ch. D. 425; *Cate* v. *Devon, &c., Newspaper Co. ib.* 500.
(*e*) *Coe* v. *Land & Water* (1869), L. R. 9 Eq. 324. See *Exchange Telegraph Co.* v. *Gregory* (1896), 1 Q. B. 147.
(*f*) (1859), 1 H. & M. 603; 32 L. J. (Ch.) 771; 11 W. R. 931; 9 L. T. (N.S.) 199. So there may be copyright in a descriptive catalogue of tricks and magical apparatus: *Bland* v. *Ilium*, 'Times,' 15th Jan. 1873
(*g*) (1875), L. R. 19 Eq. 623; see also *Hogg* v. *Scott*, 18 Id. 444; *Callender* v. *Griffith*, 11 Blatchf. (Amer.) 212.
(*h*) (1874), L. R. 14 Eq. 407.

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text, a distinction was drawn between that part "which bears the trace of original composition," and that which "simply describes the contents of a warehouse, the exertions of the proprietors, or the common mode of using familiar articles." The court held that matter of the latter kind was not entitled to protection: but that the plaintiff was entitled to an injunction restraining the defendant from publishing about sixty words of "original composition" which had been copied. In the case referred to, Lord Romilly considered that the distinction between directories, concordances, dictionaries, &c., and the work then in question was, that such works were compiled and published for the information and use of the public, and were bought by the public without any reference to individual benefit—nothing in the shape of advertisements of articles specified in the work forming a part of the work, whereas in the case before him the work was a mere advertisement for the sale of particular articles which any one might advertise for sale.

The distinction drawn in the above decision between the different sources from which the work may emanate is not sound. The question whether an author of a work is entitled to copyright therein, depends neither upon the vocation of the author nor the purpose for which he has designed or may use it, but on the character, the inherent qualities of the production itself.

Cobbett v. *Woodward* overruled.

The case of *Cobbett* v. *Woodward* was overruled by the Court of Appeal in *Maple* v. *Army and Navy Stores* (*a*). In that case the plaintiffs, who were upholsterers, published an illustrated catalogue of furniture, which was duly registered under the Copyright Acts as a book. The illustrations were engraved from the original drawings made by artists employed by the plaintiffs, but the work contained no letterpress of such a description as to be the subject of copyright, and it was not published for sale, but was used by the plaintiffs as an advertisement. The defendants published an illustrated catalogue, many of the illustrations in which were copied from those of the plaintiffs' book. It was held by the Court of Appeal (affirming the decision of Vice-Chancellor Hall) that the plaintiffs were entitled to an injunction restraining the defendants from publishing any catalogue containing illustrations copied from the plaintiffs' book, and it was further held that a collection of prints published together in a volume was a book within the meaning of the Copyright Acts and the

(*a*) (1882), 21 Ch. D. 369; 52 L. T. (Ch.) 67.

proper subject of copyright, though it contained no such letterpress as could be the subject of copyright, and it made no difference that the book was not published for sale, but only used as an advertisement.

The Master of the Rolls (Jessel) said: "I am of opinion that this catalogue is the subject of copyright and that the engravings are protected. In the first place it is a book, and so clearly comes within the words of the Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 2. There may be such things as picture books for those who cannot read letterpress. The preamble of the statute has been referred to, but it cannot restrict the enacting part of the statute if the enacting part is clear, and moreover the preamble can in no case have much effect unless it is itself clear. Here the enacting part is clear. 'The word book shall be construed 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, and the word copyright shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is herein applied.' . . . The case which has done all the mischief is *Cobbett* v. *Woodward*. The late Master of the Rolls there says: 'But at the last it always comes round to this, that in fact there is no copyright in an advertisement. If you copy the advertisement of another you do him no wrong, unless in so doing you lead the public to believe that you sell the articles of the person whose advertisement you copy.' I think that is not the law. I am not aware that the use to which a proprietor puts his book makes any difference in his rights. His copyright gives him the exclusive right of multiplying copies, and he may use them as he pleases. I think, therefore, that *Cobbett* v. *Woodward* will not bear legal examination." After referring to *Hotten* v. *Arthur* and *Grace* v. *Newman*, the Master of the Rolls continues: "The weight of authority then is against the doctrine that there cannot be copyright in a book issued as an advertisement, and I cannot see any principle in support of that doctrine. There would be difficulty in protecting these designs as engravings under the Act relating to engravings, it is easier to protect them as parts of a book (*a*). The defendants thought that the law allowed them to appropriate the results of other men's labours, and they call upon us for

(*a*) Registration of a book under the Act of 1842 in the name of the author of the letterpress does not confer any protection in respect of drawings, which are introduced into the book as illustrations and the art copyright in which is vested in other persons. *Petty* v. *Taylor* (1897), 1 Ch. 165.

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an indulgent construction of the Act in their favour. It is in my opinion the duty of the court to construe Acts of Parliament with a view to the furtherance of justice."

Lists of articles for sale.

In *Maple* v. *Junior Army and Navy Stores*, it seems to have been assumed that the plaintiffs could not have had any copyright in the letterpress of their catalogue. The illustrations had artistic merit, but it apparently never occurred to the parties that there might have been sufficient literary merit in the letterpress to entitle it to copyright. It has, however, been decided that copyright may exist in a mere list of articles for sale (*a*). In the case cited the plaintiff was a chemist and druggist who had prepared a catalogue of medicines and drugs sold by him under various headings and sub-headings, under which were arranged in alphabetical order a list of articles with their prices. The defendants inserted in their catalogue copies of the above-mentioned headings and lists, omitting two preparations only, and an injunction was granted against them. North, J., in delivering judgment in this case remarked: "It is said this is not the subject of copyright; and a distinction is made between copyright in a large catalogue by a clever author which gives a great deal of information and is interesting to persons who read it, and a catalogue like the plaintiffs', which is nothing whatever but a simple list of certain articles described by their common names, which every one is entitled to use in respect to them, with the addition of the price at which they are sold." . . . "For the purpose of making such a catalogue [as the plaintiffs'] one man sets to work in a proper manner. He incurs a good deal of trouble. He does what must take a good deal of time in preparing a full catalogue, such as either of these works I have before me. To some extent it might be done by his stock-taking, but there may be a good many articles in his catalogue which are not found in stock—articles which a man does not always keep—which he may be out of, or does not keep in stock, but obtains when he receives an order for them. In one way or another a man engaged in preparing a catalogue of this sort has incurred labour in its preparation, or it may be expense and trouble in its preparation, and has done it for the advantage of having his own catalogue. As compared with his neighbour, he is better off in that he has a catalogue, while his neighbour has not; and if the latter wants to be on

(*a*) *Collis* v. *Cater* (1898), 78 L. T. 613. The same has been held in Scotland. *Harpers Ld.* v. *Barry Henry & Co.* (1892), 20 Court Sess. Cas., 4th series (Rettie), 133; cf. *Cooper* v. *Stevens* (1893), 1 Ch. 567; *Marshall* v. *Bull* (1901), 85 L. T. 77.

a level with him, he must incur the same labour or expense and trouble."

Time tables.

A railway time table may be the subject of copyright, provided independent labour be bestowed upon it, and it is not merely a copy of official information (*a*).

Directories and advertisements.

There may also, clearly, be copyright in the headings and arrangement of a directory (*b*). In *Lamb* v. *Evans*, the question was raised whether there could be copyright in a collection of advertisements. Chitty, J., held that there could not (*c*), and there was no appeal from his decision upon this point, but in the Court of Appeal, Lindley, L.J., remarked: "As regards copyright, I rather think that Mr. Justice Chitty has not gone quite far enough. I do not myself see the difficulty in a publisher's having copyright in a sheet of advertisements. I do see a difficulty in his having a copyright in one advertisement, because, as Mr. Justice Chitty pointed out, that might prevent the advertiser from republishing his advertisement in another paper, which is absurd. But to say that it follows from that, that the proprietor, say of the 'Times,' has no copyright in a sheet of advertisements, so that he cannot restrain anybody from copying that sheet, appears to me a very different proposition. It is not necessary for me to decide it, and I do not decide it, as the plaintiff does not ask for an injunction larger than Mr. Justice Chitty has granted; but I doubt very much whether he has not been a little too cautious. . . . It appears to me that the learned judge has overlooked the difference between the right to publish a whole sheet of the paper and the right to publish a sentence out of the sheet (*d*). And in this opinion Bowen, L.J., concurred (*e*).

No copyright in diagrams, &c.

Though, as we have seen, the Courts will not enter into a discussion as to the merits of a literary production, yet that which it is sought to protect as a book must be something which can be fairly described as a literary production of some sort. Thus, the Court has refused to grant copyright in respect of a cardboard pattern sleeve containing upon it scales, figures, and descriptive words for adapting it to sleeves of any dimensions (*f*); in respect of a list of sporting selections (*g*);

(*a*) *Leslie* v. *Young* (1894). A. C. 335.

(*b*) *Lamb* v. *Evans* (1893). 1 Ch. 218; *Kelly* v. *Morris* (1866). L. R. 1 Eq. 697; *Morris* v. *Ashbee* (1868). L. R. 7 Eq. 34.

(*c*) (1892). 3 Ch. 462.

(*d*) (1893). 1 Ch. p. 223.

(*e*) *Ib.* p. 228.

(*f*) *Hollinrake* v. *Truswell* (1894). 1 Ch. 420, followed *Bovey* v. *Wright* (1900). 1 Ch. 122. The contrary seems to have been held in America. *Drury* v. *Ewing* 1 Bond (Amer.) 540; but see *Baker* v. *Selden*, 110 Otto's Rep. (Amer.) 99; *Seaville* v. *Toland*, 6 West. Law Jour. 84; *Higgins* v. *Keuffel*, 33 Davis Rep. (Amer.) 128.

(*g*) *Chilton* v. *Progress Printing Co.* (1895). 2 Ch. 29: 71 L. T. 661: 43 W. R. 136: *Fournat* v. *Pearson* (1897). 14 Times L. R. 82.

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or a scoring sheet or "tablet" used in the game of cricket (*a*).

Album for holding photographs not a book.

So an album for holding photographs with pictorial borders for containing views of castles, with short descriptions attached, is not a "book" within 5 & 6 Vict. c. 4, s. 41, so as to be capable of obtaining copyright for the contents. An album thus illustrated was entitled by the plaintiff, who claimed to have been the first inventor, the "Castle Album," and had been sold by him under that name since 1883, when the work was registered by him under 5 & 6 Vict. c. 45, and the illustrations under the Act of 1862; and it was held that the plaintiff could not by registration obtain copyright for the mere name "Castle Album," he had not in the absence of distinct evidence that such name had become generally accepted in the market as exclusively denoting the plaintiff's album, acquired any exclusive right to the name as a trade name, so as to be able to restrain the use of it by others to describe their albums similarly illustrated, but not shown to be printed from that of the plaintiff (*b*).

Face of a barometer not entitled to copyright.

So the face of a barometer, displaying special letterpress, was held not to be capable of copyright (*c*).

Gloved hand printed on card with letterpress entitled to copyright.

But a gloved hand printed on a card cut to the exact size, and showing the back and palm of the hand, the card opening bookwise, and having on the inside in the palm of a hand the lines of life of palmistry, and on the back of the hand some original verses, was held to be a sheet of letterpress and the proper subject of copyright (*d*).

No copyright in a mere plan.

There can be no copyright in the mere plan of a work; nor any exclusive property in a general subject or in the particular method of treating it (*e*). Any number of persons may use the same common materials, in a like manner and for a similar purpose. Their productions may contain the same thoughts and ideas: and resemblance to each other is immaterial so long as there is no unlawful copying.

Copyright in words used for telegraphy.

There may be copyright in the system of electric telegraphy in which every letter of the alphabet is expressed by a dot or a dash, or different combinations of dots and dashes, with

(*a*) *Page* v. *Wisden* (1869), 20 L. T. 135; *Kenrick* v. *Lawrence* (1890), 25 Q. B. D. 99.

(*b*) *Schove* v. *Schmincke* (1886), 33 Ch. D. 546; 55 L. J. Ch. 892; 55 L. T. 212; 34 W. R. 700.

(*c*) *Davis & Co.* v. *Comitti* (1885), 54 L. J. Ch. 119; 52 L. T. 339; W. N. (1885), 15; 1 T. L. R. 216.

(*d*) *Hildesheimer & Faulkner* v. *Dunn & Co.*, 64 L. T. 452; W. N. (1891) 66; but see *Cable* v. *Marks* (1882), 52 L. J. Ch. 107; 47 L. T. 132.

(*e*) *Perris* v. *Hexamer*, 99 Otto Rep. (Amer.) 674.

certain pauses between them, the meaning of these dots and dashes differing according to the place where the pause between them is made or its duration (*a*).

Copyright in newspaper telegrams.

There can of course be copyright in newspaper telegrams. A case came before the Supreme Court in Melbourne in which it appeared that the proprietors of the 'Melbourne Argus' paid a large sum for the purpose of obtaining the latest telegrams from Europe, and any newspaper proprietors who might wish to publish the telegrams so obtained could do so by paying a contribution towards the expenses incurred. The proprietor of the 'Gippsland Mercury' made an agreement to pay for the right of republishing the telegrams, but after carrying out the arrangements for some months cancelled the agreement. The European telegrams received by the 'Argus' were, however, re-published in another form, as from a Melbourne correspondent of the 'Mercury,' with the preliminary words "It is reported," or "The news about town is." This was considered a breach of the copyright which the proprietors of the 'Argus' possessed in the telegrams, and a suit was instituted in the Equity Court to restrain the proprietor of the 'Mercury' from re-publishing the telegrams. It was argued for the defendant that, as the telegrams were matters of news, any one could re-publish them without breach of the Copyright Act; but Mr. Justice Molesworth held that the plaintiff had a property in the telegrams, and that no one could re-publish them without the permission of the person to whom they had been sent in the first instance. An injunction was, therefore, granted to restrain the defendant from publishing the telegrams (*b*).

How far new editions the subject of copyright.

Questions of great nicety and difficulty may arise as to how far a new edition of a work is a proper subject for copyright. A new edition of a book may be a reprint of the original edition, which does not entitle the author to a new term of copyright running from the new edition; or it may be so enlarged and improved as to constitute in reality a new work; for example, a scientific work twenty or thirty years old may be comparatively worthless, owing to the progress of science in the interval: but a new edition, particularly if it be the production of the original author, would be as valuable at a later period as the original edition of the book was at the time it was published. There are many courses which lie between

(*a*) *Ager* v. *Peninsular & Oriental Steam Navigation Co.* (1881), 26 Ch. D. 637, followed in *Ager* v. *Collingridge* (1886), 2 T. L. R. 291.

(*b*) See also *Walter* v. *Steinkopff* (1892), 3 Ch. 489; *Exchange Telegraph Co.* v. *Central News* (1897), 2 Ch. 48, and Chapter 'Newspapers,' post.

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the two extremes, and the difficulty would be to lay down any general rule as to what amount of additions, alterations, or new matter would entitle the second or new edition of a book to the privilege of copyright, or whether the copyright extends to the book as amended or improved, or is confined to the additions and improvements themselves as distinguished from the rest of the book (*a*).

The general rule is, that each successive edition, which is substantially different from the preceding ones, or which contains new matter of substantial amount or value, becomes entitled to copyright as a new work, and it is immaterial whether the new edition is produced by condensing, expanding, correcting, re-writing, or otherwise altering the original work; or by introducing notes, citations, or other additions. Nor is it essential that the new edition should be an improvement on the old, the sole question is whether it is substantially different. A few more colourable alterations in the text or the addition of a few unimportant notes will not be enough to sustain copyright as in a new work. As Lord Kinloch said in *Black* v. *Murray* (*b*), to create a copyright by alterations of the text, these must be extensive and substantial, practically making a new book. With regard to notes, in like manner, they must exhibit an addition to the work which is not superficial or colourable, but imparts to the book a true and real value, over and above that belonging to the text. This value may perhaps be rightly expressed by saying that the book will procure purchasers in the market on special account of these notes. There is involved in such annotation, and often in a very eminent degree, an exercise of intellect and an application of learning which place the annotator in the position and character of author in the proper sense of the word. It will still of course remain open to publish the text, which *ex hypothesi* is the same as in the original edition. But to take and publish the notes will be a clear infringement of copyright.

An action was raised in the Scotch Court of Session at the instance of Messrs. Black against Messrs. Murray and Son for a breach of copyright, and the infringement was said to be contained in a book published by the defenders in 1869, which

(*a*) 9 Sc. Sess. Cas. 3rd Ser. 311; *Hedderwick* v. *Griffin*, 3 Sc. Sess. Cas. 2nd Ser. 383. See *Thomas* v. *Turner* (1886), 33 Ch. D. 292; 56 L. J. Ch. 56; 55 L. T. 534; 35 W. R. 177 (C.A.); *Hutchons* v. *Sheard*, W. N. (1881), 20.

(*b*) 9 Sc. Sess. Cas. 3rd Ser. 311; *Hedderwick* v. *Griffin*, 3 Sc. Sess. Cas. 2nd Ser. 383. See *Thomas* v. *Turner* (1886), 33 Ch. D. 292; 56 L. J. Ch. 56; 55 L. T. 534; 35 W. R. 177 (C.A.)

purported to be an edition of the 'Minstrelsy of the Scottish Border,' collected by Sir Walter Scott, and it was stated in the title-page to be a reprint of the original edition. The peculiarity of the case was that the original edition of the 'Minstrelsy of the Scottish Border' was no longer protected by copyright; and therefore, if the book was what its title represented it to be, a mere reprint of the original edition, the complaint of the pursuers could not be maintained. But they alleged that this was a false pretence on the face of the title-page, and that while all the poems and ballads contained in the original edition of the 'Minstrelsy' were reproduced in this volume, there was a considerable amount of other matter borrowed from works the copyright of which had not expired. The Lord President said that in the first complaint the pursuers alleged that the defenders had illegally copied and pirated from the copyright edition of the 'Minstrelsy of the Scottish Border' the advertisement, or part thereof, prepared by Mr. John Gibson Lockhart, and that they had printed the same, or part thereof, as a preface to their volume, and, further, that they had copied from the 'Minstrelsy' the notes, quotations, illustrations, and references, or the essential parts thereof. The defenders could have no excuse, if this were the case, for it was distinctly stated in that advertisement that this copyright edition contained matter which was not to be found in the original edition. That there might be a copyright of notes, even when the text was not copyright, was a fixed principle in law, and most deservedly so; for there was no doubt that the addition of good notes to a standard work was a task worthy of the highest literary talent and reputation; and it must be remembered that Mr. Lockhart stood in a position of peculiar advantage as the editor and annotator of Sir Walter Scott's works, being his son-in-law and literary executor, and having opportunities during the lifetime of Sir Walter Scott to collect materials for the performance of such a task. His lordship, after quoting numerous passages, said there was no doubt that the editor of the defenders' book of 1869 had copied these notes of Mr. Lockhart in the most slavish manner, without even verifying or attempting to make them more accurate than Mr. Lockhart's. It was quite clear to his mind that there had been an appropriation of original matter and quotations, and therefore he held that this part of the pursuers' case had been completely made out. In the said complaint it was alleged that the defender had used notes from 'Old Mortality' with reference to the skirmish of Drumclog, and a letter written by

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Claverhouse to the Earl of Linlithgow, and also a description of the Battle of Drumclog, on Loudon-hill. He was of opinion that the note with the reference to the Battle of Drumclog stood in the same position as the notes to the 'Minstrelsy,' and there again he held that piracy had been committed. In regard to the next complaint—that the defender had copied from volume 8 of the poetical works, containing the 'Lady of the Lake' and other poems, and an account of the 'Massacre of Glencoe'—he was of opinion that there had been the same kind of piracy as in the notes to the 'Minstrelsy.' The Court granted costs to the plaintiffs (*a*).

Copyright in each edition.

The copyright in each edition will extend from the date of that edition, and will be wholly independent of the copyright in any preceding one (*b*). Copyright may be obtained for any number of editions and it is immaterial whether copyright has existed or not in any previous one, but, *semble*, copyright in one edition will cover subsequent editions, except as regards new matter (*c*). And though no person but the proprietor of the copyright may bring out a new edition of the work, supposing the copyright to be subsisting, without his consent; yet if the work be not protected there is nothing to prevent any person from bringing out a new edition of the work and obtaining a valid copyright therein.

Copyright in private letters.

The copyright of private letters forming literary compositions is, prior to publication, in the composer, and not in the receiver, who has only a special property in them; "possibly the property of the paper may belong to him, but this does not give a licence to any person whatever to publish them to the world, for at most the receiver has but a joint property with the writer" (*d*). The right of the writer of the letter to prevent its publication is not founded on considerations of policy or social ethics, but on the principle of property. "The question will be," said Lord Eldon, "whether the bill has stated facts of which the court can take notice as a case

(*a*) *Black* v. *Murray*, Sol. Journ. Dec. 31, 1870.

(*b*) See *Murray* v. *Bogue* (1852), 1 Dr. 353. 365.

(*c*) *Hutchins* v. *Sheard*, W. N. (1881), p. 20.

(*d*) *Per* Lord Hardwicke, *Pope* v. *Curl* (1741), 2 Atk. 342: *Perceval* v. *Phipps* (1813), 2 V. & B. 19; *Forrester* v. *Walker* (1741), 4 Burr. 2331; *Webb* v. *Rose*, *ibid.* 2330; *Macklin* v. *Richardson* (1770), Amb. 694; *Duke of Queensberry* v. *Shebbeare* (1758), 2 Eden, 329; *Millar* v. *Taylor* (1769), 4 Burr. 2303; *Donaldson* v. *Becket* (1774), 2 Bro. P. C. 129: *Oliver* v. *Oliver* (1861), 11 C. B. (N.S.) 139; *Cadell* v. *Stewart*, Mor. Dict. of Dec. vols. 19, 20. App., Lit. Prop. 13; *Palin* v. *Gathercole* (8144), 1 Coll. C. C. 565; *Folsom* v. *Marsh*, 2 Story (Amer.) 100: *Boosey* v. *Jefferys* (1851), 6 Exch. 583, *per* Lord Campbell. *E. of Lytton* v. *Devey* (1884), 52 L. T. 121, where the executrix of a person to whom letters were sent was restrained from publishing them on the application of the executor of the writer. See *Hopkinson* v. *Lord Burghley* (1867), L. R. 2 Ch. 447, and *Hess* v. *Labouchere* (1898), 77 L. T. 559, where North, J., reviewed the earlier authorities.

of civil property which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of that friendship affords a reason for the interference of the court" (*a*). If a letter by any means gets back into the hands of the sender the receiver is entitled to recover it from him by action. In *Oliver* v. *Oliver* the facts were as follows. The plaintiff and defendant were brothers. The letters for the recovery of which the action was brought, related to family affairs. They were written and sent by the defendant to the plaintiff,—had been given back by the plaintiff to the defendant, and proof was given of a demand and refusal to restore them. There was contradictory evidence as to whether the letters had been given by the plaintiff to the defendant to be kept by him as his own property, or whether they had been merely handed to the defendant as custodian, to be re-delivered to the plaintiff on request. The learned judge told the jury that the receiver of a letter had such a property in the paper as to entitle him to maintain an action against the sender, if, by any means, it got back into his hands; and that it was for them to say whether the letters in question had been given to the defendant that he might retain them as his own property, in which case the defendant would be entitled to their verdict, or whether they were merely deposited with him to take care of them for the plaintiff, in which case the latter would be entitled to the verdict. Erle, C.J., in refusing a rule for a new trial, upheld this direction, and said: "In the case of letters, the paper at least becomes the property of the persons receiving them. Of course it is necessary to distinguish between the property in the paper and the copyright. The former is in the receiver, the latter is in the writer" (*b*).

The letters of Pope (*c*), Swift, and others, and the letters of Lord Chesterfield (*d*), were prevented from a surreptitious and unauthorised publication by injunction, on the ground of copyright in their authors. Lord Hardwicke, in *Pope's Case*, thought it would be extremely mischievous to draw a distinction between a book of letters, which came out into the world either by the permission of the writer or the receiver of them,

(*a*) *Gee* v. *Pritchard* (1818), 2 Swans. 413, 19 R. R. 86.

(*b*) See *Howard* v. *Gunn* (1863), 32 Beav. 462. 2 N. R. 256. North. J., in *Labouchere* v. *Hess* (1898), L. T. 559, p. 562, did not consider it clearly established by the cases that the property in the paper is in the receiver.

(*c*) *Pope* v. *Curl* (1741), 2 Atk. 342.

(*d*) *Thompson* v. *Stanhope* (1774), Amb. 737.

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and any other learned work. The same objection would, he thought, hold good against sermons which the author may never have intended to be published, but which had been obtained from loose papers and brought out after his death.

In the case of the *Earl of Granard* v. *Dunkin* (*a*) the executors of Lady Tyrawley obtained an injunction in the first instance against the defendant publishing letters to Lady Tyrawley from different correspondents, which he had got possession of by being permitted to reside in her house, and continuing to do so after her death. In 1804 the Court of Session in Scotland interdicted, at the instance of the children, the publication of the manuscript letters of the poet Burns (*b*).

Distinction between commercial or friendly letters and literary compositions.

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

No such distinction at the present time admitted.

Non nostrum est tantas componere lites; yet this distinction appears to us to have but little foundation, and seems to have existed merely in the imagination of Sir Thomas Plumer. It is true that a court of equity cannot interfere to prevent the publication of private letters simply on the ground that such

(*a*) (1809). 1 Ball & Beattie, 207 : 12 R. R. 18.

(*b*) *Cadell & Davies* v. *Stewart* (1804), cited 1 Bell's Com. 116, n., cited 2 Kent's Com. 381.

(*c*) (1813) 2 V. & B. 19 : 13 R. R. 1 ; see *Wetmore* v. *Scoville*, 3 Edw. Ch. (Amer.) 515 : *Hoyt* v. *Mackenzie*, 3 Barb. Ch. (Amer.) 320 ; but see *Woolsey* v. *Judd*, 4 Duer (N. York) 379 ; and *Eyre* v. *Higbie*, 35 Barb. (N. York) 502.

(*d*) "Another class is the correspondence between friends or relations, upon their private concerns ; and it is not necessary here to determine how far such letters falling into the hands of executors, assignees of bankrupts, &c., could be made public in a way that must frequently be very injurious to the feelings of individuals. I do not mean to say that would afford a ground for a Court of Equity to interpose to prevent a breach of that sort of confidence independent of contract and property." *Perceval* v. *Phipps* (1813). 2 V. & B. 19 ; 13 R. R. 1.

a publication, without the consent of the writer, as a breach of confidence, and social duty, is injurious to the interests of society; but solely on the ground that the writer has an exclusive property which remains in him, even where the letters have been transmitted to the person to whom they were addressed. A court of equity is not the general guardian of the morals of society. It has not an unlimited authority to enforce the performance or prevent the violation of every moral duty. It would be extravagant to say that it may restrain by an injunction the perpetration of every act which it may judge to be corrupt in its motives or demoralising or dangerous in its tendency. An injunction can never be granted unless it is apparent to the court that the personal legal rights of the party who seeks its aid are in danger of violation, and, as a general rule, that the injury to result to him from such violation, if not prevented, will be irreparable.

Motives why no distinction should be drawn.

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

(*a*) School books for teaching children are entitled to protection. See *Lennie* v. *Pillans*, 5 Sess. Cas. 2nd series, 116; *Constable & Co* v. *Brewster*, 3 Sess. Cas. 215 (N. E. 152). So are abstracts and indices of title to land, so long as the compiler retains the ownership of the unpublished manuscript: *Banker* v. *Caldwell*, 3 Min. (Amer.) 94. (*b*) 2 Story's Rep., cited *Woolsey* v. *Judd*, 4 Duer (N. York) 379.

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

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

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

Lord Eldon's opinion of the case of *Perceval* v. *Phipps*.

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

(*a*) *Walter* v. *Lane* (1900), A. C. 539.

(*b*) *Duke of Queensberry* v. *Shebbeare* (1758), 2 Eden, 329: *Thompson* v. *Stanhope* (1774), Amb. 737: *Rundell* v. *Murray* (1821), Jac. Rep.: 23 R. R. 75: *Cooper* v. *Stephens* (1895), 1 Ch. 567, and see *per* Lindley, L.J., *Walter* v. *Lane* (1899), 2 Ch. at p. 770. But, apparently, the executors of a writer may authorise the publication of letters written by their testator, though the latter never intended them for publication. *Dodsley* v. *M'Farquhar*, Mor. Diet. of Dec., Lit. Prop., App. 1, 5. *Quære*, whether a licence to publish implied by a gift of a MS. would be exclusive. *Rundell* v. *Murray*, *supra*.

(*c*) (1818), 2 Swans. 118, 126, 127. See *Brandreth* v. *Lance*, 8 Paige's R. (Amer.) 24, 26.

between private letters of one nature and private letters of another nature."

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

Mr. Story's opinion.

With these natural feelings on the breach of epistolary confidence the determinations of the Court of Session in Scotland have accorded (*c*); but it must be borne in mind that that court is held to have jurisdiction by interdict to protect, not property only, but reputation from injury, and private feelings from outrage and invasion (*d*).

Principles on which the determinations of the Court of Session have proceeded.

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

Ground on which a court of equity will frequently interfere.

Thus, upon the principle of *breach of contract*, an injunction was granted to prevent the publication of letters written by an old lady to a young man, to whom she had been foolishly

(*a*) Story's Com. on Eq. Jur. ss. 947–949.

(*b*) Cic. *Orat. Philipp.* ii. c. 4. See Sir S. Romilly, 2 Swans. 419.

(*c*) So it was held in *Dodsley* v. *M'Farquhar*, Feb. 27, 1775. relative to the publication of Lord Chesterfield's Letters: Mor. Dict. of Dec., Lit. Prop., App. 1. 5; Br. Sup. 509; and again more solemnly in *Cadell and Davies* v. *Stewart*, June 1, 1804, Mor. Dict. of Dec., Lit. Prop., App. 4. *Ibid.* But see, 5 Pat. 493. Here letters written by Burns to a lady whom he distinguished by the name of *Clarinda*, had been by her given to Stewart, a bookseller, who published them. The family of Burns, as interested in his literary reputation, were found entitled to an interdict: Bell's Com.

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

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attached, there being an agreement not to publish the letters, but to deliver them up for a valuable consideration (*a*).

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

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

Accordingly an injunction obtained on account of agency and confidence was dissolved by the court when the answer denied confidence, and avowed that the defendant's object in publishing them in a newspaper, of which he was the proprietor, was not to obtain profit, but to *vindicate his own character* from the imputation of having published false intelligence publicly cast on him by the plaintiff; for defective and injurious indeed would be the effect of a law permitting not the publication or production of business letters when necessary for one's own defence (*c*).

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

The receiver of a letter, however, will not be permitted to publish it for the purpose of representing to the public as true that which he has, in legal proceedings upon that very question, admitted to be false. The case of *Palin* v. *Gathercole* (*d*) elucidated this point. The circumstances of that case were these: Palin, the plaintiff, had written to Gathercole, the defendant, who was the editor of a newspaper, certain letters containing information respecting one Noakes, and Gathercole from these letters drew up an article which he published in his newspaper. Noakes brought an action against him for libel, and he compromised the action, paying Noakes' costs, and apologising. Gathercole then claimed of Palin half the costs that he, Gathercole, had so incurred, and Palin refusing to pay them, Gathercole published in his newspaper a statement that the libel upon Noakes was communicated to him, Gathercole, by Palin. Palin thereupon brought an action against Gathercole; and Gathercole pleaded that the matter, however libellous as between Noakes and Gathercole, was matter of which, as between Palin and Gathercole, Palin was the author; but

(*a*) *Anon.* v. *Eaton*, cited 2 V. & B. 27; *Perceval* v. *Phipps* (1813), 2 V. & B. 27; *Earl of Granard* v. *Dunkin* (1809), 1 Ball. & B. 247; Story's Eq. Jur. vol. 2, ss. 944–950; *Denis* v. *Laclere*, 1 Martin (Amer.), 297; *Woolsey* v. *Judd*, 4 Duer. (N. York) 379; *Eyre* v. *Higbie*, 35 Barb. (N. York) 502

(*b*) See Godson on Copy. p. 330.

(*c*) *Folsom* v. *Marsh*, 2 Story (Amer.) 100; see *Howard* v. *Gunn* (1863), 32 Beav. 162, and *E. of Lytton* v. *Devey* (1884), 52 L. T. 121, and *Labouchere* v. *Hess* (1898), 77 L. T. 559, where the defence of vindication of character was held not to be made out.

(*d*) (1811), 1 Coll. C. C. 565.

before trial Gathercole submitted to what was, in effect, a general verdict, establishing in substance, as Vice-Chancellor Knight Bruce expressed it in his judgment, that the libel published by Gathercole on Noakes was not a libel which Palin had communicated to Gathercole. Gathercole then proceeded to show Palin's letters to third persons, upon which Palin filed his bill for an injunction to restrain Gathercole from publishing or showing the letters, and obtained an *ex parte* injunction. The use which Gathercole desired to make of the letters was, it will be observed, to establish the fact that Palin was the author of the libel upon Noakes, the very fact which he had, by submitting to the general verdict in Palin's action, admitted not to exist. Under those circumstances, the court refused to dissolve the injunction, permitting, however, the defendant to exhibit the letters to his solicitors and counsel in the cause.

Communications sent to editors of periodicals.

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

What is a publication of private letters?

To make any public use of the production is to publish it. Hence a letter may be published not only by printing it, but also by reading it in public, or by circulating copies of it, though such copies be in manuscript. Any such public use of the letter, without the consent of the writer, is a violation of his right. But the receiver may, if he wish, destroy the letter as soon as received, and there is nothing to prevent him giving them to another, or reading them to others, or lending them to others to be read, provided such reading or lending does not amount to a publication: and in *Yates* v. *Hesse* (*c*). North J., while granting an injunction restraining the publications of letters, refused an injunction restraining the defendant from informing any person of their contents.

Letters written by

Letters written by one person employed by another, and

(*a*) *Hogg* v. *Kirby* (1803). 8 Ves. 215: 7 R. R. 30. See Chapter. Newspapers, *post*.

(*b*) *Davis* v. *Miller*, July 28, 1855: 17 Dec. of Ct. of Sess. 2nd Series, 1167. See 1 Jur. (N.S.) pt. 2, 523.

(*c*) (1898). 77 L. T. 559.

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one person for or on behalf of another.

relating to the business affairs of the latter, will rightly be considered as the property of the employer who pays the writer for his services. Thus it has been held that the letters which an officer of an insurance company had written in the discharge of his official duties became the property of the company (*a*). "If the solicitor of an assurance company, established in London," said the Master of the Rolls in the case cited; "by the direction of the directors, wrote a letter to one of the shareholders in the country, it is clear that such letter is not the property of the solicitor, and that he cannot say that the company have not a right to publish it. Take it a step further, and assume that the solicitor wrote a letter, but not by the direction or on behalf of the directors, though it had all the appearance of being written on their behalf, and by their direction. Thus, if it were written to a person who proposed to take shares in the company, and it related to the affairs of the company, and contained authoritative information on behalf of the company in answer to an application for shares, and the person who receives it treats it as such, and sends back to the company, objecting to its contents, shall the solicitor be allowed to complain of its publication, and to insist that it is a private letter, though it appears to be written on behalf of the directors? The answer is, if that be so, it ought not to have been written. It has all the appearance of having being written by the plaintiff on their behalf, and Jamieson [the person to whom it was written] so treats it, for he writes to the manager in answer to it. Can the plaintiff be allowed to say that the company have no right to publish it? and if they have, is not the defendant entitled, as regards the plaintiff, to bring it forward? It is obvious that this was not a private letter, and was not intended to be a private letter."

Power of government to publish or withhold letters.

The government has, moreover, a right to publish or to withhold all letters addressed to the public offices (*b*). This exception in favour of the government is not supposed to make such communications common property, to be published by any person who may see fit, without the sanction of the government, nor to take away the property of the writers or their representatives. "In respect to official letters addressed to government," observed Mr. Justice Story in *Folsom* v. *Marsh* (*c*). "or any of its departments, by public officers, so far as the right of the government extends from principles of

(*a*) *Howard* v. *Gunn* (1863), 32 Beav. 462.
(*b*) Curtis on Copy. 98.
(*c*) 2 Story (Amer.) 100.

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

Copyright in lectures and speeches.

Copyright may be had in lectures. Lectures are generally more or less literary productions—frequently the result of much thought and research. They are continually being published in the form of books and pamphlets—such publications being in many cases of great value, and it would be unjust and impolitic to deprive lecturers or other persons of the power of securing an exclusive right to their addresses, scarcely less so than to deprive authors generally of copyright in their productions. If a lecture has been reduced wholly or partially into writing, the author has clearly a right of property in it; and the court when called upon to restrain the publication of such a lecture, will compare the original composition with the piracy.

The admission of persons to hear such a lecture affords no

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

Injunction granted where lecture was oral only.

In the case of *Nichols* v. *Pitman* (*b*), the plaintiff, an author and lecturer upon various scientific subjects, delivered from memory, though it was in manuscript, a lecture at the Working Men's College upon "The Dog as the Friend of Man." The audience were admitted to the room by tickets issued gratuitously by the committee of the college. Mr. Pitman, the author of a system of shorthand writing and the publisher of works intended for instruction in the art of shorthand writing, attended the lecture and took notes nearly *verbatim* in shorthand of it, and afterwards published the lecture in his monthly periodical 'The Phonographic Lecturer.' On a motion for an injunction to restrain the publication, it was held that where a lecture of this kind is delivered to an audience limited and admitted by tickets, the understanding between the lecturer and the audience is that, whether the lecture has been committed to writing beforehand or not, the audience are quite at liberty to take the fullest notes for their own personal purposes, but they are not at liberty to use them afterwards for the purpose of publishing the lecture for profit; and the publication of the lecture in shorthand characters is not regarded as being different in any material sense from any other, and an injunction was granted accordingly.

Lectures in university.

So where a professor of a university delivers orally in his

(*a*) *Per* Lord Eldon, in *Abernethy* v. *Hutchinson* (1825), 3 L. J. (Ch.) 209.
(*b*) (1884), 26 Ch. D. 374.

class-room lectures which are his own literary composition, no person is entitled to republish them without the permission of the author (*a*).

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

But if a lecturer unconditionally publishes his lecture, then the only way in which he can protect his copyright is by taking advantage of the provisions of the 5 & 6 Will. 4, c. 65. This statute provides that, from and after the 1st of September, 1835, the author of any lecture (*b*), or the person to whom he has sold or otherwise conveyed the copy in order to deliver the same in any school, seminary, institution, or other place, or for any other purpose, shall have the sole right and liberty of printing and publishing such lecture; and that if any person shall, by taking down the same in shorthand, or otherwise in writing, or in any other way, obtain or make a copy of such lecture, and shall print or lithograph or otherwise copy and publish the same, or cause the same to be printed, lithographed, or otherwise copied and published, without leave of the author thereof, or of the person to whom the author has sold or otherwise conveyed the same, and every person who knowing the same to have been printed and copied and published without such consent, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such lecture, shall forfeit such printed or otherwise copied lecture or parts thereof, and be liable to certain penalties. The 2nd section provides that any printer or publisher of any newspaper who shall without such leave as aforesaid print and publish in such newspaper any lecture shall be deemed to be a person printing and publishing without leave within the provisions of the Act, and liable to the aforesaid forfeitures and penalties in respect of such printing and publishing. The 3rd section declares that no person, allowed for a certain fee and reward or otherwise to attend and be present at any lecture delivered at any place, shall be deemed and taken to be licensed, or to have leave to print, copy, and publish such lecture on account merely of having permission to attend the delivery. The 4th section makes the period of copyright twenty-eight years.

Notice must be given to justices.

It is, however, a condition precedent to obtaining protection under this Act that two days previous notice in writing of the intention to deliver a lecture be given to two justices living within five miles of the place of delivery (*c*).

(*a*) *Caird* v. *Sime* (1887), 13 C. of Sess. Cas. 23 : 12 A. C. 326 ; 57 L. T. P. C. 2 ; 57 L. T. 634 ; 3 T. L. R. 681. *Bartlett* v. *Crittenden*, 5 McLean (Amer.) 32.

(*b*) No doubt, including a speech. *Walter* v. *Lane* (1899), 2 Ch. 749, 754.

(*c*) Sect. 5. The notice must be given every time such lecture is delivered, and therefore the omission in any one instance to give the requisite notice would render

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

It is questionable whether copyright applies under this Act to lectures merely orally delivered even when reduced previously into writing; but with regard to speeches properly so called, or speeches not reduced into writing, there can be no doubt (*a*).

There is nothing in this statute to prevent any person from delivering in public an unpublished lecture without the consent of the author, it only prohibits the printing, copying, publishing, and exposing for sale, though the delivery would seem to be an infringement of the author's common law rights in the manuscript (*b*).

In France, the *cour royale* of Paris had before it in 1828 the interesting question whether, when a course of oral lectures is merely the reproduction of a work previously published by the professor, a person who publishes the lectures from notes taken by a stenographer, can be made responsible for a piracy to the publisher of the work thus reproduced, the decision of the question was given in the affirmative (*c*).

Reports of speeches, &c.

It has been decided that a reporter who attends a public meeting, and takes the speeches down in shorthand, may obtain copyright in his report (*d*); but if a speaker, speaking in a place from which he had power to exclude reporters, were to declare that he would not permit a report of his speech being taken, possibly a report might be restrained on the ground of breach of faith (*e*).

any person at liberty to obtain a copy, which the lecturer would be unable to prevent his publishing. Lectures delivered in any university, or public school, or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment, or foundation, are also, by the same section, excepted from the Act.

(*a*) See 'Edinburgh Review,' October 1851.

(*b*) In an American case, *Keene* v. *Kimball*, 16 Gray (82 Mass.) 551, Hoar, J., said: "The student who attends a medical lecture may have a perfect right to remember as much as he can, and afterwards to use the information thus acquired in his own medical practice, or to communicate it to students or classes of his own, without involving the right to commit the lecture to writing, for the purpose of subsequent publication in print or by oral delivery. So any one of the audience at a concert or opera, may play a tune which his ears has enabled him to catch, or sing a song which he may carry away in his memory, for his own entertainment or that of others, for compensation or gratuitously, while he would have no right to copy or publish the musical composition." See *Caird* v. *Sime*, 13 C. of Sess. 23 (Sc.).

(*c*) See Renouard, tom. 2, p. 116, cited Curtis on Copy. 103.

(*d*) *Walter* v. *Lane* (1900), A. C. 539; 69 L. J. Ch. 699; 81 L. T. 571; 48 W. R. 228.

(*e*) The alterations in the law suggested by the report of theRoyal Commissioners on Copyright are set forth in the 81th and three following paragraphs.

They are of opinion that the author's copyright should extend to prevent

Copyright in abridgments.

Copyright may likewise exist in a genuine and just abridgment, for it is said that an abridgment may with great propriety be called a new book (*a*). It has been held that an abridgment is not a piracy of the original work; but this matter will be more appropriately dealt with in the chapter on Infringement of Copyright (*b*).

What constitutes an abridgment.

To constitute a true and equitable abridgment the entire work must be preserved in its precise import and exact meaning, and then the act of abridgment is an exertion of the understanding, employed in moulding and transfusing a large work into a small compass, thus rendering it less expensive, and more convenient both to the time and use of the reader. Independent labour must be apparent, and the reduction of the size of a work by copying some of its parts and omitting others, confers no title to authorship: and the result will not be an abridgment entitled to protection. To shorten a work by leaving out the unimportant parts is not to abridge it in a legal sense. To abridge in the legal sense of the word is to preserve the substance, the essence of the work, in language suited to such a purpose: language substantially different from that of the original. To make such an abridgment requires

re-delivery of a lecture without leave as well as publication by printing, though this prohibition as to re-delivery they consider should not extend to lectures which have been printed and published. They also recommended that the term of copyright in lectures should be the same as in books, namely, the life of the author and thirty years after his death.

"In the course of our inquiry," they report, "it has been remarked that, in the case of popular lectures, it is the practice of newspaper proprietors to send reporters to take notes of the lectures for publication in their newspapers, and that, unless this practice is protected, it will become unlawful. It does not seem to us desirable that this practice should be prevented, but on the other hand the author's copyright should not in any way be prejudiced by his lectures being reported in a newspaper. The author should have some sort of control, so as to prevent such publication if he wishes to do so; and we therefore suggest that though the author should have the sole right of publication, he should be presumed to give permission to newspaper proprietors to take notes and report his lecture, unless, before or at the time when the lecture is delivered, he gives notice that he prohibits reporting.

"By the present law, a condition is imposed of giving notice to two justices. Without entering into the origin of this provision we find that it is little known, and probably never or very seldom acted upon; so that the statutory copyright is practically never or seldom acquired. We therefore suggest that this provision should be omitted from any future law.

"We do not suggest any interference with the exception made in the Act as to lectures delivered in universities and elsewhere wherein no statutory copyright can be acquired."

The commissioners also thought that in case of piracy either by publication or re-delivery without the author's consent, there should be penalties recoverable by summary process, and that the author should be capable of recovering damages by action in case of serious injury, and of obtaining an injunction to prevent printed publication or re-delivery. If the piracy were committed by printed publication they were of opinion that the author should also have power to seize copies (Para. 181). The recent Copyright Bill (1900) proposed to carry out these suggestions.

(*a*) Per *Lord Hardwicke*, *Gyles* v. *Wilcox* (1740), 2 Atk. 143.

(*b*) Chapter vi. *post*.

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the exercise of the mind; labour, skill, and judgment are brought into play, and the result is not merely copying.

Copyright in digests.

Copyright may also be had in a digest. A digest, or a compilation differs from an abridgment. A digest or 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 arrangement of the works cited; the latter must adopt the arrangement of the work abridged to be a faithful abridgment. The former infringes the copyright if the matter transcribed when published impairs the value of the original book, while a fair abridgment, though it may injure the original, is, as we have seen, lawful.

Head-notes of reports.

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

Selections from reports and judgments.

The right of selecting passages from books of reports (including entire judgments) in treatises upon particular subjects is not disputed. Had it been otherwise decided, the greater

(*a*) (1855), 16 C. B. 491; 1 Jur. (N.S.) 543. *Vide D'Almaine* v. *Boosey* (1835), 1 Y. & C. 288, 301; 4 L. J. (N.S.) Ch. 21; but there Lord Lyndhurst referred to digests such as Viner's 'Abridgment' and Comyns' 'Digest.'

part of our law libraries would be much thinned and attenuated, and we should be deprived of many valuable works; for a considerable portion consists of mere transcripts from books of report (*a*).

What would become of the elaborate commentaries of modern scholars upon the classics, which, for the most part, consist of selections from the works and criticisms of various former authors, arranged in a new form, and combined together by new illustrations? What would become of the modern treatises upon astronomy, mathematics, natural philosophy and chemistry? What would become of the treatises in our own profession, the materials of which, if the work be of any real value, must essentially depend upon faithful abstracts from the reports, and from juridical treatises, with illustrations of their bearing. 'Blackstone's Commentaries' is but a compilation of the Laws of England drawn from authentic sources, open to the whole profession; and yet it was never deemed that it was not a work which, in the highest sense, might be considered an original work, since never before were the same materials so admirably combined and exquisitely wrought out, with a judgment, skill and taste absolutely unrivalled (*b*).

Copyright in forms or precedents.

In a Scotch case the validity of the complainant's copyright in a collection of legal forms or "styles" was questioned, on the ground that in preparing them he had simply followed the directions prescribed by the statute; and that under the circumstances the forms prepared by two or more persons must be substantially the same. The Court held that if the statute had contained the forms themselves and the complainant had simply copied them, his copyright would have failed through want of originality. But, as the statute gave simply directions, it was an act of authorship to prepare the forms pursuant to such directions (*c*). Lord Fullerton in the case referred to observed: "It is said that owing to the particular nature of the styles they cannot be the subject of copyright, because they are drawn up precisely after the form prescribed in the statute, and because any styles relating to the same subjects as those given by the complainer must, if the directions of the statutes and phraseology of conveyancers were used, be expressed in the same manner exactly as those proposed by the complainer. Now it may be quite true that

(*a*) See *Butterworth* v. *Robinson* (1801), 5 Ves. 709: Evans' 'Statutes,' 2nd ed. vol. 2, p. 25.

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

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

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if the statute had supplied certain forms by which the operations intended to be thereby regulated were to be done, if the statute had contained, as such statutes sometimes do, an appendix exhibiting certain schedules of forms which it was only necessary for any one to copy in order to avail himself of the provisions of the Act, then I hold that the reprinting of such forms in a separate publication would not give him a copyright in these forms. But the case here is different, for the statute only gives very general directions and descriptions of the styles that are to be used. The schedules are very general in their terms, and it is no doubt of great practical importance to suit these general directions to each case falling under the statute as it may arise. The preparing and adjusting of such writings require much care and exertion of mind. As to invention, that is a different thing: it does not require the exercise of original or creative genius, but it requires industry and knowledge."

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

We have already noticed that originality is not necessary to entitle a work to copyright. This is further illustrated by the case of *Jarrold* v. *Houlston* (*a*) respecting Dr. Brewer's 'Guide to Science,' in which work the author does not profess to have made any discovery in science, or to do more than to provide for the young and other persons who have not been in the habit of making observations for themselves, information by which some of the ordinary phenomena of common life may be explained to them on scientific principles, and that they may themselves be led to observe and to reflect upon those wonderful laws of nature, by which the most ordinary phenomena are governed. And it was determined that, if any one by pains and labour corrects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions, and explanations of those phenomena, whether such explanations and answers are furnished by his own recollection of his former general reading, or out of works consulted by him for the express purpose, the reduction of the questions so collected, with such answers, under certain heads and in a scientific form, is amply sufficient to constitute an original work of which the copyright will be protected.

(*a*) (1857), 3 K. & J. 708 ; 3 Jur. (N.S.) 1051. As to the amount of originality required in a musical composition in America, see *Jollie* v. *Jaques*, 1 Blatch. (Amer.) 626. It has been there held that a good title to copyright is acquired by representing on a map boundaries of townships which are fixed by statute ; *Farmer* v. *Calvert Lithographic Engraving and Map Publishing Co.*, 5 Am. L. T. R. 168.

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No copyright in that which has no present existence.

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

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

In *Maxwell* v. *Hogg*, Lord Cairns seemed to think that there could not be what is termed copyright in a single word, although the word were used as a fitting title for a book. He considered that the copyright contemplated by the Act must

(*a*) *Platt* v. *Walter* (1867), 17 L. T. 157.
(*b*) *Maxwell* v. *Hogg*; *Hogg* v. *Maxwell* (1867), L. R. 2 Ch. Ap. 307: 15 L. T. 201: 15 W. R. 84, 464; 36 L. J. (Ch.) 433; 12 Jur. (N.S.) 916.

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be not in a single word (*a*), 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 (*b*). But his lordship was dealing with a case in which the defendant had nothing but the name, publication not having been effected.

Copyright in a title.

The titles to books, newspapers, and periodicals, though often coming before the courts on the question of copyright therein, seem not to be in themselves the proper subjects of this right. A title is no doubt, in one sense, a part of the work itself, for one cannot read a book or turn over the title-page without finding that the title is at the commencement of the work and sometimes on every page, yet it is rather the index to the whole than part thereof—and certainly when registered before the publication, or perhaps even before the creation of the work whereof it is intended to be the title, could hardly be deemed to be part of the same; and if it were, then as copyright could not subsist in that which has no actual existence, the right to the title would fail on this ground, except it could be argued that the title being part of the work, and the only part in existence, could be registered as having an intrinsic value of its own.

However intimately connected with the copyright in the work to which it is prefixed, the title is more properly a trade-mark (*c*). It is not protected on the ground of any intrinsic merit or value possessed by itself, but, like other trade-marks, is protected for the purpose of insuring the genuineness of the article to which it is attached.

There can be no doubt that there is in a title a right capable of protection, and an asset capable of realization (*d*). The right to use the title to Dickens's periodical 'Household Words' sold for £3550 (*e*).

(*a*) *Chilton* v. *Progress Printing Co.* (1895), 2 Ch. 29; *The Primrose Press Agency Co.* v. *Mark Knowles and others* (1886), 2 T. L. R. 101.

(*b*) See *Maxwell* v. *Hogg*, *supra*; *Licensed Victuallers Newspaper Co.* v. *Bingham* (1888), 38 Ch. D. 139.

(*c*) Lord Cottenham in *Spottiswoode* v. *Clarke* (1844), 2 Ph. 154, seems to have thought that the title-page of an almanack was quite a different thing from a trade-mark, but his reasoning is not convincing, and hardly capable of being sustained in view of subsequent decisions. And in *Mack* v. *Petter* (1872), L. R. 14 Eq. 431, 20 W. R. 961, Lord Romilly used the word "copyright" as applied to the title of a book: "but it is impossible," says V.-C. Bacon in *Kelly* v. *Byles* (1880), 13 Ch. D. at p. 688, "to read his judgment and to doubt that the injunction he granted was to restrain the defendant's colourable imitation of the actual book which the plaintiff had first sent into the world."

(*d*) *Longman* v. *Tripp* (1815), 2 Bos. & P. 67: 9 R. R. 617: Ex parte *Foss* (1858), 2 De G. & J. 230: *Bradbury* v. *Dickens* (1859), 27 Beav. 53.

(*e*) *Bradbury* v. *Dickens*, *supra*.

Titles infringed.

The registered proprietors of 'Bell's Life in London and Sporting Chronicle,' published weekly, at the price of 5*d.*, filed a bill against the proprietors and publishers of a new newspaper, called 'The Penny Bell's Life and Sporting News,' which was published at the price of a penny. The evidence produced showed that from the similarity of the two names mistakes had occurred, and were likely to occur, on the part of the public, and that inquiries had been made at the office of 'Bell's Life in London,' for 'The Penny Bell's Life.' On motion on behalf of the plaintiffs, the Court granted an injunction to restrain the defendants from the use of the words 'Bell's Life' in the title of their newspaper, though no fraudulent intention was proved (*a*). So also in *Ingram* v. *Stiff* (*b*) an injunction was granted by Sir W. P. Wood, V.-C., to restrain the defendant from printing, publishing, or selling any newspaper or other periodical under the name of 'The Daily London Journal,' or under any other name or style of which the words 'London Journal' should form part, and from doing or committing any act or default which might tend to lessen or diminish the sale or circulation of the plaintiff's periodical called 'The London Journal.'

In the case of the *Correspondent Newspaper Company* v. *Saunders* (*c*), where the publishers of 'The Correspondent' newspaper sought to restrain the defendant from publishing another paper under the name of 'The Public Correspondent,' Lord Hathorley, when Vice-Chancellor, after holding that registration of a newspaper was of no avail without actual publication, went on to express a doubt whether in any case registration would protect the title of the paper as being included in the copyright, but did not doubt that a title could be acquired as in a trade-mark.

And in a later case (*d*) the same judge, when Lord Justice, said that there appeared to him to be nothing analogous to copyright in the name of a newspaper; but that the proprietor had a right to prevent any other person from adopting the same name for any other similar publication (*e*).

Where precisely the same title taken.

There are two cases reported of novels with identical titles. In the case of *Weldon* v. *Dicks* (*f*) the plaintiff was the assignee

(*a*) *Clement* v. *Maddick* (1859), 1 Giff. (Ch.) 98; 5 Jur. (N.S.) 592.
(*b*) (1859), 5 Jur. (N.S.) 947.
(*c*) (1865), 13 W. R. 804; 11 Jur. (N.S.) 540.
(*d*) *Kelly* v. *Hutton* (1868), L. R. 3 Ch. 703; 16 W. R. 1182.
(*e*) *Borthwick* v. *The Evening Post* (1888), 37 Ch. 449; *Walter* v. *Emmott* (1885), 54 L. J. (Ch.) 1059, as to which and this subject generally, see chapter Newspapers, *post*.
(*f*) (1878), 10 Ch. D. 247; 27 W. R. 369.

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of the copyright in the 'Parlour Library' series consisting partly of original works, and partly of works which had been previously published. Amongst this series was a novel bearing the title 'Trial and Triumph,' which had been originally published in 1854, in a separate form in three volumes, and re-published in the 'Parlour Library' series in 1860. In 1876 the plaintiff commenced to re-issue the series and was preparing for publication a new edition of 'Trial and Triumph,' which would be shortly published by him at the price of two shillings. The defendant had recently commenced to issue a series of books and novels under the general title of 'Dick's English Novels,' and he had published in such series a novel under the title of 'Trial and Triumph' at the price of sixpence. The plaintiff claimed an injunction to restrain the defendant from publishing or selling any book or publication under that title, and the injunction was granted by Malins, V.-C., though the defendant was in entire ignorance that the title 'Trial and Triumph' had been previously used, and though his work was quite distinct in its plot and subject-matter from the plaintiff's book. The learned judge said: "It is plain that every man who publishes a book under a particular name, the name forming part of the book, has a copyright extending to forty-two years or the life of the author, whichever lasts longest: therefore the author of 'Trial and Triumph' when it was published in 1854 acquired title for that period."(*a*) If, however, the right to the title rested on copyright, it is difficult to see how the defendant had infringed the plaintiff's right, seeing he had never seen or heard of his book; but there are indications in the judgment that the judge granted the injunction also on the ground that the public were likely to be deceived.

The second case of novels with identical titles is *Dicks* v. *Yates* (*b*). There the defendant had published a novel in the 'World,' a sixpenny newspaper, with the title 'Splendid Misery' in ignorance that that was the title of a novel which had appeared a few years before in the plaintiff's periodical 'Every Week,' published at a penny a number. It was, however, proved that, many years before the plaintiff's novel was published, another novel had borne the same title. The Court of Appeal, reversing Bacon, V.-C., refused the plaintiff an injunction, Jessel, M.R., and Lush, L.J., on the ground of lack of

(*a*) 10 Ch. D. at p. 260. Of course, the period is not quite accurately stated by the learned Judge.
(*b*) (1881), 18 Ch. D. 77.

originality or likelihood of mistake on the part of the public, and James, L.J., on the ground that there had been no infringement. "I do not say," said the Master of the Rolls, "that there could not be copyright in a title, as, for instance, in a whole page of title, or something of that kind, requiring invention. However, it is not necessary to decide that. But, assuming that there can be copyright in a title, what does this copyright mean? It means the right of multiplying copies of an original work. If you complain that part of your work has been pirated, you must show that that part is original, and if it is not original, you have no copyright (*a*). How can the title 'Splendid Misery' be said to be original, when the very same words, for the very same purpose, were used nearly eighty years ago?" Later on, however, he stated that it appeared to him that no authority binding on that Court had been produced to show that there could be copyright in such a title as that, and with this opinion Lord Justice James expressed his concurrence, Mr. Justice Lush desiring to keep the point open.

There is, therefore, no express decision that there cannot be copyright in a title, though it must be admitted, the current of authority is in favour of that proposition, at any rate, unless there be ingenuity in the title. The Courts would, however, without doubt, grant an injunction if one person deliberately appropriated the title of a successful novel for the title of his novel (*b*), either on the ground of infringement of copyright, or on the ground that such conduct was evidence of an intention to deceive.

Where exact title not taken.

When the exact title is not copied, an injunction will certainly not be granted unless the title and appearance of the defendant's publication are designed to deceive persons who are ordinarily intelligent and careful. Thus in a case where the well-known title of 'Punch' was taken, with the addition thereto of 'Judy,' although the court held that the defendant would not be at liberty to use 'Punch' singly as a title, yet it refused to restrain the use of a title made up of the two words, on the ground that in combination they did not form such a title as to deceive persons of ordinary intelligence. "The defendants," said Vice-Chancellor Malins, "clearly have no right to use a name which is calculated to mislead or deceive the public in purchasing; and if I thought, on the whole, that their journal

(*a*) But see *Walter* v. *Lane* (1900), A.C. 539 and *ante* p. 30.

(*b*) Thackeray could hardly have had a right to restrain the proprietors of the illustrated paper 'Vanity Fair,' using that title, as being an infringement of his rights in the novel of the same name.

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was calculated to mislead persons of ordinary intelligence (for these are the persons I must consider) I should grant the injunction. Now 'Punch' 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*).

So where the proprietor of the 'Era' newspaper sought to restrain the use of his title with the addition of 'New,' by a rival publication, the Lord Justices reversed the decision of Vice-Chancellor Bacon, and held that there was no ground for granting any 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 is, and what it seeks to imitate?"

Again, the proprietors of the old-established 'Mail,' published at 11 A.M. three days a week at the price of twopence, were refused an interlocutory injunction to restrain the publication at 3 A.M. daily of a halfpenny paper entitled the 'Morning Mail'; but this was expressly without prejudice to what might be done at the hearing of the action (*b*).

The law on this subject cannot be considered to be in a satisfactory state, for it is perfectly clear that a publication may be seriously injured by the similarity of name of a rival publication, without the wrappers or general style or appearance being in any way copied. Thousands of copies are purchased through advertisements, and without the purchaser until delivery seeing the subject of his purchase. The hardship is increased when it is remembered that to obtain a right to the title of his publication, a proprietor will have to prove that it has been in the market long enough to acquire a public reputation (*c*).

Where necessary to show fraud.

It is usually considered that as the injury caused by the infringement is an injury to property, it is not necessary to prove fraudulent intent. This is true so far as it goes, but at the same time it must be remembered that unless fraud in a sense is proved, or at least a probability of deception or

(*a*) *Bradbury* v. *Beeton* (1869), 18 W. R. 33; 39 L. J. Ch. 57: 21 L. T. 323.
(*b*) *Walter* v. *Emmott* (1885), 54 L. J. Ch. 1059. cf. *Borthwick* v. *Evening Post* (1888), 37 Ch. D. 449; *Walter* v. *Head* (1881), 25 Sol. J. 757; *Cowen* v. *Hulton* (1882), 46 L. T. 897; *Reed* v. *O'Meara* (1888), 21 L. R. Ir. 216.
(*c*) *Licensed Victuallers Newspaper* v. *Bingham* (1888), 38 Ch. D. 139.

imposition on the public is established (*a*) and of injury to himself (*b*), a plaintiff cannot well succeed. Where there is a close resemblance in general style and arrangement of the contents of the book itself (*c*), or a claim of certain attributes which are known to belong to the original work (*d*), or a sudden change from an unobjectionable title, style of publication, and arrangement of contents to a style more closely resembling the plaintiff's (*e*), an intention to deceive may be established.

Thus in *Hogg* v. *Kirby* (*f*) the proprietor of 'The Wonderful Magazine' succeeded in stopping the publication of 'The Wonderful Magazine, New Series, Improved.' So in *Chappell* v. *Sheard* (*g*), and *Chappell* v. *Davidson* (*h*), where the plaintiff's song was entitled 'Minnie,' and those of the respective defendants 'Minnie Dale,' and 'Minnie, Dear Minnie'; and where the purchaser of 'The Britannia' newspaper incorporated it with the 'John Bull,' under the name of 'The John Bull and Britannia,' and the former publisher of 'The Britannia' began to publish 'The True Britannia' (*i*), injunctions were issued.

Taking a part of title without fraud.

But, as already stated, the taking of *part of the title* of a registered work without fraud, and without any circumstances from which an *animus furandi* could be inferred, and where no deception is to be apprehended, will not be deemed an offence, and this is well illustrated by a case in which the proprietor of a book entitled 'Post Office Directory of West Riding of Yorkshire,' which included the town of Bradford, sought to restrain the intended publication by the defendants of a directory of Bradford with the words 'Post Office' forming part of the title. It appeared that many years ago an officer of the London Post Office published, with the assistance of the letter carriers, a directory which he called 'Post Office' Directory. Subsequently a brother of the plaintiff became the publisher and proprietor of the work, which was carried on by him till 1846, with the assistance of the letter carriers as before. After 1846 the plaintiff's brother was prohibited by the Post Office authorities from employing the letter carriers, and he

(*a*) See *Hall* v. *Barrows* (1863), 4 De G. J. & S. 150; 12 W. R. 322; *Chappell* v. *Davidson* (1855), 2 K. & J. 123.

(*b*) *Borthwick* v. *Evening Post*, *ubi sup.*

(*c*) *Mack* v. *Petter* (1872), L. R. 14 Eq. 431; 20 W. R. 964; *Corns* v. *Griffiths*, W. N. (1873), 93.

(*d*) *Chappell* v. *Sheard* (1855), 2 K. & J. 117.

(*e*) *Corns* v. *Griffiths*, *supra*. *Metzler* v. *Wood* (1878), 8 Ch. D. 606; 26 W. R. 577.

(*f*) (1803), 8 Ves. 215. (*g*) *Supra*. (*h*) *Supra*.

(*i*) *Prowett* v. *Mortimer* (1856), 4 W. R. 519; 27 L. T. 132; see *Edmonds* v. *Benbow* (1821), Seton on Decrees, 6th Ed. 629.

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thereupon employed a large staff of private agents to obtain the information necessary for the continuance of his directory, which was still called the 'Post Office' Directory. In 1852 the plaintiff began publishing country directories, making use of his brother's staff of agents, and, with his brother's consent, called his directories 'Post Office' Directories. The plaintiff alleged that his directories were distinguished and known in the trade and to the public as 'Post Office Directories,' and that the term 'Post Office' was a very valuable trade distinction. The defendants had received assistance of the postmaster at Bradford, and it was not alleged that there had been any copying or colourable imitation of any part of the text of the plaintiff's work, neither was there any similarity in price or appearance between the two directories, and the only question was as to the plaintiff's exclusive right to the use of the word 'Post Office' as applied to directories. Vice-Chancellor Bacon was of opinion that to support a claim to restrain the use by another of a name on the ground of it being a *quasi* trademark, it was necessary to show that the wares offered for sale were so nearly identical that the use of the particular trademark or name might mislead unwary purchasers. He considered that the defendants were clearly entitled to publish a directory of Bradford, and as no person wishing to possess the plaintiff's 'Post Office Directory for the West Riding of Yorkshire' could be misled or deceived into buying the defendant's 'Post Office Bradford Directory, judgment must be given for the defendants (*a*), and on appeal the court affirmed the judgment of the Vice-Chancellor (*b*).

Assuming title which

Should a periodical change its name for another, there

(*a*) *Kelly* v. *Byles* (1880), 13 Ch. Div. 682; see *Barnard* v. *Pillow*, W. N. (1868), 94; *Snowden* v. *Noah*, Hopk. (Amer.) 347; *Bell* v. *Locke*, 8 Paige (Amer.) 75; *Stephens* v. *De Cento*, 30 N. Y. Sup. Ct. 343: *Talbot* v. *Moore*, 13 N. Y. Sup. Ct. 106.

(*b*) *Jollie* v. *Jaques*, 1 Bl. C. C. (Amer.) 618, was a suit to restrain an imitation of a musical composition entitled 'The Serious Family Polka'; it having been decided that the plaintiff's claim to copyright could not be supported, it was held that the plaintiff not being entitled to the copyright in the composition, he was not entitled to protection in respect of the title. Nelson, J., said, "The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it, as certainly as the principal carries with it the incident." So in another American case, where the plaintiffs were the proprietors and publishers of a monthly magazine for the young, published at Boston, Mass., under the title 'Our Young Folks; an Illustrated Magazine for Boys and Girls,' and the defendant began to advertise and publish, and sell at Augusta, Maine, a fortnightly illustrated paper for the young, under the title 'Our Young Folks' Illustrated Paper.' A suit being instituted for an injunction to restrain the defendant from using the words 'Our Young Folks' as the title of the publication, the Court 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 not having been infringed, that in the title had not been: *Osgood* v. *Allen*, 1 Holmes (Amer.) 185; 6 Am. L. T. 20.

would be no ground for preventing another periodical assuming the name which has been thus cast off, after a reasonable lapse of time, provided the latter periodical did not hold out to the world as a continuation of the periodical whose title it had adopted (*a*). CAP. II. has been disused.

Copyright in translations.

Copyright may exist in a translation, whether it be the result of personal application and expense, or donation (*b*). In the case of *Wyatt* v. *Barnard* (*c*), Lord Eldon states this to be the law: The plaintiff was the proprietor of a periodical called 'The Repository of Arts, Manufacture, and Agriculture.' He claimed the sole copyright of the work, containing, amongst other articles, translations from foreign languages. The defendants were publishers of another periodical which contained various articles, being translations from foreign languages, copied or taken from the plaintiff's work without his consent. The defendants, by their affidavit, stated that it was the usual practice among publishers of magazines, &c., to take from each other articles translated from foreign languages, or become public property by reason of their having appeared in other works. They relied on the custom of the trade and contended that neither of the works was original, both being mere compilations; that it had never been decided that a translator might have a copyright in a translation, supposing, what was not proved, that these translations were made by the plaintiff himself. The Lord Chancellor said that the custom among booksellers could not control the law; and upon an affidavit stating that all the articles were translated by a person employed and paid by the plaintiff, and were translated from foreign books imported by the plaintiff at considerable expense, his Lordship granted an injunction (*d*).

The work from which the translation was taken in the present case was, of course, unprotected by the copyright law in existence here, and the cases which have treated translations from foreign works, having no copyright in this country, as original, would not necessarily form a precedent in the case of a translation of an English copyright work. But in the case above cited, Lord Eldon drew no distinction between translations

Every fair translation

(*a*) The *Cour Royale* at Paris in 1831 sanctioned the publication of a journal under the title of *Gazette de Santé*, which another journal had formerly borne, but which it had for seven months abandoned for the title *Gazette Médicale de Paris*. Renouard, tom. 2, p. 128, cited Curtis on Copy. 297.

(*b*) *Wyatt* v. *Barnard* (1814), 3 V. & B. 77. If a foreigner translates an English work, and then an Englishman re-translates the foreign work into English, that is an infringement of the original copyright: *Murray* v. *Bogue* (1852), 17 Jur. 219: 1 Drew. 353; 22 L. J. (Ch.) 457.

(*c*) *Supra*. *Vide Stowe* v. *Thomas*, 2 Amer. L. Reg. 231.

(*d*) See per North, J., *Walter* v. *Lane* (1899), 2 Ch. at p. 758.

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an original work.

of works unprotected and those protected in this country, indeed it was not necessary to do so for the decision of the point involved in the case before him. This case is sometimes cited for the purpose of showing that every translation is an original work and entitled to protection, whether made from an unprotected or a protected work. But it does not go to this extent, and notwithstanding the dicta of Mr. Justice Yates, in *Millar* v. *Taylor* (*a*), and Lord Macclesfield, in *Burnett* v. *Chetwood* (*b*), and of the late Lord Justice Knight Bruce, when Vice-Chancellor (*c*), it appears to be the better opinion that a work in which copyright is still subsisting cannot be translated without the consent of the proprietor of the copyright. Lord Justice Knight Bruce, in the well-known case of *Prince Albert* v. *Strange* (*d*), thought that a work lawfully published, in the popular sense of the term, stood in this respect differently from a work which had never been in that situation. The former was liable to be translated, abridged, analyzed, exhibited in morsels, complemented, and otherwise treated in a manner that the latter was not. There has been a decision in America in accordance with the opinion of Lord Justice Knight Bruce (*e*), but it is not likely to be followed in this country. It is unsupported by authority and opposed to the principles of the copyright law (*f*).

Provisions of International Copyright Act, 1886, as to translations.

By the International Copyright Act, 1886 (49 & 50 Vict. c. 33, s. 5), where a work being a book or dramatic piece is first produced in a foreign country to which an order in council under the International Copyright Acts applies, the author or publisher as the case may be, shall, unless otherwise directed by the order, have the same right of preventing the production in and importation into the United Kingdom of any translation not authorized by him of the said work as he has of preventing the production and importation of the original work. Provided that if after the expiration of ten years or any other term prescribed by the order next after the end of the year in which the work, or in the case of a book published in numbers, each number of the book was first produced, an authorised translation in the English language of such work or numbers has not been produced, the said right to prevent the production in and

(*a*) (1769), 4 Burr. 2348.
(*b*) 2 Mer. 141. (*c*) *Prince Albert* v. *Strange* (1849), 2 De G. & Sm. 693.
(*d*) *Supra*.
(*e*) *Stowe* v. *Thomas*, 2 Wall. Jr. 547; 2 Am. Law Reg. 210; but see, now, Revised Statutes (Amer.), sect. 4952, Act of 1891.
(*f*) But in India it has been held that a translation is not an infringement of copyright. *MacMillan* v. *Shamsull* (1895), 19 Indian L. R. (Bombay) 557.

importation into the United Kingdom of an unauthorised translation of such work shall cease. And it is also declared that the law relating to copyright, including the International Copyright Act, 1886, shall apply to a lawfully produced translation of a work in like manner as if it were an original work (*a*).

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

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

The property here referred to is that consisting in the right to take the profits of the work when published. But in *Southey* v. *Sherwood* (*d*) Lord Eldon seems to have carried the rule still further, and refused to admit a right in the author of a work of a non-innocent nature to the possession and control of his manuscript. He appears to have overlooked the fact that the law recognised two kinds or degrees of property in a literary work. There is a right of property which consists in the right to take the profits of a book when published; and there is also a right to the exclusive possession and control of a manuscript, or the right to publish or to withhold from publication altogether (*e*).

"The first of these rights," says Mr. Curtis, in his examination of Lord Eldon's judgment in the last-mentioned case (*f*), "depends now in England and in America upon statute. The other is a right at common law, independent of the property created or recognised by statute. The law of England has never said that an author has no property in his manuscript *qua* manuscript, or in the ideas and sentiments written upon it before publication. If it had, it would only be necessary to

(*a*) See International Copyright, *post*.

(*b*) *Stockdale* v. *Onwhyn* (1826), 5 B. & C. 173; 7 D. & R. 625; 29 R. R. 207; *Hime* v. *Dale* (1803), cited, 2 Camp. 28; *Walcot* v. *Walker* (1802), 7 Ves. 1; *Poplett* v. *Stockdale* (1825), 1 Ryan & M. 337; *Gee* v. *Pritchard* (1818), 2 Swans. 113; *Southey* v. *Sherwood* (1817), 2 Mer. 435; *Murray* v. *Benbow* (1822), 1 Jac. 474; *Lawrence* v. *Smith*, *ibid.* 471; *Fores* v. *Johnes* (1802), 4 Esp. 97; *Gale* v. *Leckie* (1817), 2 Stark. N. P. C. 107; and see an article in 'Quarterly Review' for April 1822, and 'Blackwood's Magazine' for July 1822; *Dodson* v. *Martin*, Sol. Journ. 29th of May 1880, 572. The principal has recently been recognized in the case of *Bauchet* v. *London Illustrated Standard Co.* (1900), 1 Ch. 73, where the Court of Appeal refused to protect two indecent pictures.

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

(*d*) (1817), 2 Mer. 435.

(*e*) See *Wheaton* v. *Peters* (1834), 8 Peters, S. C. R. (Amer.) 591; cited Curtis Copy. 158.

(*f*) Copyright, p. 158.

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steal a manuscript in order to be able to print it with impunity; and the author could only take the profits, or obtain an injunction by showing that he himself intended to publish and to take the profits. It has long been settled, however, that the author and proprietor of a manuscript has the sole dominion over it, and may obtain an injunction to prevent its publication by another: and in no case has it been considered that his right depends on his intention to publish and to make a profit. But the cases proceed upon the ground of *a right of property*: and what seems to be intended by this is a right to the possession and control of the manuscript, and to publish or to withhold from publication. In the great case of *Donaldson* v. *Becket*, in the House of Lords, in which the perpetual right of authors after publication was held to have been taken away by the Act of Anne, eleven of the judges (including those who decided against some of the claims of authors) affirmed the sole right and dominion of an author over his own manuscript, as a right at common law. When, therefore, an author has not published, or does not intend to publish a work existing in manuscript, but on the contrary desires and intends to withhold it from publication, the question as to its innocence cannot arise, because that question, according to principle and the decisions, affects only so much of his right of property as consists in the right to take the profits of the publication. It is in this sense that the law declares there can be no property in an immoral, irreligious, or seditious publication; and not that there can be no right to the exclusive possession and control of whatever a man writes, before publication, unless it be innocent."

Lord Eldon's decision in *Southey* v. *Sherwood* has been severely critised by Lord Campbell, who states that in consequence of the refusal of the injunction asked for, hundreds of thousands of copies of 'Wat Tyler,' the poem the publication of which was sought to be restrained, at the price of one penny were circulated over the kingdom (*a*).

Argument in favour of protecting such work.

Not to protect such works, it has been argued, is to increase the circulation by allowing the publication of pirated editions; but it is an open question whether the circulation is not more effectually restrained by holding that there can be no property in such a work, than by protecting it; for the inducement to the publisher will be less if other persons may copy and publish *ad infinitum*.

Answer thereto.

In answer to the remark, that by refusing to interfere in

(*a*) 'Lives of Chancellors,' vol. 10, p. 254 (4th Ed.).

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

Dr. Priestley's case.

The first case establishing the doctrine that there could not be property in a work of the above description, is that known as Dr. Priestley's. The plaintiff brought an action against the hundred to recover damages for injury sustained by him in consequence of the riotous proceedings of a mob at Birmingham, and, among other property alleged to have been destroyed, claimed compensation for the loss of certain unpublished manuscripts, offering to produce booksellers as witnesses to prove that they would have given considerable sums for them. On behalf of the hundred it was alleged that the plaintiff was in the habit of publishing works injurious to the government of the State; but no evidence was produced to that effect. Upon this the Lord Chief Justice Eyre remarked, that if any such evidence had been produced, he should have held it was fit to be received as against the claim made by the plaintiff. Several passages were read from the work itself in support of the charge as to its tendency (*c*).

Though Lord Eldon appears to base his decision in *Southey* v. *Sherwood* upon this case before Lord Chief Justice Eyre, yet

(*a*) *Vide* 7 Ves. 2; 2 Mer. 438; 2 Swans. 413; 1 Jac. 473.
(*b*) Jer. Eq. Jur. bk. 3, ch. 2.
(*c*) See 2 Mer. 437.

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it will be at once perceived that there is a material difference between them, for in the case before Lord Eldon, Southey claimed the right to prevent publication, whereas in the case before Lord Chief Justice Eyre, Dr. Priestley sued for the loss of profits, which he alleged he might have realised by publication—a point to which he never could have lawfully proceeded.

No copyright in a work of an irreligious tendency.

The above cases were followed in *Walcot* (*Peter Pindar*) v. *Walker* (*a*), and in *Lawrence* v. *Smith* (*b*). In the latter case the doctrine was carried very far. The plaintiff having published a work under the title of 'Lectures on Physiology, Zoology, and the Natural History of Man,' filed a bill to restrain the defendant from selling a pirated edition, and obtained an injunction upon motion made *ex parte*. The defendants then moved to dissolve the injunction, and argued that the nature and general tendency of the work in question was such that it could not be the subject of copyright, and in support of this argument several passages in it were referred to, which, it was contended, were hostile to natural and revealed religion, and impugned the doctrines of the immateriality and immortality of the soul. Lord Eldon, in dissolving the injunction, said: "Looking at the general tenor of the work, and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the Scripture, considering that the law does not give protection to those who contradict Scripture (*c*), and entertaining a doubt, I think a rational doubt, whether this book does not violate the law, I cannot continue the injunction. The plaintiff may bring an action, and when that is decided, he may apply again." From a note by the editor, we learn that in 1822, in *Murray* v. *Benbow*, Mr. Shadwell, on the part of the plaintiff, moved for an injunction to restrain the defendants from publishing a pirated edition of Lord Byron's poem of 'Cain.' The Lord Chancellor, after reading the work, refused the motion, on grounds similar to those stated in the above judgment. He said "that the Court of Chancery, like other courts of justice in this country, acknowledged Christianity as part of the law of the land; that the jurisdiction of the court in protecting literary property was founded on this: that, where an action would lie for pirating a work, then the court, attending to the

(*a*) (1802), 7 Ves. 1. See *Stockdale* v. *Onhwyn* (1826). 5 B. & C. 173; *Poplett* v. *Stockdale* (1825). Ry. & M. 337.

(*b*) (1822), 1 Jac. 171; 23 R. R. 123.

(*c*) "Christianity is part and parcel of the law of the land:" Kelly, C.B., in *Cowan* v. *Milbourn* (1867), L. R. 2 Ex. 230.

imperfection of that remedy, granted its injunction, because there might be publication after publication, which one might never be able to hunt down by proceeding in other courts. But where such an action did not lie, he did not apprehend that it was according to the course of the court to grant an injunction to protect the copyright. That the publication, if it were one intended to vilify and bring into discredit that portion of Scripture history to which it related, was a publication with reference to which, if the principles on which that case at Warwick (Dr. Priestley's) was decided were just principles of law, the party could not recover damages in respect of a piracy of it. That the court had no criminal jurisdiction: it could not look on anything as an offence; but in those cases it only administered justice for the protection of the civil rights of those who possessed them, in consequence of being able to maintain an action. Milton's immortal work had been alluded to; it so happened that in the course of the previous long vacation, amongst the *solicita jucunda oblicia vitæ*, he had read that work from beginning to end; it was therefore quite fresh in his memory, and it appeared to him that the great object of its author was to promote the cause of Christianity; there were, undoubtedly, a great many passages in it of which, if that were not its object, it would be very improper by law to vindicate the publication; but, taking it altogether, it was clear that the object and effect were not to bring into disrepute, but to promote, the reverence of our religion. That the real question was, looking at the work before him, its preface, the poem, its manner of treating the subject, particularly with reference to the Fall and the Atonement, whether its intent was as innocent as that of the other with which it had been compared; or whether it was to traduce and bring into discredit that part of sacred history. This question he had no right to try, because it had been settled, after great difference of opinion among the learned, that it was for a jury to determine that point; and where, therefore, a reasonable doubt was entertained as to the character of the work (and it was impossible for him to say he had not a doubt, he hoped it was a reasonable one), another course should be taken for determining what was its true nature and character" (*a*).

In a case which came before the Vice-Chancellor in 1823, 'Don Juan.' an injunction which had been obtained to restrain the publication of a pirated edition of a portion of the poem of

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

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'Don Juan,' was dissolved on a similar principle. His Honour ordered that the defendant should keep an account.

Referring to Lord Eldon's decisions in the above cases, Mr. Justice Story says: "The soundness of the general principle can hardly admit of question. The chief embarrassment and difficulty lie in the application of it to particular cases. If a court of equity, under colour of its general authority, is to enter upon all the moral, theological, metaphysical, and political inquiries, which in the past times have given rise to so many controversies, and in the future may well be supposed to provoke many heated discussions, and if it is to decide dogmatically upon the character and bearing of such discussions, and the rights of authors growing out of them; it is obvious that an absolute power is conferred over the subject of literary property, which may sap the very foundations on which it rests, and retard, if not entirely suppress, the means of arriving at physical as well as at metaphysical truths. Thus, for example, a judge who should happen to believe that the immateriality of the soul, as well as its immortality, was a doctrine clearly revealed in the Scriptures (a point upon which very learned and pious minds have been greatly divided), would deem any work anti-christian which should profess to deny that point, and would refuse an injunction to protect it. So, a judge who should be a Trinitarian might most conscientiously decide against granting an injunction in favour of an author enforcing Unitarian views; when another judge, of opposite opinions, might not hesitate to grant it" (*a*).

'Life of Jesus.'

The very case surmised by Mr. Justice Story arose in the year 1874 in the Scotch Courts. A work entitled 'The Life of Jesus re-written for Young Disciples,' by Mr. Page Hopps, Unitarian minister, Glasgow, was published by Messrs. Trübner & Co., London, at 1*s.* a copy. The defendant, Harry Alfred Long, Protestant missionary, about a year after its appearance, issued a review containing the whole of Mr. Hopps's book, with notes and criticisms attached to each chapter, and this publication was sold at 6*d.* Hopps applied for an interim interdict, which being granted, he subsequently sought to have it declared perpetual. The plea put forward by the defendant was that the pursuer could not claim the protection of the law for the book, as it was blasphemous and heretical, denying tacitly or expressly the divinity of Christ. To this the pursuer replied that apart from the fact

(*a*) 2 Story's Eq. Jur., p. 938.

that it was written by a Unitarian, and set forth the Unitarian view of the Saviour's life, a more unobjectionable book did not exist. Mr. Sheriff Buntine, of the Sheriff's Court of Lanarkshire, declared the interdict perpetual, and found Long liable in expenses, holding that, though the doctrine that Jesus Christ is the second person of the Trinity is statute law, yet the public are entitled to criticise and controvert any part of the statute law, provided they do it in such a way as not to endanger the public peace, safety, or morality. Mr. Hopps. the sheriff considered, violated none of these conditions, and was entitled to the protection of the law.

No copyright in a work of a scandalous nature.

In the case of *Hime* v. *Dale*, referred to in *Clementi* v. *Goulding* (*a*), counsel called attention to the libellous nature of the publication, and contended that it was of such a description that it could not receive the protection of the law. Lord Ellenborough, however, stated that though if the composition had appeared on the face of it to be a libel so gross as to affect the public morals, he should advise the jury to give no damages, as he knew the Court of Chancery on such an occasion would grant no injunction, yet he thought the particular publication ought not to be considered one of that kind. But in another case (*b*) where an action was brought for the purpose of recovering compensation in damages for the loss alleged to have been sustained by the publication of a copy of a book which had been first published by the plaintiff; and at the trial it was proved that the work was the memoir of Harriette Wilson, which professed to be a history of the amours of a courtezan, that it contained in some parts matter highly indecent, and in others matter of a slanderous nature upon persons named in the book, Abbott, C.J., directed a nonsuit, and in refusing a rule nisi for a new trial said: "In order to establish such a claim (*i.e.*, to compensation for infringement of his copyright), he must, in the first place, show a right to sell, for if he has not that right, he cannot sustain any loss by an injury to the sale. Now I am certain no lawyer can say that the sale of each copy of this work is not an offence against the law. How then can we hold that by the first publication of such a work a right of action can be given against any person who afterwards publishes it? It is said

(*a*) (1803), 2 Camp. 27.

(*b*) *Stockdale* v. *Onhuyn* (1826), 5 B. & C. 173; 29 R. R. 207; see *Poplett* v. *Stockdale* (1825), Ry. & M. 337, where it was held that the printer of the work, the subject of the last case, could not maintain an action for his bill against the publisher who employed him. Best, C.J., said the defendant was equally guilty with the plaintiff, but that he would not, as Lord Kenyon once said, sit to take an account between two robbers on Hounslow Heath.

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that there is no decision of a court of law against the plaintiff's claim. But upon the plainest principles of the common law, founded as it is, where there are no authorities, upon common sense and justice, this action cannot be maintained. It would be a disgrace to the common law could a doubt be entertained upon the subject, but I think that no doubt can be entertained, and I want no authority for pronouncing such a judicial opinion."

No copyright in works intended to deceive the public.

Neither can there be copyright in works intended to deceive purchasers, and therefore, in an action for pirating a work of a devotional character, falsely professing to be a translation from the German, of an author who had a high reputation for writings of this kind, the object being to deceive purchasers, and give the work a value which it would not otherwise have possessed, judgment was given for the defendants. Chief Justice Tindal, in the case referred to (*a*), drew a distinction between such a work and books of instruction or amusement which have been published as translations, whilst they have, in fact, been original works, or which have been published under an assumed instead of a true name. Such, for instance, as 'The Castle of Otranto,' professing to be translated from the Italian, and such the case of innumerable works published under assumed names—voyages, travels, biographies, works of fiction or romance, and even works of science and instruction; for, in all these instances the misrepresentation is innocent and harmless. But the facts stated in the pleas in the case under consideration imported a serious design on the part of the plaintiff to impose on the credulity of each purchaser, by fixing on the name of an author who had a real existence, and who possessed a large share of weight and estimation in the opinion of the public. The object of the plaintiff was, not merely to conceal the name of the genuine author, and to publish opinions to the world under an innocent disguise, but it was to practise upon some of the best feelings of the public, namely, their religious feelings; and thus to induce them to believe that the work was the original work of the author whom he named, when he knew it not to be so. The transaction, therefore, ranged itself under the head of *crimen falsi*. It was a species of obtaining money under false pretences; and as the very act of publishing the work, and the sale of the copies to each individual purchaser, were each liable to the objection above stated, the Chief Justice thought the plaintiff could not be considered as having a valid

(*a*) *Wright* v. *Tallis* (1845), 1 C. B. 893; 14 L. J. (C.P.) 283: 9 Jur. 916.

and subsisting copyright in the work, the sale of which produced such consequences, or that he was capable of maintaining an action in respect of its infringement. Cases in which a copyright has been held not to subsist, where the work is one which is subversive of good order, morality, or religion, did not bear, he thought, on the case before him, but they had so far analogy, that the rule which denied the existence of copyright in those cases, was the rule established for the benefit and protection of the public (*a*).

So decided on the ground of fraud.

This decision proceeded more on the ground of fraud than invasion of literary property, and to the principle of this decision may also be referred the case of *Seeley* v. *Fisher* (*b*), where an injunction was granted to restrain A. from putting forth his work under advertisements which the court below thought tended to produce the impression, contrary to the truth, that it contained matter which was in fact the property of B. But if there be no such fraudulent misrepresentation, but only statements which, whether true or false, tend merely to encourage a belief that the matter contained in A.'s work is truly valuable matter, and that contained in B.'s is spurious and of no value, an injunction will not be granted to restrain such representations; and on the ground that such was the true effect of the advertisements, in the last cited case, the Lord Chancellor dissolved the injunction.

Where the plaintiff was the well-known writer and com-

(*a*) In a suspension and interdict brought to prevent infringement of the copyright of a book of designs for trade circulation, the complainers stated that they were a firm of artistic ironfounders, that they had prepared for gratuitous circulation, and had entered at Stationers' Hall, a book containing some 3500 designs of goods supplied by them, and that the respondents had violated the complainers' copyright by publishing a similar book containing a material portion of the designs in the complainers' book. The respondents in answer stated, *inter alia*, that the complainers' book contained many statements which to the knowledge of the complainers were untrue, were intended to mislead the public, and were contrary to public policy, in particular that the complainers had in their book untruly described as "registered" and "patent," and advertised for sale as "registered" and "patent," designs and articles which had never been registered or patented, or of which the registration or patent had expired before the publication of the complainers' book, or which had been improperly registered and patented. Eight instances were given of designs represented as registered which had never been registered, and twenty-eight of designs which had ceased to be registered, and a large number of instances of each of the other classes of alleged misrepresentation were also given. On these averments the respondents pleaded that the complainers having thus fraudulently and wrongfully violated the statutes dealing with the copyright and registration of designs, their book was not entitled to the protection of the Court. It was held that it was no answer to an action to prevent infringement of the copyright in a book that its author had in some incidental cases made such mistakes as might involve him in a penalty under the Copyright of Designs Act, and that as the respondents' averments did not raise the case of a book calculated to make money by misrepresentation, or which had something connected with its publication against public morals, these averments were irrelevant. *Macfarlane & Co.* v. *Oak Foundry Co.*, March 16, 1883, 10 R. 801.

(*b*) (1841), 11 Sim. 581.

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poser of songs and music called 'Claribel,' the defendants were the music publishers carrying on business under the name of "Sinclair and Co.," and it appeared that four songs named respectively 'Under the Willows,' 'Spinning by her Cottage Door,' 'I'll cast my Rose on the Waters,' and 'Spring Carol,' the words only of which were written by 'Claribel,' had been published and sold by the defendants, with the name of 'Claribel' appearing on them thus "'Under the Willows,' song written by Claribel," no mention being made of the name of the composer of the music of the song; and it was contended by the plaintiff that the above mode of publication was intended to deceive, and had deceived, people into the belief that not merely the words, but also the music of these songs was by 'Claribel,' and he prayed that the defendant might be restrained from so publishing; the Master of the Rolls held that the injunction must be refused, as he was of opinion that the words "written by" referred only to the words of the songs, and did not mean "written and composed," and that ordinary purchasers using ordinary caution could not be deceived into thinking that the music was composed by 'Claribel' (*a*).

But where a publisher advertised for sale certain poems, which he represented to be the work of Lord Byron, who was abroad, an injunction was granted until answer or further order to restrain the publication, Lord Byron's agents deposing to their belief that the poems were not Lord Byron's work and to circumstances rendering it highly improbable that they were so, and the defendant refusing to swear to his belief that they were written by Lord Byron (*b*).

(*a*) *Barnard* v. *Pillow*, W. N. (1868). 94.
(*b*) *Lord Byron* v. *Johnston* (1816), 2 Meriv. 29; 16 R. R. 135.

CHAPTER III.

TERM OF COPYRIGHT, AND IN WHOM VESTED.

Term of copyright.

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

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

Considerations respecting a perpetuity in copyright.

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The effect of a perpetuity in copyright.

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

The Emperor Napoleon's opinion of a perpetuity.

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

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

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

Again, it would seem to us most unfortunate if legislation were to render it impossible for anybody to reproduce an old book with annotations.

Those who argue in favour of a restricted period for copyright, speak of it as a monopoly: whilst upholders of copyright in perpetuity speak of the author's right to prevent others multiplying copies of his work as a right of property. But those who argue upon the basis of property appear sometimes to overlook the fact that a book is also property and that, by the common law, the owner of a chattel has absolute dominion

(*a*) Locré, *Législation civile de la France*, tit. ix. pp. 17–19; Renouard, *Droits d'Auteurs*, tom. 2, p. 387.

over it; but the copyright laws, in effect, restrict this absolute dominion in the case of a purchaser of a book the term of copyright in which has not expired. In truth, the controversy is not one that can be decided by a mere phrase, but by a consideration of what protection an author can reasonably demand to ensure an adequate return for his labours, it being generally admitted that literature cannot, in these days, be expected to flourish in a country possessing lax, or insufficient, copyright laws (*a*).

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

Present term of copyright.

The 3rd section of the 5 & 6 Vict. c. 45, enacts that the copyright in every book which shall after the passing of that Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns; provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years.

Posthumous works

The copyright in every book which shall be published after the death of its author is, by the same section, to endure for the term of forty-two years from the first publication thereof, and to be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns.

Collaborations.

In the case of works written in collaboration, it is probable that the term is forty-two years, or seven years from the death of the longest liver, whichever period shall be the longer. There is no express provision in the statute to this effect, but, by virtue of section 2, the word "author" is to include "authors"; and a work could not well be partly in the public domain, and partly in the private (*b*).

As to copyright subsisting at the

In case of books published before the passing of the Act and in which copyright then subsisted, the 4th section provides

(*a*) Perpetual copyright is at the present day conceded only in Guatemala, Mexico, and Venezuela, countries which have not generally been considered pioneers in civilization.

(*b*) There is a decision in France in accordance with this opinion. Trib. civ. Seine, 7 April, 1869, Aymat-Dignat, Pataille, 69, 252. Pouillet (2nd. Ed.), p. 160, cf. *Hole* v. *Bradbury* (1879), 12 Ch. D. 886. It might, however, be contended that as copyright is conferred on an "author," which includes "authors," the term is during the joint lives and seven years after.

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time of passing of Copyright Act, 1842.

that the copyright shall be extended and endure for the full term provided by the Act in cases of books thereafter published, and shall be the property of the person who at the time of the passing of the Act shall be the proprietor of such copyright. But it is further provided that in all cases in which such copyright shall belong in whole or in part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by the Act, but shall endure for the term which shall subsist therein at the time of the passing of the Act, and no longer, unless the author of such book if he shall be living, or his personal representative if he shall be dead, and the proprietor of such copyright, shall before the expiration of such term consent to accept the benefits of the Act in respect of such book, and shall cause a minute of such consent in the form in that behalf given in the schedule to the Act to be entered in the registry at Stationers' Hall, in which case such copyright shall endure for the full term provided in cases of books published after the passing of the Act, and shall be the property of such person or persons as in such minute shall be expressed (*a*).

Judicial Committee of Privy Council may license republication of certain books.

The 5th section, in order to provide against the suppression of books of importance to the public, provides that the Judicial Committee of Her Majesty's Privy Council may, on complaint made to them that the proprietor of the copyright in any book after the death of its author has refused to republish or to allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, grant a licence to such complainant to publish such book, in such manner and subject to such conditions as they may think fit (*b*).

Meaning of the word "book."

The term "book" by virtue of the interpretation clause is to be construed to signify and include every volume, part, or division of a volume (*c*), a pamphlet, sheet of letter-

(*a*) See *Marzials* v. *Gibbons* (1874), L. R. 9 Ch. App. 58.

(*b*) This section seems to have been put in force with regard to Sir Kenelm Digby's 'Broadstone of Honour.'

The Royal Commissioners in their report on copyright recommend that the term shall be for life and thirty years from his death in cases of books published in the author's lifetime and with his name; and for thirty years from the date of the deposit of the book for the use of the British Museum as to works published anonymously or after the death of their authors, and as to cyclopædias; but that if the author of an anonymous work publishes in his lifetime an edition bearing his name he should be entitled to copyright therein for his life and thirty years after his death.

(*c*) See the *University of Cambridge* v. *Bryer* (1812), 16 East, 317; *The British Museum* v. *Payne* (1828), 2 Y. & J. 166; *Clayton* v. *Stone*, 2 Paine (Amer.) 383; *Scoville* v. *Toland*, 6 West L. J. (Amer.) 84. But a label used in the sale of an

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

What is a publication?

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

Gratuitous circulation when a publication.

A presentation of copies, on the part of the author, may not amount to a publication, but the gratuitous circulation generally would seem to be so (*f*).

Abbott, C.J., in *White* v. *Geroch* (*g*), considered that a *sale* of copies of a work in manuscript amounted to a *publication* of the work from which the statutory period would commence to run, and, referring to this opinion, Mr. Sweet, in his notes to Bythewood and Jarman's Conveyancing (*h*), says "this construction, if well founded, would apply to the recent Act." He admits there is no direct authority on the point; but he states

article is not a book: *Clifton* v. *Brunton*, 1 McLean (Amer.) 517; see *ante*, p. 36.

(*a*) See *Clementi* v. *Goulding* (1809), 2 Camp. 25; 11 East, 244; *Hime* v. *Dale* (1803), 2 Camp. 27 a; *White* v. *Geroch* (1819), 2 B. & Ald. 298; *Davis* v. *Comitti* (1885), 1 T. L. R. 216; *Hollinrake* v. *Truswell* (1894), 3 Ch. 420.

(*b*) *Murray* v. *Maxwell* (1860), 3 L. T. 466.

(*c*) The use of letters as evidence in a court is not publication: 7 Byth. & Jarm., by Sweet, 628, note (*a*).

(*d*) (1793) 5 T. R. 245: see *Roberts* v. *Myers*, 13 Mo. Law. Rep. (Amer.) 397; *Crouce* v. *Aiken*, Amer. Law. Rep. L. Jour. vol. 5, No. 226. But see, now, 5 & 6 Vict. c. 45, s. 20. *post*, Musical and Dramatic Copyright.

(*e*) *Macklin* v. *Richardson* (1770), Amb. 694, cited 2 Kent's Com. 378.

(*f*) *Vide Norello* v. *Ludlow* (1852), 12 C. B. 177; 16 Jur. 689; 21 L. J. (C.P.) 169; *Dr. Paley's Case*, cited 2 V. & B. 23; *Alexander* v. *Mackenzie*, 9 Sess. Cas. 2nd series, 748.

(*g*) (1819), 2 B. & Ald. 298; S. C. 1 Chit. Rep. 24.

(*h*) Vol. 7, p. 626.

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that it seems clear that a *gratuitous* circulation of copies of a work among friends and acquaintances would not amount to a publication; quoting in support of this proposition the *Duke of Queensberry* v. *Shebbeare* (*a*); and *Dr. Paley's Case*, where the bookseller was restrained from publishing manuscripts left by Dr. Paley for the use of his own parishioners only. The distinction is in the limit of the circulation, if limited to friends and acquaintances it would not be a publication, but if general, and not so limited, it would be.

Private distribution of lithographic copies.

So the distribution of lithograph copies of music for private use, and not for the purpose of sale or exportation, has been held to be a publication, but on the other hand it is clear that a private circulation for a restricted purpose is not a publication. Thus, in *Prince Albert* v. *Strange* (*b*) it appeared that her Majesty and the late Prince Consort had given to their intimate friends lithographic copies of drawings and etchings which they had made for their own amusement. This was held to be a private circulation of copies, and hence not a publication.

Circulation among pupils of a system of book-keeping.

In an American case (*c*) it appeared that the plaintiff, who was a teacher of book-keeping, had written his system of instruction on separate cards, for the convenience of giving instruction to his pupils. He had permitted them to copy these cards for their own convenience, and to enable them to instruct others. The defendant published copies of the cards, which he had obtained while a pupil in the school, and maintained that the plaintiff, by permitting his manuscripts to be so copied, had abandoned them to the public. The court, however, held this to be a private circulation of copies, which did not prejudice the owner's common law rights. "The students of Bartlett who made these copies," said Mr. Justice McLean, "have a right to them and their use as originally intended. But they have no right to a use which was not in the contemplation of the complainant and of themselves when the consent was first given . . . . The lecturer designed to instruct his hearers, and not the public at large. Any use, therefore, of the lectures which should operate injuriously to the lecturer would be a fraud upon him for which the law would give him redress."

Publication not a question of

The question of publication does not depend on the number of copies sold or given away; because the sale of one copy

(*a*) (1758), 2 Eden. 329.
(*b*) (1849), 2 De. G. & Sm. 652; 1 Mac. & G. 25.
(*c*) *Bartlett* v. *Crittenden* (1849), 4 McLean, 300; 5 Id. 32; *Rees* v. *Peltzer*, 75 Ill. (Amer.) 475.

only is as clearly a publication as is the sale of ten thousand. Nor can it be essential that a single copy be disposed of before the work can be said to be published, for the work is published when it is publicly offered for sale. The act of publication is the act of the author, and cannot be dependent upon the act of a purchaser. Printing does not amount to publication, for it is obvious that it may be withheld from the public long after it is in print. To constitute publication it is necessary that the work shall be exposed for sale or offered gratuitously to the general public, so that any person may have an opportunity of enjoying that for which copyright is intended to be secured.

number of copies sold.

The publication of a part of a book is not a publication of the whole; neither is the publication of a pianoforte arrangement of an opera, nor that of a few of the orchestral parts, a publication of the opera itself (*a*).

Publication of part not a publication of the whole.

The previous publication of a work abroad disqualifies it for copyright in this country, except under the provisions of the International Copyright Acts (*b*). If, however, the publication here and abroad be simultaneous, the publication abroad will not stand in the way of copyright in this country (*c*). The legislature contemplates publication *here* and *here only*, and it contemplates such publication only when made by the author, or with such consent and authority from him as the statute requires (*d*).

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

So where the work was composed before June 1814, and in that month the author sanctioned a publication of it in France, and five copies of it were deposited in a musical depôt in Paris; in July 1814, the author made a verbal arrangement with the plaintiff, and the latter published in the September following; it was held, that the publication was not such a publication by the author as to entitle him to the statutory privilege (*e*).

That the publication must be on British soil scarcely

Publication must be on British soil.

(*a*) *Boosey* v. *Fairlie* (1877), 7 Ch. D. 301. But publication of a story in parts in a magazine is equivalent to publication in book form, *Holmes* v. *Hurst* (1898), 174 U. S. Rep. (Amer.) 82: *Mifflin* v. *R. H. White* (1902), 190 U. S. Rep. 260: *Mifflin* v. *Dutton*, *ib.* 265.

(*b*) See *Clementi* v. *Walker* (1824), 2 B. & C. 861; 26 R. R. 569; *Guichard* v. *Mori* (1831), 9 L. J. (O.S.) (Ch.) 227; *Delondre* v. *Shaw* (1828), 2 Sim. 237; *Page* v. *Townsend* (1832), 5 Sim. 395; *Boucicault* v. *Delafield* (1863), 1 H. & M. 597; 23 L. J. Ch. 38; *Hedderwick* v. *Griffin*, 4 Sess. Cas., 2nd Series, 383. See *McFarlane* v. *Hulton* (1899), 1 Ch. 884, as to where a work is published.

(*c*) *Cocks* v. *Purday* (1846), 2 Car. & Kirw. 269; *Routledge* v. *Low* (1868), L. R. 3 H. L. 100.

(*d*) *Per* Bayley, J., *Clementi* v. *Walker* (1824), 2 B. & C. 861; *Chappell* v. *Purday* (1845), 4 Y. & C. 485; 14 M. & W. 303; *Guichard* v. *Mori*, *supra*.

(*e*) *Clementi* v. *Walker*, *supra*. See *Reid* v. *Maxwell* (1886), 2 T. L. R. 790.

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admits of a doubt. The words of the 3rd section are "every book which shall be published," without saying where; but it was held prior to 1886 that it would be inconsistent with the usual practice of the Imperial Parliament to create a system of copyright law for all the colonies and dependencies of the empire, and that consequently a work published in the colonies did not obtain British copyright (*a*). In deciding this question Lord Cairns said: "But there are, as it seems to me, still clearer indications in the Act of the intention of the legislature on this point. By the 8th section copies of every book are to be delivered to various public libraries in the United Kingdom within one month after demand in writing; an enactment which in the case of a publication at the antipodes could not be complied with. By the 10th section penalties for not delivering these copies are to be recovered before two justices of the county or place where the publisher making default shall reside, or by action of debt in any court of record in the United Kingdom. By the 11th section the book of registry of copyrights and of assignments is to be kept at Stationers' Hall, in London, and no registry is provided for the colonies. By the 14th section a motion to expunge or vary any entry in this registry is to be made in the Court of Queen's Bench, Common Pleas, or Exchequer. These clauses are intelligible if the publication is in the United Kingdom, but hardly so if it may be in India or Australia. Finally by the 17th section there is a provision against any person importing into any part of the United Kingdom, or any other part of the British dominions, for sale or hire, any copyright book first composed or written, or printed and published in any part of the United Kingdom, and reprinted in any country or place out of the British dominions; a provision showing clearly, as it appears to me, that publication in the United Kingdom is indispensable to copyright" (*b*). So far as the British possessions are concerned, the law has now been altered by the International Copyright Act, 1886 (*c*), and colonial works do obtain British copyright, but the above-cited decision holds good with regard to publication in foreign countries.

An Englishman resident abroad may have a copyright.

A residence abroad by an English subject, or the fact of the work having been composed abroad, either by an Englishman or a foreigner, would not have the effect of preventing the author from acquiring a copyright in this country. On this point

(*a*) *Routledge* v. *Low* (1865), L. R. 3 H. L. 100. (*b*) *Per* Lord Cairns, *ib.*
(*c*) 49 & 50 Vict. c. 33, s. 8, and see *post*, Colonial Copyright.

there can be no doubt, for independent o the peculiar wording of the copyright statute and under the old Act of Queen Anne this was decided, the reason assigned being, that an English subject, though resident abroad, does not by such residence throw off his natural allegiance; he cannot be relieved from it, and therefore carries with him the natural rights of a subject of England wherever he goes (*a*). That gives him, though resident abroad, the right of publishing and acquiring a copyright here, because he has always fulfilled the implied condition of being a subject of, and owing allegiance to, the crown of Great Britain (*b*).

Copyright no existence in the law of nations.

Copyright has no existence in the law of nations; it acquires a power simply by the municipal law of each particular community. "As soon," observes Mr. Curtis (*c*), "as a copy of a book is landed in any foreign country, all complaint of its republication is, in the absence of a treaty, fruitless, because no means of redress exist, except under the law of the author's own country. It becomes public property, not because the justice of the case is changed by the passage across the sea or a boundary, but because there are no means of enforcing the private right."

Persons who may claim copyright.

The only persons who can claim the copyright in a book published before the 1st of July, 1842, are the proprietor on that day of the copyright therein, or his assigns; and in the case of a book since published, the author or his assigns.

Can an alien acquire copyright in this country?

The important question arises whether an alien can acquire copyright under the 5 & 6 Vict. c. 45? Of course, he clearly cannot do so, except under the International Copyright Acts, if he publishes his work abroad before he does so in the United Kingdom (*d*); but there is, unfortunately, no express decision whether, supposing him to publish first in the United Kingdom, any condition of residence is attached to his acquiring copyright in this country. It may, however, be laid down, first, that he, undoubtedly, acquires copyright if he is resident in any part of the British Dominions at the moment of publication in the United Kingdom (*e*), and, secondly, that he *probably* acquires it wherever he is resident.

(*a*) But British subjects under certain circumstances may, under the Naturalization Act of 33 Vict. c. 13, free themselves from their allegiance, and may resume it again.

(*b*) *Jefferys* v. *Boosey* (1854), 4 H. L. C. 985. (*c*) 'Copyright,' 22.

(*d*) See *ante*, p. 89.

(*e*) The United Kingdom embraces England and Wales, Scotland and Ireland; while the British Dominions include "all parts of the United Kingdom of Great Britain and Ireland, the islands of Jersey and Guernsey, all parts of the East and West Indies, and all the colonies, settlements, and possessions of the Crown, which now are or hereafter may be acquired." 5 & 6 Vict. c. 45 s. 2.

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Certainly, if resident within British Dominions at time of publication.

First, then, an alien author may acquire copyright by first publishing in the United Kingdom, if he be within the British Dominions at the time of publication. This was expressly decided in the case of *Routledge* v. *Low* (*a*), where an American authoress had gone to Canada with the object of being there at the moment of the publication in England. It matters not where the author has composed the work, nor whether he goes into the realm with the sole purpose of being there at the time of publication, and leaves when publication has taken place. His presence is not necessary for any definite period, it is only necessary that he be on British soil at the time of publication (*b*). The author must be there in person—the presence of his assignee, publisher, or agent is not sufficient to bring him within this rule. "Every alien coming into a British colony," said Turner, L.J. (*c*), "becomes temporarily a subject of the crown—bound by, subject to, and entitled to the benefit of, the laws which affect all British subjects," and he is, therefore, clearly an "author" within the meaning of the statute.

Probably, wherever resident.

Secondly, an alien author probably acquires copyright by first publishing in the United Kingdom, wherever he be resident at the time of publication. The decisions upon this point under the statute of Anne were conflicting (*d*), until in the case of *Jefferys* v. *Boosey* (*e*), in the year 1854, the House of Lords finally decided that under that statute an alien could not acquire copyright in England, if he were on foreign soil at the moment of publication.

Jefferys v. *Boosey.*

In that case Bellini, a foreign musical composer, resident at that time in his own country, composed, in the year 1831, his opera 'La Sonnambula,' in which, by the laws there in force, he had a copyright. He then assigned to Ricordi (another foreigner also resident there), according to the laws of their country, his right to the copyright in the composition of which he was the author, and which was then unpublished. The assignee brought the composition to this country, and, before publication, assigned it, according to the forms required by the laws of this country, to an Englishman. The first publication took place in this country. The work was subsequently pirated,

(*a*) (1868), L. R. 3 H. L. 100; 37 L. J. (Ch.) 454; 18 L. T. 874: *Jefferys* v. *Boosey* (1854), 4 H. L. C. 815; *Burton* v. *James* (1851), 5 De. G. & Sm. 80; 16 Jur. 15; *Ollendorf* v. *Black* (1850), 4 De. G. & Sm. 209; 20 L. J. (Ch.) 165.

(*b*) Suppose he went on board a British vessel?

(*c*) *Low* v. *Routledge* (1865), L. R. 1 Ch. App. 42, 47.

(*d*) *Chappell* v. *Purday* (1845), 14 M. & W. 303; *Cocks* v. *Purday* (1846), 5 C. B. 860, and *Boosey* v. *Davidson* (1849), 13 Q. B. 257, *pro*; *Boosey* v. *Purday* (1849), 4 Ex. 145, *contra*.

(*e*) (1854), 4 H. L. C. 815; 1 Jur. (N.S.) 615; 24 L. J. (Ex.) 81.

and proceedings instituted which ultimately reached the Upper House. The judges were called upon for their opinions, which they delivered *seriatim*, six judges being in favour of the plaintiff and four in favour of the defendant, but judgment was finally pronounced by the House in favour of the defendant. The grounds of the decision were that an Act of Parliament of this country, having within its view a municipal operation only, and being therefore limited to this kingdom, cannot be held to extend beyond our own subjects, except as both statutes and common law so provide for foreigners *when they become resident here*, and owe at least a temporary allegiance to the sovereign, and thereby acquire rights just as other persons do; not because they are foreigners, but because being here, they are here entitled, in so far as they do not break in upon certain rules, to the general benefit of the law for the protection of their property, in the same way as if they were natural-born subjects. "Where an exclusive privilege," said Lord Cranworth (*a*), "is given to a particular class at the expense of the rest of Her Majesty's subjects, the object of giving that privilege must be taken to have been a national object; and the privileged class to be confined to a portion of that community for the general advantage of which the enactment is made. When I say that the legislature must *primâ facie* be taken to legislate only for its own subjects, I must be taken to include under the word 'subjects,' all persons who are within the Queen's dominions, and who thus owe to her a temporary allegiance. I do not doubt but that a foreigner resident here, and composing and publishing a book here, is an author within the meaning of the statute; he is within its words and spirit. I go further; I think that if a foreigner having composed, but not having published a work abroad, were to come to this country, and the week or day after his arrival, were to print and publish it here, he would be within the protection of the statute. This would be so if he had composed the work after his arrival in this country, and I do not think any question can be raised as to when and where he composed it. So long as a literary work remains unpublished at all, it has no existence, except in the mind of its author, or in the papers in which he, for his own convenience, may have embodied it. Copyright, defined to mean the exclusive right of multiplying copies, commences at the instant of publication; and if the author is at that time in England, and while here

(*a*) 4 H. L. C. at p. 955 (Ex. 81); *Low* v. *Routledge*, 10 Jur. (N.S.) 922; 10 L. T. (N.S.) 838.

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he first prints and publishes his work, he is, I apprehend, an author within the meaning of the statute, even though he should have come here solely with a view to the publication. The law does not require or permit any investigation on a subject which would obviously, for the most part, baffle all inquiry, namely, how far the actual composition of the work itself had, in the mind of its author, taken place here or abroad. If he comes here with his ideas already reduced into form in his own mind, still, if he first publishes after his arrival in this country, he must be treated as an author in this country. If publication, which is (so to say) the overt act establishing authorship, takes place here, the author is then a British subject, wherever he may, in fact, have composed his work. But if at the time when copyright commences by publication, the foreign author is not in this country, he is not, in my opinion, a person whose interests the statute meant to protect."

Routledge v. *Low.*

The case of *Jefferys* v. *Boosey* related to a work that had been first published in the year 1831, and, therefore, was decided under the old Copyright Act of Queen Anne and not under the present Copyright Act; but, in the year 1868, the case of *Routledge* v. *Low* (*a*) came before the House of Lords for decision under the later Act. The actual point did not, however, arise, for the authoress was in fact resident in Canada at the moment of publication, but both Lord Westbury and Lord Cairns expressed the opinion that the decision ought to have been the same wherever she had been resident. In the opinion of Lord Westbury the case of *Boosey* v. *Jefferys* was a decision attached to and dependent on the particular statute of which it was the exponent; and that statute having been repealed, and replaced by another Act, with different enactments expressed in different language, could not be considered a binding authority on the exposition of this latter statute. "The Act," said his Lordship, "secures a special benefit to British subjects by promoting the advancement of learning in this country, which the Act contemplates as the result of encouraging all authors to resort to the United Kingdom for the first publication of their works. The benefit of the foreign author is incidental only to the benefit of the British public. Certainly the obligation lies on those who would give the term 'author' a restricted signification to find in the statute the reasons for so doing." "The Act," he remarks in another place, "appears to have been dictated by a wise and liberal

(*a*) (1868), L. R. 3 H. L. 114; 37 L. J. (Ch.) 454; 18 L. T. 874.

spirit, and in the same spirit it should be interpreted, adhering of course to the settled rules of legal construction. The preamble is, in my opinion, quite inconsistent with the conclusion that the protection given by the statute was intended to be confined to the works of British authors. On the contrary, it seems to contain an invitation to men of learning in every country to make the United Kingdom the place of first publication of their works, and an extended term of copyright throughout the whole of the British dominions is the reward of their so doing. So interpreted and applied, the Act is auxiliary to the advancement of learning in this country. The real condition of obtaining its advantages is the first publication by the author of his work in the United Kingdom. Nothing renders necessary his bodily presence here at the time, and I find it impossible to discover any reason why it should be required, or what it can add to the merits of the first publication. It was asked, in *Jefferys* v. *Boosey*, why should the Act (meaning the statute of Anne) be supposed to have been passed for the benefit of foreign authors? But if the like question be repeated with reference to the present Act the answer is, in the language of the preamble, that the Act is intended 'to afford greater encouragement to the production of literary works of lasting benefit to the world (*a*); a purpose which has no limitation of person or place . . . If the intrinsic merits of the reasoning on which *Jefferys* v. *Boosey* was decided be considered (and which we are at liberty to do, for it does not apply to this case as a binding authority), I must frankly admit that it by no means commands my assent."

"Protection," said Lord Cairns, "is given to every author who publishes in the United Kingdom, wheresoever that author may be resident, or of whatever state he may be the subject. The intention of the Act is to obtain a benefit for the people of this country by the publication to them of works of learning, of utility, of amusement. The benefit is obtained, in the opinion of the legislature, by offering a certain amount of protection to the author, thereby inducing him to publish his work here. This is, or may be, a benefit to the author, but it is a benefit given, not for the sake of the author of the work, but for the sake of those to whom the work is communicated. The aim of the legislature is to increase the common stock of the literature of the country; and if that stock can be increased

(*a*) The Act of Anne was passed for the "encouragement of learned men to compose and write useful books."

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by the publication for the first time here of a new and valuable work, composed by an alien, who never has been in the country, I see nothing in the wording of the Act which prevents, nothing in the policy of the Act which should prevent, and everything in the professed object of the Act, and in its wide and general provisions, which should entitle such a person to the protection of the Act, in return and compensation for the addition he has made to the literature of the country. I am glad to be able to entertain no doubt that a construction of the Act so consistent with a wise and liberal policy is the proper construction to be placed upon it." To this view, however, Lord Cranworth (*a*) objected, and Lord Chelmsford doubted whether it was good in law.

Present state of the authorities.

The point has not again come up for decision before our Courts. Possibly foreign authors have preferred the protection of the International Copyright Acts; or possibly, they have found the King's dominions so wide that they have preferred the expense of a few days' residence on British soil to that of giving their name to a leading case. In the year 1870 was passed the Naturalization Act, 1870 (33 Vict. c. 14), the 2nd section of which enacts that "real and personal property of *every description* may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject," but it is doubtful if this statute is relevant, for the issue seems to depend not upon the capacity of a foreigner to hold property, but upon the true intent of the Copyright Act.

In the year 1891, however, there was passed in the United States of America the statute known as the Chace Act. Up till that year foreigners had been unable to obtain copyright in that country, and the object of that Act was to enable them to do so (*b*), provided they were citizens of a state or country that "permits to citizens of the United States of America the benefit of copyright on substantially the same basis as its own citizens." The Act further provides that the existence of

(*a*) Lord Cranworth was a party to the decision in *Jefferys* v. *Boosey*.

(*b*) It is worth while to note the way in which this was effected. Section 4952 of the Revised Statutes of the United States originally read, "Any citizen of the United States or resident therein, who shall be an author of any book . . . shall have the sole liberty of printing," &c., the same. The Chace Act struck out the opening words of this section, so that it now reads "the author of any book . . . shall have the sole liberty of printing," &c., the same: and then Section 13 provides that the Act is only to apply to a foreigner under certain conditions.

these conditions is to be determined by the President of the United States by proclamation. The question then arose whether Great Britain fulfilled the necessary conditions to entitle her citizens to the benefit of the Chace Act, and the President required from her late Majesty's Government an assurance that residence in the British dominions was not essential to enable a citizen of the United States to obtain copyright in a book published by him in England. This assurance Lord Salisbury, after having taken the opinion of the law officers of the Crown, gave to the President in a despatch dated the 16th June, 1891.

It is, therefore, only reasonable to suppose that when this question next arises our Courts will give their decision in accordance with the views expressed by Lord Cairns and Lord Westbury in the case of *Routledge* v. *Low* (*a*).

(*a*) On the subject-matter of these cases, the Royal Commissioners on Copyright reported in 1878 as follows :—"We recommend, generally, that where a work has been first published in any one of your Majesty's possessions, the proprietor of such work shall be entitled to the same copyright, and to the same benefits, remedies, and privileges in respect of such work as he would have been entitled to under the existing Imperial Act, if the work had been first published in the United Kingdom.

"With regard to publication in foreign states, the law now is that, except under treaty, no copyright can be obtained if a book has been published in any foreign country before being published in the United Kingdom, but it is doubtful whether contemporaneous publication in this and a foreign country would prevent the acquisition of copyright here.

"It is a grave question whether it is desirable that the condition requiring first publication in this country should continue, and whether the reason advanced for this condition, namely, that it is advantageous to this country that works should be first published here, outweighs the hardship that may be inflicted upon British authors by preventing them from availing themselves of arrangements which they might otherwise make with foreign or colonial publishers.

"We have come to the conclusion that a British author who publishes a work out of the British dominions should not be prevented thereby from obtaining copyright within them by a subsequent publication therein. Yet we think that such republication ought to take place within three years of the first publication, and we may add that we think the law should be the same with reference to dramatic pieces and musical compositions first performed out of your Majesty's dominions, even though they are not printed and published—in other words, that first performance in a foreign country should not injure the dramatic right in this country. It has been decided under the 19th section of the International Copyright Act, that the writer of a drama loses his exclusive right to the performance of his drama here in England, if it has been first performed abroad; that is to say, representation has been held to be a publication. We see no reason why the rule which may be finally determined upon in reference to first publication of books should not apply to first representation of dramatic pieces. The evidence shows how hardly the present law presses upon British dramatic authors.

Suggestion as to aliens.

"As to aliens, although we would give them the same rights as British subjects if they first publish their works in the British dominions, it is obvious that the same reason does not exist for giving them copyright if they do not bring their books first to our market; and we therefore recommend that aliens, unless domiciled in your Majesty's dominions, should only be entitled to copyright for works first published in those dominions. It is to be borne in mind that, even though aliens may be deprived of British copyright by first publication abroad, they may still obtain it in many cases by means of treaties.

Suggestions as to persons

"With regard to the persons who are capable of obtaining imperial copyright in your Majesty's dominions, as distinguished from international copyright under

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Term in periodicals.

The 19th section of the Copyright Act, 1845, provides that the proprietor of the copyright in any encyclopædia, review, magazine, periodical work, or a work published in a series of books or parts, shall be entitled to all the benefits of the registration at Stationers' Hall under the Act, on entering in the registry the title of such encyclopædia, review, periodical work, or other work published in a series of books or parts, the time of the first publication of the first volume, number, or part thereof, or of the first number or volume first published after the passing of this Act in any such work which shall have been published before the passing of the Act, and the name and place of abode of the proprietor thereof, and of the publisher thereof when he is not also the proprietor. Under this section it is clear that as each part of a periodical is a book within the meaning of the Act, and copyright runs from the date of publication of any book, that the copyright in each part accrues from the publication of each part, so that if a subsequent part be published twelve years after the publication and registration of the first part all the benefit of registration will accrue for forty-two years from the publication of the subsequent part, notwithstanding that registration has only been effected of the first part (*a*).

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

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

capable of holding copyright.

treaty, we find that, according to the existing law the author in order to obtain copyright must be either—

"(*a*) A natural-born or naturalised subject of your Majesty, in which case the place of residence at the time of publication of the book is immaterial; or,

"(*b*) A person who, at the time of the publication of the book in which copyright is to be obtained, owes local or temporary allegiance to your Majesty, by residing at that time in some part of your Majesty's dominions.

"Besides these, it is probable, but not certain, that an alien friend who first publishes a book in the United Kingdom, even though resident out of your Majesty's dominions, acquires copyright therein. We think this doubt should be set at rest, and that, subject to our previous recommendations as to place of publication by aliens not domiciled in your Majesty's dominions, the benefit of the copyright laws should extend to all British subjects and aliens alike." Par. 58–64.

(*a*) *Bradbury* v. *Sharp*, W. N. (1891) 143, where the first number only of a periodical is registered, an injunction will be granted against infringement, to protect future numbers.

(*b*) See *Reid* v. *Maxwell* (1886), 2 T. L. R. 790.

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

The Government may own a copyright.

A manuscript or a copyright may be owned by the government or a corporation as well as by an individual, and the rights of the government or corporation are governed by the same principles as those of an individual owner (*b*). So statutes, judicial decisions, public documents, official reports, and productions which are the direct results of official labour, become the property of the government which pays for such services. But the government can have no proper claim to the literary property in a work produced by an officer independently of his official duties.

Works written on commission, encyclopædias, and periodicals.

Copyright is not necessarily vested in, nor is its term necessarily to be measured by the life of, the person who composes the work. This follows from section 18 of the Act 5 & 6 Vict. c. 45, which is as follows:—"When any publisher or other person shall before or at the time of the passing of this Act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work,

(*a*) *Low* v. *Ward* (1868), L. R. 6 Eq. 415; 37 L. J. (Ch.) 841; but see *Routledge* v. *Low* (1868), 37 L. J. (Ch.) 454; 18 L. T. (N.S.) 874; L. R. 3 H. L. 100; *cf.* *Leslie* v. *Young* (1894), A. C. 335.

(*b*) *Marziais* v. *Gibbons* (1874), L. R. 9 Ch. 518. *Quære*, as to the term of copyright in such cases. See *McLean* v. *Moody*, 20 Sess. Cas. 1154, cited Phillips on Copy. p. 55.

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and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act; except only that *in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature*, after the term of twenty-eight years from the first publication thereof respectively the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this Act: Provided always, that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly, without the consent previously obtained, of the author thereof, or his assigns: Provided, also, that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed as aforesaid to publish any such his composition in a separate form who by any contract, express or implied, may have reserved or may hereafter reserve to himself such right; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid."

Scope and effect of this section.

This is an exceedingly ill-drafted and puzzling section, and many difficult questions arise as to its construction. Its effect appears to be to put the publisher or projector in the place of the author, to vest the copyright in him, and to make the term of copyright depend upon his life and not on that of the author. It is submitted, however, that the section is limited to works of the character of encyclopædias, magazines, and periodicals, and that it does not apply to the case of a publisher requesting an author to compose a book for him on a particular subject. It is true that at the commencement of the section the draftsman has used the expression "any book whatsoever" (though later on he seems to have forgotten it); but it is conceived that the publisher, in the circumstances supposed, neither "projects, conducts, and carries on" the book, nor is the "proprietor" of a work which has no existence when he gives his commission (*a*).

(*a*) *Shepherd* v. *Conquest* (1856), 17 C. B. 427; *Pierpont* v. *Fowle*, 2 Wood &

In order to give the proprietor of an encyclopædia or periodical a copyright in articles composed for him by others, under the above section he must establish three things—(1) Employment by him of the writer to compose the articles; (2) that the articles were composed on the terms that the copyright should belong to the proprietor; and (3) that the articles were paid for by him. As to this last requirement, it will not be sufficient to show a contract for payment: there must be actual payment (*a*).

When are articles written on the terms that the copyright shall belong to the proprietor?

In order to comply with requirement number 2, it is not necessary that there be an express contract that the proprietor is to have the copyright. The fact of the author being paid by the proprietor for articles supplied expressly for the encyclopædia or periodical raises the presumption that the copyright is intended to be the property of the proprietor. Otherwise the articles might be published by the writers thereof simultaneously, or shortly afterwards; possibly to the detriment and injury of the purchasers of the articles for the particular periodicals.

Sweet v. *Benning*.

Thus, in *Sweet* v. *Benning* (*b*) the plaintiffs were the publishers of 'The Jurist,' and had employed various lawyers to prepare reports of cases for that periodical. Nothing was said as to the copyright. The Court of Common Pleas held that there must be presumed an implied agreement that the copyright was to be the property of the employers. "It was urged," said Maule, J., "that these reports were not written on the terms that the copyright therein should belong to the proprietors of 'The Jurist,' because there were no express words in the contract under which they were written conferring upon them the right to the copyright. But, though no express words to that effect are stated in this special case, I think that where a man employs another to write an article, or to do anything else for him, unless there is something in the surrounding circumstances, or, in the course of dealing between the parties, to require a different construction, in the absence of a special agreement to the contrary, it is to be

Min. (Amer.) 23; *Atwill* v. *Ferrett*, 2 Blatch. (*ibid.*) 36; *Binns* v. *Woodruff*, Wash. (Amer.) 53.

(*a*) *Richardson* v. *Gilbert* (1851), 1 Sim. (N.S.) 336; 20 L. J. (Ch.) 553; 15 Jur. 389. See *Brown* v. *Cooke* (1846), 11 Jur. 77; 16 L. J. (Ch.) 140; *Trade Auxiliary Co.* v. *Middlesbrough, &c., Association* (1889), 40 Ch. D. 425; *Collingridge* v. *Emmott* (1887), 57 L. T. 864; 4 T. L. R. 99.

(*b*) (1855), 16 C. B. 459; cf. *Bishop of Hereford* v. *Griffin* (1848), 16 Sim. 190; *Walter* v. *Howe* (1881), 17 Ch. D. 708, in which latter case, however, *Sweet* v. *Benning* was not cited. In *Johnson* v. *Newnes* (1894), 3 Ch. 663, Romer, J., found, on the facts, that a contributor to a periodical had not parted with the copyright to the proprietor.

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understood that the writing or other thing is produced upon the terms that the copyright therein shall belong to the employer, subject of course, to the limitation pointed out in the 18th section of the Act."

Lamb v. *Evans.*

Again, in a case where the plaintiffs were the proprietors of a trades directory and the defendants were employed to obtain advertisements to be inserted in the directory, for which they were paid by the plaintiffs, but there was no express agreement as to the person in whom the copyright was to be vested, it was held that it was vested in the plaintiff. "If there is no express agreement" [as to whom the copyright is to be vested in] said Lindley, L. J., "the question is, which is the inference to be drawn from the circumstances of the case? In drawing the inference regard must be had to the nature of the articles . . . and the view expressed by Mr. Justice Maule in *Sweet* v. *Benning*, may be very safely acted upon, viz., that *prima facie* at all events, you will infer, in the absence of evidence to the contrary, from the fact of employment and payment that one of the terms was that the copyright should belong to the employer. That is not a necessary inference; but in a case of this sort, where any other inference would be unbusiness-like, I should not hesitate myself to draw that inference" (*a*).

Lawrence & Bullen v. *Aflalo.*

These decisions were approved by the House of Lords in the recent case of *Lawrence & Bullen* v. *Aflalo* (*b*). There the respondent Aflalo was employed by the appellants, a firm of publishers, to edit an encyclopædia on sport, and it was a term of the agreement that the former was to be remunerated for his editorial services by a lump sum, for which he was to contribute certain articles without further fee. The respondent Cooke was also employed by the appellants to contribute certain articles to the encyclopædia at so much per thousand words. No express agreement was made as to copyright. The respondents duly contributed their articles, and the encyclopædia was published. Afterwards the appellants published a book called 'The Young Sportsman,' containing copies of articles written by the respondents for the encyclopædia, and the respondents sought to restrain them from doing so. Mr. Justice Joyce held that the circumstances were not such as to warrant the inference that the copyright was to belong to the publishers, and granted an injunction to restrain the publishers from publishing the articles in separate form (*c*). Upon appeal, this decision was affirmed by Romer and Stirling, L.J.J.,

(*a*) *Lamb* v. *Evans* (1893), 1 Ch. 218.
(*b*) (1904), A. C. 17; 20 Times L. R. 42.
(*c*) (1902), 1 Ch. 264.