

CAP. VIII. meaning of the Copyright Act, 1842, that the publisher is bound to deliver a copy of every issue at the British Museum, and if demanded copies must be delivered at Stationers' Hall for the Bodleian, the University Library, Cambridge, the Advocates' Library, Edinburgh, and the Library of Trinity College, Dublin. The penalty for non-compliance with the Act in this respect is £5, and the value of the copy not delivered.

Difference between registration under copyright and newspaper acts.

Registration under the Copyright Acts for the purpose of suing for infringement of copyright must not be confounded with the registration of the newspaper under the Newspaper Libel and Registration Act of 1881, which has nothing whatever to do with the copyright (*a*).

Consequently the proprietor of a newspaper registered as a serial publication under the Copyright Act, 1842, can sue in respect of his copyright in matters published in his paper, though neither the name of the proprietor nor the title of the paper is registered under the Newspaper Libel and Registration Act, 1881. And an injunction was granted to three plaintiffs, the proprietors of three several serial publications registered under the Copyright Act, to restrain the infringement of their joint copyright in matter printed in all three publications, though the printed matter was copied not from either of the three publications, but from a reproduction of the same matter issued in another form by the authority of one of the plaintiffs without further registration under the Copyright Act (*b*).

Illustrations.

A coloured plate headed "Supplement" to a periodical registered as a newspaper and referred to as "Our illustration for this week," was held to be part of the newspaper as regards copyright, though not physically attached to the newspaper (*c*); but the registration of the newspaper does not protect illustrations, the copyright in which belongs to another person not the proprietor of the newspaper (*d*).

Newspaper articles.

In a case which came before Lord Curriehill, in November 1875, wherein Mr. Charles Reade brought an action against the 'Glasgow Herald' for damages for infringement of copyright by the publication of his sketch called 'A Hero and Martyr,' which appeared originally in the 'Pall Mall Gazette,'

(*a*) A large number of magazines, story papers, papers composed of scraps of miscellaneous reading, and the like, though issued periodically, are not "newspapers" under this Act, and the authors or proprietors are therefore under no obligation to register, nor can they claim the protection afforded by the Act.

(*b*) *Cute v. Devon and Exeter Constitutional Newspaper Co.* (1889), 40 Ch. D. 500; 58 L. J. Ch. 288; 60 L. T. 672; 37 W. R. 487; 5 T. L. R. 229; *The Trade Auxiliary Co. (Limited) v. Jackson* (1887), 4 T. L. R. 130.

(*c*) *Comyns v. Hyde* (1895), W. N. 9; 72 L. T. 250.

(*d*) *Petty v. Taylor* (1897), 1 Ch. 465.

and which the 'Herald' had transmitted daily from London by its special wire for the next day's paper; his Lordship, in giving judgment, so far as concerned the plea of irrelevancy set up by the defendants against the plaintiff's action, said: "The defenders maintain that as the London newspaper is not registered as copyright, they are entitled to copy and publish in their journal anything which appears in it, and that even if its proprietor might have a title to sue for damages for such appropriation of matter published, the author, who has been paid by the proprietors for the right to publish such matter, has no action against the journal so appropriating. This raises a question of great importance both to authors and journalists. I am of opinion that the defence is not relevant, and that the counter-issues proposed by the defenders must be disallowed. I know of no principle or authority holding that the author loses his copyright by permitting third parties to print and publish his work. To hold such a doctrine would, I think, be analogous to holding that a patentee loses his monopoly on licensing a third party to manufacture his patented invention" (a).

There can be little doubt but that there is copyright in the literary form given to news—not in the substance of the news itself, but in the form in which it is conveyed, and this even where it consists of a mere statement or summary, and the information is with respect to the current events of the day (b). As to what is known as a "descriptive report," whether of the proceedings in a law court or Parliament, or at any public meeting, there can be no doubt that copyright attaches. One newspaper cannot legally use the telegrams sent to another, but we are not able to go so far as to admit copyright in the substance of the news as distinguished from the form of language by which that substance is conveyed.

Press agencies have received protection in two recent cases. In *Exchange Telegraph Co. v. Gregory and Co.* (c) the plaintiffs, under a contract with the committee of the London Stock Exchange, obtained valuable information as to the prices of stocks and shares from time to time during the day. This information the plaintiffs handed on to their subscribers by means of tape machines, the subscribers expressly agreeing not to sell or communicate to non-subscribers the intelligence thus supplied to them. The defendants had been at one time

(a) See *The Trade Auxiliary Co. (Limited) v. Jackson*, *supra*.

(b) Per North, J., *Walter v. Steinkopff* (1892), 3 Ch. 489, 495.

(c) (1896), 1 Q. B. 147; *Gilbert v. Star Newspaper Co.* (1894), 11 T. L. R. 4.

CAP. VIII. subscribers of the plaintiffs', but the latter had recently refused to continue them as such, and they had succeeded in surreptitiously obtaining the information from another subscriber, and posted the information thus received in their offices. The Court held that the plaintiffs had a right of property at common law in the information, and were entitled to an injunction restraining the defendants from infringing their copyright and from continuing to induce any subscriber of the plaintiffs' to supply them with the information in breach of his contract with the plaintiffs.

This decision was followed in the case of *Exchange Telegraph Co. v. Central News (a)*, where an injunction was sought to restrain the defendants from improperly copying information as to the results of horse races at Manchester, collected by the plaintiffs and communicated to the plaintiffs' subscribers, and for communicating the information so copied to the defendants' subscribers. It was sought to distinguish this case from the case of *Exchange Telegraph Co. v. Gregory and Co.*, on the ground that the result of a horse race is public property, but Mr. Justice Stirling refused to acknowledge the distinction. "The information," he said, "was not made known to the whole world; it was, no doubt, known to a large number of persons, but a great many more were ignorant of it. By the expenditure of labour and money the plaintiffs had acquired this information, and it was, in their hands, valuable property in this sense—that persons to whom it was not known were willing to pay, and did pay, money to acquire it." An injunction was granted.

Racing tips.

With these cases must be compared the case of *Chilton v. Progress Printing Co. (b)*. There the plaintiff, who was the publisher of a registered weekly periodical, inserted each week, under the title of 'One Horse Selections,' a list of horses which he expected to win at races in the ensuing week. The defendants published each day at race-meetings a sheet or card giving, under the title, 'The Specials, One Horse Finals,' a list of horses which the plaintiff and other sporting authorities had selected as likely to win in races on that particular day, with the names of those who had selected them. The Court of Appeal held, affirming Kekewich, J., that the announcement of the horses which the plaintiff had selected as winners was not in the nature of a literary composition which could be protected under the Copyright Acts, and that the defendants had not infringed the copyright in the plaintiffs' periodical.

(a) (1897), 2 Ch. 18.

(b) (1895), 2 Ch. 29.

It has now been decided, in accordance with the opinion expressed in the last edition of this work, that a shorthand reporter has copyright in his verbatim report of a public speech (a). In the case which decided this, the reports in question were of certain speeches of Lord Rosebery, in which Lord Rosebery did not assert any copyright, and the infringement complained of was the publishing of the entire speeches; but no doubt in such cases considerable freedom of quotation will be permitted. CAP. VIII.
Reports of
speeches.

The proprietor of a newspaper who has employed and paid a writer of articles appearing in it can, upon registration, restrain any other person from publishing such articles for twenty-eight years, but he is not entitled to publish the articles separately without the consent of the writer. A reprint of the original issue will not be regarded as a separate publication, but republishing an article in any other form would amount to such. The question came before the court in a case (b) where the plaintiff was the writer of a novel which had appeared in the defendant's paper, the 'London Journal.' The defendant began the issue of what was called "supplementary numbers," which could be bought along with or separate from the current numbers. They were composed of stories and other matter which had previously appeared in the 'London Journal.' The plaintiff's story appearing in these supplementary numbers, he applied for an injunction on the ground that this was a separate publication of it. Stuart, V.-C., held that he was entitled to the relief sought. The Vice-Chancellor considered that publishing separately must mean separately from something. "What," said he, "is that publishing which the Act of Parliament says shall not be separately made? It must be the publishing of the part or portion separately from that which has been before published" (c). Articles

During the twenty-eight years after publication of an article in a newspaper, the right of the author is simply to prevent a publication of the matter separately, and this right he has independent of any registration. Upon the expiration of the twenty-eight years the copyright reverts to the author for the remainder of the full term of copyright.

This is the result of the absence of any agreement between the parties, and it must be remembered that under the

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

(b) *Smith v. Johnson* (1863), 33 L. J. Ch. 137; *Johnson v. Newnes* (1891), 3 Ch. 663.

(c) See, too, *Mayhew v. Maxwell* (1860), 1 John. & Hem. 312.

CAP. VIII. 18th section of the Act of 1842, the author may reserve to himself the separate right of publication even during the period of twenty-eight years, or he may agree to the vesting of the whole of the copyright in the proprietor of the newspaper absolutely.

International provisions as to newspapers.

Article VII. of the Berne Convention, as modified by the Additional Act of Paris 1896, provides that serial stories, including tales, published in newspapers or periodicals of one of the countries of the Union, may not be reproduced, in original or translation, in the other countries, without the sanction of the authors or of their lawful representatives. This stipulation is to apply equally to other articles in newspapers or periodicals, when the authors or editors shall have expressly declared in the newspaper or periodical itself in which they shall have been published that the right of reproduction is prohibited. In the case of periodicals it is to suffice if such prohibition be indicated in general terms at the beginning of each number. In the absence of such prohibition, such articles may be reproduced on condition that the source is acknowledged. The prohibition contained in this Article does not, however, apply to articles or political questions, to the news of the day, or to miscellaneous information.

Property in letters, &c., sent to newspapers.

It may be mentioned here that letters and other manuscripts sent to the editor of a newspaper, as agent for the proprietor are the property of the latter, and if the editor after ceasing to be editor attempts to use them for his own purposes he will be restrained on the application of the proprietor, and be compelled to hand over such letters or other manuscripts (a).

There is no obligation on the part of the proprietor of a newspaper to insert or to preserve any manuscript sent to him uninvited, and if the manuscript be lost or destroyed, the author cannot recover for its value. Of course, if an editor or proprietor undertook to return unaccepted communications the case would be different.

Alterations in communications made to newspapers.

Difficulties sometimes arise by reason of alterations made in the matter communicated by correspondents and others to newspapers. The rule may be taken to be as follows: Where the author's name appears, any alterations of a nature which may affect the credit or the literary reputation of the author would be illegal, and an injunction might be obtained to restrain the publication (b). Of course, if the communication,

(a) *Hogg v. Kirby* (1803), 8 Ves. 215.

(b) But see *Lee v. Gibbins* (1892), 9 T. L. R. 773; *Athenaeum*, 13th August, 1892.

though signed, contained any matter of an objectionable or offensive description this might be omitted, but the insertion of new matter which would have the effect of distorting the writer's meaning would not be permissible. In *Archbold v. Sweet* (a), where the plaintiff had written a law book on the Law of Pleading and Evidence in Criminal Cases, and the defendant, who had acquired the copyright, brought out a new edition by another person without a statement appearing that it was so edited, and in this edition were several serious errors which were likely to prove prejudicial to the author's reputation as a legal writer, the court considered the publication a libel on the author. So where an application was made for an injunction to restrain the defendants from advertising the plaintiff's name in connection with the representation of an opera called 'Les Brigands,' and it appeared that the defendants had inserted into Mr. Gilbert's version of the libretto two songs which were not written by him and had omitted a solo by him, Mr. Justice Denman, in delivering judgment, said: "He considered what had been done did not justify the granting of an interlocutory injunction unless it had been done in bad faith, or the acts had been of such a kind as to injure the reputation of the plaintiff. If the songs had been scandalous or indecent, there would have been a strong ground for the court interfering. There was nothing of the kind here, only advertisements attributing to Mr. Gilbert what was not his work, but only to a very small extent. . . . He considered it too strong a measure to hamper this performance by an interlocutory injunction where no substantial injury had been done, and no substantial injury was likely to be done to Mr. Gilbert." On appeal this decision was substantially affirmed (b).

As to unsigned communications, the right of the editor to alter seems to be unlimited. The author here can suffer no injury in reputation, the "custom of the trade" in this respect is well known and must be deemed to be known to the author (c).

(a) (1832), 5 C. & P. 219.

(b) *Gilbert v. Boosey & Co.*, Times, 21 Sept. 1889; L. T. 28 Sept. 1889. *Lee v. Gibbins* (1892), 8 T. L. R. 773, where the defendant published an imperfect edition of a work of the plaintiff of which the assignor of the copies to the defendant owned the copyright and on the plaintiff applying to restrain him, it was held that the plaintiff's remedy (if any) was an action for libel.

(c) In a recent case where the plaintiff had sent an account of an incident which he had witnessed to a newspaper for insertion amongst the general news, and for which insertion he had been paid, the sub-editor of the newspaper had made alterations in the plaintiff's copy, by curtailing the account and improving its style. It was held that the sub-editor, and not the plaintiff, was the "author" of the

CAP. VIII.

Copyright in a newspaper included in the term "goods and chattels" in the Bankruptcy Act.

The copyright in a newspaper was held to be included in the words "goods and chattels," in the 125th section of the Bankruptcy Law Consolidation Act, 1849.

The registered proprietor of a newspaper mortgaged the copyright of the newspaper, and also the type and machinery used in printing it, to the petitioner. The proprietor remained in possession and no change was made in the registration. Afterwards the sheriff seized the type and machinery under a judgment obtained by a creditor. While he was in possession the proprietor filed a declaration of insolvency and was made bankrupt. It was held on a petition by the mortgagee to have the benefit of his security, that the type and machinery, having been seized by the sheriff, were not in the "order and disposition" of the bankrupt at the time of the bankruptcy, but that the copyright of the newspaper could not be seized by the sheriff, and therefore remained in the order and disposition of the bankrupt as registered proprietor (*a*). In thus deciding, Turner, L.J., said: "The case in the argument before us was very properly divided into two considerations—first, as it affects the newspapers, and, secondly, as it affects the plant. As to the newspapers, it was, in the first place, contended that they are not goods and chattels within the meaning of the 125th section of the Bankrupt Act, which provides for goods and chattels of which the bankrupt is reputed owner passing to the assignee. It was said that the right in the newspaper is a mere right to publish the paper under that name, and that such a right could not be considered as goods and chattels within the meaning of the Act. But, to say nothing of the copyright in the newspapers, which undoubtedly exists, the right to publish the newspapers is a right to which an interest is attached. It is a right protected by courts of law and by courts of equity, and therefore a proprietary right; and the statutes—the very Newspaper Acts on which the argument before us proceeds—treat the matter as a matter of property and as being a proprietary right. I feel, therefore, that the property in these newspapers must be considered as goods and chattels within the meaning of the Bankrupt Act. These words, 'goods and chattels,' are words of very extensive signification, and undoubtedly comprise both property tangible and

newspaper paragraph, and that the plaintiff could not complain of its piracy by another newspaper; but the decision is difficult to follow. *Springfield v. Thane* (1903), 89 L. T. 242; 19 T. L. R. 650.

(*a*) *Ex parte Foss* (1858), 6 W. R. 417; 2 De G. & J. 230; *Langman v. Tripp* (1805), 2 Bos. & Pul. (New R.) 67; 9 R. R. 617; see also *Kelly v. Hutson* (1868), L. R. 3 Ch. App. 703.

property which is not tangible. If there had been any doubt in my mind on that point, it would have been removed by the case of *Longman v. Tripp* (a), which seems to me to be a decisive authority upon the subject, and to be well founded in point of law. The case was argued further as to the question of the copyrights on this ground—it was said that the Newspaper Acts were Acts that were merely passed for fiscal purposes; that they had nothing to do with the rights of property, and therefore could not be considered as at all affecting the question whether the property was in the nature of goods and chattels within the meaning of the Bankrupt Act. But the case of *Longman v. Tripp* governs that point also; and independently of the case of *Longman v. Tripp* I think that the argument derived from the newspaper statutes is not well founded: for whether these statutes are for fiscal purposes or not, they at all events furnish the means by which the ownership of the property may be made known to the world. The declarations which are made under the Newspaper Acts are *indicia* of the property, and where such *indicia* exist I apprehend they must be attended to for the purpose of taking the property out of the disposition of the bankrupt, and removing them out of the operation of the reputed ownership clauses. The declaration is evidence of the ownership, and what may be effectual to remove that evidence must be resorted to.”

A mortgage of a share in a newspaper and the copyright and right of publication thereof, and all profits arising therefrom, is not an assignment of copyright which requires registration at Stationers' Hall, but merely an assignment of a chattel interest in the publishing adventure, which derives no additional efficacy from the registration (b).

Mortgage of share of newspaper not assignment of copyright requiring registration.

During the progress of a suit instituted by Mr. Beeton against Mr. Hutton in reference to the proprietorship of the 'Sporting Life,' in which it was ultimately decided that the parties were entitled in equal shares, Mr. Beeton assigned by way of mortgage his share in the newspaper "and the copyright and right of publication thereof and all profits arising therefrom," to Messrs. Wrigley and Son, the assignment reciting certain chancery proceedings, and containing a power of sale.

Mr. Beeton subsequently mortgaged this same share to his partner Mr. Hutton, to secure two sums of £2000 and £512.

(a) (1805), 2 Bos. & P. N. R. 67.

(b) *Kelly v. Hutton* (1868), L. R. 3 Ch. App. 703; 38 L. J. (Ch.) 917; 19 L. T. 228.

CAP. VIII. with interest at $7\frac{1}{2}$ per cent.; the former sum being the amount Beeton had been overpaid in a settlement of accounts with Hutton, the latter being the balance of Beeton's purchase-money for his moiety of the newspaper. Messrs. Wrigley and Son registered the assignment to them at Stationers' Hall, under the provisions of the Copyright Act, and subsequently sold the mortgaged share to the plaintiff Kelly, who filed a bill for a declaration that he was entitled to a moiety of the newspaper. Both Wrigley and Son and the plaintiff had permitted the newspaper to be carried on as formerly by Beeton and Hutton. It was held by the Lords Justices that the plaintiff could only take Beeton's share in the newspaper subject to the equities subsisting between the parties. "Many points have been raised before us," said Wood, L.J., "as regards the property which was the subject of the mortgage to Wrigley and Son. . . . It appears to us that Beeton and Hutton were engaged in a joint adventure, namely, the publishing of the paper in question. Capital was required for the adventure, and the co-partners or co-adventurers possessed leasehold premises and type, and other chattels necessary for carrying it on. The mortgage to Wrigley and Son assigned to them Beeton's share in the newspaper, whatever it might be, and all profits belonging thereto or arising therefrom. In the habendum the deed speaks of the copyright of the newspaper, and the right of continuation and publication thereof. Now it appears to us that there is nothing analogous to copyright in the name of a newspaper, but that the proprietor has a right to prevent any other person from adopting the same name for any other similar publication; and that this right is a chattel interest capable of assignment was held in *Longman v. Tripp* (a), and *Ex parte Boss* (b). The mortgage, then, to Wrigley and Son was that of Beeton's share of a chattel, which formed the principal subject of the co-adventure between Beeton and Hutton. Considerable stress has been laid in argument, on the part of the appellants, on the necessity of notice being given of such an assignment, either by direct notice to Hutton, or by an entry at the Inland Revenue Office; and much controversy has arisen in evidence as to whether Hutton had or had not in fact such notice previously to the 9th of March, 1866. The entry of their mortgage by Wrigley and Son at Stationers' Hall was clearly futile; but we do not pause to consider the question further, because it is clear on the face of their mortgage deed that Wrigley and Son

(a) (1815), 2 Bos. & P. 67; 9 R. R. 617.

(b) (1858), 2 De G. & J. 280; *Bradbury v. Dickens* (1859), 27 Beav. 53.

were aware of the litigation between Beeton and Hutton. They allowed the joint adventure to be worked jointly, whether with or without notice, and it is impossible that they can now take to themselves the subject of that adventure and the profits arising therefrom without being subject to every equity of the co-adventurer. A judgment creditor in execution against one partner, his debtor, takes only the interest of the debtor, subject to his co-partner's equities; and Wrigley and Son could not claim the asset without satisfying in the first place the lien of £512 for the unpaid purchase-money of Beeton's moiety, nor without satisfying the balance of accounts due from Beeton to his co-adventurer Hutton. The lien of Hutton as *quasi* partner in the adventure must be satisfied before the subject-matter of the adventure can be passed over to any person claiming under an assignment from Beeton; and this lien must continue so long as Wrigley and Son, as the assigns of Beeton by way of mortgage, allow the business to be carried on in co-partnership by Beeton and Hutton. Irrespective of the doctrine of notice, they cannot take the benefit of Hutton's capital in carrying on the concern (whether they have given him notice or not) and then ask to have the share of Beeton in the chattel, and still less in the profits of the concern, handed over to them without first satisfying the lien of the co-adventurer for what may be due to him on taking the accounts of the adventure. The same reasoning applies to the plaintiff as purchaser. His letter of the 27th of December, 1866, to Hutton the elder, set out in the amended bill, shows that he, at least up to that time, acquiesced in the arrangement under which the newspaper was to be carried on. In fact, having acquired the interest of Beeton in the newspaper, his mortgagees allow Beeton to conduct the business, and he must be taken to act as their agent and on their behalf. They do not advance any capital, and ask no question as to how it is to be provided. They must therefore take the business as they found it, at least up to the time of the actual exclusion of the plaintiff by Hutton from the concern, and even after that time profits cannot be claimed without making all just allowances in respect of such moiety. Hutton, therefore, wholly irrespective of his mortgage of the 9th of October, 1866, would be entitled to a lien on Beeton's share in the newspaper for £512, the unpaid purchase-money. He would also, we think, be entitled to the balance on the account settled on the 9th of March, 1866, with Beeton (which account came down to the 30th of September, 1865), and to the £2000 due to Hutton as the result of that account

CAP. VIII.

and the arrangement subsequent on it. We think, also, that interest at the rate of $7\frac{1}{2}$ per cent. per annum must be allowed on those two sums: for Hutton was clearly entitled to decline carrying on the business, whether with or without the knowledge of Wrigley and Son's mortgage, except on the terms of being allowed interest on his capital. It is in fact advanced to the plaintiff. . . . As to the whole case, therefore, we conclude that the plaintiff has become entitled to the interest of Beeton in the newspaper. We see no reason why that interest should not be dealt with as on former occasions, by directing the defendants to concur in procuring the plaintiff's name to be registered at the office of Inland Revenue as such owner, subject to the lien before mentioned" (a).

No copyright
in title of
newspaper.

There is no copyright, strictly speaking, in the title of a newspaper, and the registration of a name at Stationers' Hall does not confer any exclusive right to the user. The right to the exclusive use of any title may, however, be acquired by "user and reputation." It then becomes a property which the Courts will protect. The use confers the right, not registration. This is well illustrated by the case of *The Licensed Victuallers' Newspaper Co. v. Bingham* (b). The plaintiffs had, on the 3rd February, published the first number of a newspaper called the 'Licensed Victuallers' Mirror.' On the next day they registered as the proprietors at Stationers' Hall, and duly deposited copies at the British Museum. They had previously to publication advertised their intention of starting a newspaper, but had not mentioned its name. Three days later, on the 6th of February, the defendant published the first number of another paper under the same title, which he registered at Somerset House and Stationers' Hall. Thereupon the plaintiffs applied for an injunction to restrain the defendant from publishing a newspaper under that name or any other name so closely resembling it as to mislead the public. The sales of the plaintiffs' paper before the issue of the defendant's were very small. It was proved also that the defendant had previously to the issue of the plaintiffs' paper registered at Stationers' Hall some twenty-eight newspaper titles, all beginning 'The Licensed Victuallers,' but 'The Licensed Victuallers' Mirror' was not among them. It was held that the plaintiffs were not entitled to an injunction on the ground that the plaintiffs' paper was not an article known in the market, or having any reputation which could induce the public to buy

(a) *Kelly v. Hutton* (1868), L. R. 3 Ch. App. 703; 38 L. J. (Ch.) 917; 19 L. T. 228.

(b) (1888), 38 C. D. 139.

the defendant's paper as being that of the plaintiffs', the mere registration in itself giving no exclusive right to the names, which right could only be acquired by user and reputation. On an appeal this decision was affirmed (*a*).

Where the name of a newspaper is taken for the purpose of deceiving the public and supplanting the goodwill of the original newspaper, an injunction will be granted (*b*); and the publication of a magazine in the name of one who no longer authorizes it will likewise be restrained (*c*).

Wrongfully assuming the name of newspaper.

Where the property in the first title has been duly acquired and a part only of that title is taken, that part must be so like the title of the first as to be calculated to deceive the public, and there must be reason to suppose that the first newspaper will suffer damages before the court can be successfully required to move.

Where part only of title taken.

The law on this point is perhaps best illustrated by the case of *Borthwick v. The Evening Post* (*d*). The plaintiff was the owner of the 'Morning Post.' The defendants were a joint-stock company which owned an old-established paper called 'Daily Recorder of Commerce.' In December 1887, they announced their intention of starting a new evening paper, to be called the 'Evening Post,' with which the 'Daily Recorder' would be incorporated. Thereupon the plaintiff applied for an injunction to restrain the defendants from publishing a newspaper under that name or under any other name of which the word 'Post' formed part. The first number of the 'Evening Post' was published on the 21st December, 1887. The words 'The Evening Post' were printed at the head of the paper in old English type, and underneath in smaller type were printed the words "With which is incorporated the 'Daily Recorder.'" It appeared that the new paper consisted of four pages, the 'Morning Post' of eight. The 'Evening Post' had no advertisements on the front page; the front page of the 'Morning Post' consisted entirely of advertisements. The price of both papers was the same. The placards issued by the two papers were printed in different colours. It was given in evidence by the plaintiff that twelve persons had called at the office of the 'Morning Post' to ask for copies of the 'Evening Post.' The defendants put in evidence to show that many London and

(*a*) See further *Dicks v. Yates* (1881), 13 Ch. D. 76.

(*b*) *Bell v. Locke*, 8 Paige (Amer.) 75; see *Snowden v. Noah*, Hopk. (Amer.) 347.

(*c*) *Hogg v. Kirby* (1803), 8 Ves. 215.

(*d*) (1888), 37 Ch. D. 449; *Walter v. Emmott* (1885), 54 L. J. Ch. 1059; *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. See *ante* p. 64 *et seq.*

CAP. VIII. provincial papers had had and some still had the word "Post" as part of their title. Mr. Justice Kay held that the defendants' paper and the circumstances connected with its issue were such as to deceive the public and damage the plaintiff, and he therefore granted an injunction. The Court of Appeal, however, reversed the decision, holding that though the defendants' conduct was calculated to deceive and had deceived the public, still there was no evidence that the plaintiff had suffered any damage hitherto, and no likelihood that he would suffer any in the future through the deception. They based this conclusion chiefly on the ground that as the one was a morning and the other an evening paper, there could be no real competition between them.

CHAPTER IX.

CROWN COPYRIGHT.

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

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

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

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

Printing, on its first introduction, was considered, as well in England as in other countries, to be a matter of state. The quick and extensive circulation of sentiments and opinions which that invaluable art produced could not but fall under the grip of government, whose strength was to some extent

CAP. IX.

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

The Bible and Book of Common Prayer (c).

The Bible
and Common
Prayer Book.

For two hundred years and more the kings have in England granted patents to their printers (*d*). From the time of Henry VIII. different persons have enjoyed, by letters patent, the privilege of printing prerogative copies to the exclusion of all other persons.

These patents have, from time to time, come under the consideration of the courts, and the judges have been invited to settle their limits. Many have given it as their opinion, that the prerogative is founded on the circumstance of the translation of the Bible having been actually paid for by King James, and its having thus become the property of the

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

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

(*c*) See *Mayo v. Hill*, cited 2 Show. 260; *King's Printer v. Bell*, Mor. Dict. of Dec. 19-20, p. 8316; Chitty's Prerogative of the Crown, ch. xi. s. 3.

(*d*) The letters patent conferring the office of King's Printer (Scotland) bear that he shall have "solum et unicum privilegium imprimendi in Scotia Biblia Sacra, Nova Testamenta, Psalmorum libros, et libros Precum communium, Confessiones Fidei, Majores et Minores Catechismos, in lingua Anglicana."

Crown (a). Others have referred it to the circumstance of the King of England being the supreme head of the Church of England, and having invested him with the prerogative in virtue of that character. This latter argument, Mr. Godson (b) contends, destroys the proposition it is adduced to support; for, if the sovereign *as head of the church*, has the exclusive right of printing *all books* of Divine service, why not, as head of the church have a right to print the principal book used in the Divine service—the Bible—and all kinds of Bibles, in whatever language they may be written? And yet the principle of *property* is resorted to for the right of printing the present edition of the Bible; and Lord Mansfield has declared that there is no prerogative right to the Bible in the original languages (c).

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

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

Mr. Reeves, one of the royal patentees, and the writer of several learned juridical publications, in the preface to his edition of the Bible (divided into sections), observes, that all the authorized Bibles published by the king's printer and the universities are wholly without explanatory notes. These privileged persons have confined themselves to printing the bare text, in which they have an exclusive right, forbearing to publish it with notes, which it is deemed may be done by any of the king's subjects as well as themselves. He subjoins to this passage a note in the following terms: "I mean such

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

(b) 'Patents and Copyrights,' p. 137.

(c) 1 Burr. 2105, cited Godson's Pat. and Copy. 137.

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

CAP. IX.

notes as are *bona fide* intended for annotations, not the pretence of notes which I have seen in some editions of the Bible and Common Prayer Book, placed there merely as a cover to the piracy of printing upon the patentees, as if fraud could make legal anything that was in itself illegal. In some of these editions the notes are placed purposely to be cut off by the binder" (a).

View taken
in Ireland.

In *Grierson v. Jackson* (b), upon an application for an injunction against printing an edition of a Bible in numbers with prints and notes, Lord Clare, as Chancellor of Ireland, asked if the validity of the patent had ever been established at law, and said he did not know that the Crown had a right to grant a monopoly of that kind. In the course of the discussion he made the following observations: "I can conceive that the king, as head of the church, may say that there shall be but one man who shall print Bibles and Books of Common Prayer for the use of churches and other particular purposes, but I cannot conceive that the king has any prerogative to grant a monopoly as to Bibles for the instruction of mankind in the revealed religion; if he had, it would be in the power of the patentee to put what price he pleased upon the book, and thus prevent the instruction of men in the Christian religion. If ever there was a time which called aloud for the dissemination of religious knowledge it is this, and, therefore, I should with great reluctance decide in favour of such a monopoly as this, which must necessarily confine the circulation of the book."

View taken
in England.

This has not been the view taken of the subject in England. for in the case of the *Universities of Oxford and Cambridge v. Richardson* (c), an injunction upon motion was granted against the king's printer in Scotland, who had a patent for the sale of Bibles, printing or selling them in England, upon the ground that possession, under colour of title, was sufficient to injoin and to continue the injunction till it was proved at law that it was only colour and not real title. In the course of the case it appeared that, in the year 1718, Sir Joseph Jekyll, as Master of the Rolls, had granted an injunction in a similar case, which was supported on appeal before the Lord Chancellor; and also, that a decree of the Court of Session had, in the year 1717, been reversed by the House of Lords in favour of the right of the king's printer in England, confining the right of the Scotch printer to Scotland. With respect to the precedent of the

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

(b) Irish T. R. 304.

(c) (1802), 6 Ves. 689. See *Manners v. Blair* (1830), 3 Bli. R. 391; *re Red Letter New Testament* (1900), 17 Times L. R. 1.

injunction, it is clear that there had been abundance of injunctions before upon private copyright, until the claim was finally put an end to by the decree of the Lords; and questions between rival patentees were not the most probable method of bringing into fair discussion the general rights of the subject to resist the claim of prerogative, root and branch (*a*). The Lord Chancellor, in his judgment, said, "My opinion is, that the public interest may be looked to upon a subject, the communication of which to the public in an authentic shape, if a matter of right, is also a matter of duty in the Crown, which are commensurate. It is not accurate to say, these privileges are not granted for the sake of unlimited sale, and for the sake of the universities, &c. They are, to a certain degree, like all other offices, calculated for that sort of advantage which will secure to the public the due execution of the duty; upon this principle proceed all the branches of our constitution (which does not adopt the wild theories that require the execution of a duty without a due compensation), that the duty is well secured in one way by giving a responsibility, in point of means, to the person to execute it. The reasoning which affects to depreciate monopoly, will perhaps tend to create it." There certainly is no great risk that false copies of the Bible would get into general circulation by an unlimited right of printing them. We do not find it materially the case in other works; and there are very few persons indeed who would admit that the beneficial circulation of any commodity in general, or of these writings in particular, can be promoted by means of an exclusive monopoly; and the principal object, both of the right and the duty, with respect to the particular subject, appears to be the benefit arising to the privileged individuals (*b*).

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

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

(*a*) 2 Evans' 'Statutes,' 2nd ed. p. 17.

(*b*) *Ibid.* p. 18.

Acts of Parliament and Matters of State.

The right in
state docu-
ments.

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

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

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

The patent was to print "all law books that concern the

(a) (1769), 4 Burr. 2303.

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

But see
Scrutton
on Copyright
ed. 1953,
p. 9.

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

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

Perhaps the most important case on this head is that of *Roper v. Streater* (b), decided in 1672, the facts of which were these:—Roper bought of the executors of Justice Croke the third part of his reports, which he printed; Colonel Streater had a grant for years from the Crown for printing all law books, and he reprinted Roper's work without permission; on which Roper brought an action under the Licensing Act. Streater pleaded the king's grant, and on demurrer it was adjudged for the plaintiff against the validity of the patent, on these grounds: that the patent tended to a monopoly; that it was of a large extent; that printing was a handicraft trade, and no more to be restrained than other trades; that it was difficult to ascertain what should be called a law book; that the words in the patent "touching or concerning the common or statute law," were loose and uncertain; that if this were to be considered as an office, the grant for years could not be good, as it would go to executors and administrators; and that there was no adequate remedy in the way of redress in cases of abuses by unskilfulness, selling dear, printing ill, &c. This judgment, however, was reversed on a writ of error in Parliament, for the following reasons: that the invention of printing was new; that this privilege had been always allowed, which was a strong argument in its favour, although it could not be said to amount to a prescription, as printing was introduced within time of memory; that it concerned the state, and was matter of public care; that it was in the nature of a proclamation, which none but the king could make; that the king had the making of judges, serjeants, and officers of the law; that as to the uncertainty, these words in the patent were to be taken *secundum subjectam materiam*, and not to be extended to

(a) *Atkyns's case*, Carter, 89; 1 Bl. 113; 6 Bac. Abr. 507; 10 Mod. 105.

(b) (1672), Skin. 234. See 1 Mod. 257; 2 Show. 260; 10 Mod. 105.

CAP. IX. a book containing a quotation of law but where the principal design was to treat on that subject; that as to its being an office, it was not so properly an office as an employment, which may well enough be managed by executors or administrators; and that as to abuses, these, like all others, were punishable at common law, or the patent itself might be repealed by *sci. fac.* (a).

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

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

As to the publication of Though a court of justice appears to have the sole power of authenticating the publication of its own proceedings, it does

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

(b) (1746), 1 W. Bl. 105; 2 Burr. 661; see 2 Bla. Com. 116; and 5 Bac. Abr. tit. Pre. F. 5.

(c) Pref. to Dougl. R.

(d) Burr. R. Pref. viii.

not necessarily follow that it has an exclusive right of publication. CAP. IX.

Since the Year-Books, it seems that no judicial proceedings, with the exception of state trials, have been published under authoritative care and inspection, either by the House of Lords or by any court of judicature.

proceedings
in courts of
justice.

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

Publication during the course of a trial will be prohibited, when the publication would have a tendency to interfere with a fair and impartial decision; on this principle Lord Abbott, C.J., sitting at the Old Bailey, acted on the indictment of Thistlewood and others for high treason in the year 1820 (d). The prohibition was infringed by the proprietor of the 'Observer' newspaper, and the proprietor was fined £500 for contempt of court. He appealed subsequently to the Queen's Bench, on which occasion Holroyd, J., in refusing to make absolute a rule *nisi* obtained, said: "This was an order made in a proceeding over which the Court had judicial cognizance; the subject-matter respecting which it was made was then in the course of judicature before them. The object for which it was made was already, as it appears to me, one within their jurisdiction, viz., the furtherance of justice in proceedings then pending before the Court; and it was made to remain in force so long, and so long only, as those proceedings should be pending before them. Now, I take it to be clear that a court of record has a right to make orders for regulating their

When pub-
lication
during trial
prohibited.

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

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

(c) Cited *Millar v. Taylor*, 4 Burr. 2329. See 13 Ves. 493; *Stockdale v. Hansard* (1842), 9 Ad. & E. 1, 97.

(d) *Reg. v. Clement* (1820), 4 Barn. & Ald. 218; see also *Tichborne v. Mostyn* (1869), L. R. 7 Eq. 55, note; *re Martindale* (1894), 3 Ch. 193.

CAP. IX.

proceedings and for the furtherance of justice in the proceedings before them, which are to continue in force during the time that such proceedings are pending. It appears to me, that the arguments as to a further power of continuing such orders in force for a longer period do not apply. It is sufficient for the present case, that the court have that power during the pendency of the proceedings. This order was made to delay publication only so long as it was necessary for the purposes of justice, leaving every person at liberty to publish the report of the proceedings subsequently to their termination. I am therefore of opinion, that this was an order which the court had the power to make."

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

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

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

It is clear, however, that no individual can claim any exclusive right to the opinions or judgments of the judges, for though a reporter can have copyright in his report and prevent the piracy of that upon which he has spent time and labour (e), yet it is obvious that he has no exclusive right to the words that the judge has uttered so as to be able to prevent another from publishing his own report of them.

(a) *Rex v. Fleet* (1817), 1 Barn. & Ald. 379, 384. See *Tichborne v. Tichborne* (1875), 15 W. R. 1072; 17 L. T. (N.S.) 5. As to staying reports of cases as libellous or unfair, see *Brooke v. Evans* (1860), 6 Jur. (N.S.) 1025; *Coleman v. W. Hartlepool Railway* (1869), 8 W. R. 734.

(b) (1801), 5 Ves. 709.

(c) (1838), 3 My. & Cr. 711, and *Vesey v. Sweet*, cited 5 Ves. 709, note 3.

(d) Phillips on Copy. 196. See *Wheaton v. Peters* (1834), 8 Peters R. (Amer.) 591, 668, and remarks of Story, J., in *Gray v. Russell* (1839), 1 Story, R. (Amer.) 4.

(e) *Walter v. Lane* (1900), A. C. 539. But see the following American decisions *Wheaton v. Peters*, *supra*; *Gray v. Russell*, *supra*; *Banks v. Manchester* (1888), 128 U.S. 244; *Davidson v. Wherlock* (1866), 27 Federal Reporter 61.

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

CAP. IX.

Almanacs.

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

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

In an action of debt by the *Company of Stationers against Seymour* (c), for printing 'Gadbury's Almanac,' it was adjudged that the letters patent granted to the company for the sole printing of almanacs were valid: and though the jury found that the almanac so printed contained some additions, yet having likewise found that the said almanac had all the essential parts of the almanac that was printed before the Book of Common Prayer, the additions were regarded as immaterial.

So also was an injunction granted against Lee (d), on the application of the Stationers' Company to restrain him from selling "primers, psalters, *almanacs*, and singing psalms, imported from Holland," the sole privilege of printing these belonging to that Company; and that without any trial directed as to the validity of the patent. Notwithstanding the above decisions, the prerogative right to the printing of almanacs was strongly protested against in the case of the *Stationers' Company v. Partridge* (e). No judgment, indeed, was given in that case, but it stood over that the Company might see if they could make it like the case of the Common Prayer Book,—whether they could show that the right of the

(a) *Baskett v. Cunningham* (1762), 1 W. Bl. 370.

(b) 2 Show. 258; *Stationers' Co. v. Wright*, 2 Ch. Cas. 76. (c) 1 Mod. 256.

(d) (1681) 2 Ch. Ca. 76, 93; 2 Show. 259; *Stationers' Co. v. Wright*, Skiu. 234; 4 Burr. 2328.

(e) (1709), 10 Mod. 105, cited 2 Bro. P. C. 137.

CAP. IX. Crown had any foundation in property; and it was never referred to again.

In a subsequent case, that of the *Stationers' Company v. Carnan* (a), the right was successfully combated, and judgment given in favour of the defendant. An account of these various phases of legal doubt and indecision is succinctly given by Lord Erskine in *Gurney v. Longman* (b): "It appears in the case of *Millar v. Taylor* that the Crown had been in the constant course of granting the right of printing almanacs; and at last King James II. granted that right by charter to the Stationers' Company and the two universities, and for a century they kept up that monopoly by the effect of prosecutions. At length Carnan, an obstinate man, insisted upon printing them. An injunction was applied for in the Court of Exchequer, and was granted to the hearing; but at the hearing, the Court of Exchequer directed the question to be put to the Court of Common Pleas, whether the king had a right to grant the publication of almanacs, as not falling within the scope of the necessity or expediency, the foundation of prerogative copies. It was twice argued in the Court of Common Pleas; and the answer returned by that court to the Court of Exchequer was, that the charter was void, and almanacs were not prerogative copies. The injunction was accordingly dissolved, that usurpation having gone on for a century; and the House of Commons threw out a bill, brought in for the purpose of vesting that right in the Stationers' Company."

In consequence of this decision, an Act was passed, which after reciting, that the power of granting a liberty to print almanacs and other books was theretofore supposed to be an inherent right in the Crown, and that the Crown had, by different charters under the great seal, granted to the universities of Oxford and Cambridge, among other things, the privilege of printing almanacs; and that the universities had demised to the Company of Stationers their privileges of printing and vending almanacs and calendars, and had received an annual sum of £1000 and upwards as a consideration for such privilege, and that the money so received by them had been laid out and expended in promoting different branches of literature and science, to the great increase of religion and learning and the general benefit and advantage of these realms; and that the privilege or right of printing almanacs had been, by a late decision at law, found to have been a common right, over which the Crown had no control, and consequently the

(a) 2 Wm. Bl. 1004.

(b) (1806), 13 Ves. 508.

universities no power to demise the same to any particular person or body of men, whereby the payments so made to them by the Company of Stationers had ceased and been discontinued, enacted that £500 a year should be paid to each of the universities, out of the moneys arising from the duties upon almanacs (a). CAP. IX.

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

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

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

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

(b) 9 Geo. IV., c. 66.

(c) See *Stationers' Co. v. Partridge*, 4 Burr. 2339, 2382, 2402; 10 Mod. 105; *Nicol v. Stockdale* (1820), 3 Swans. 687.

CHAPTER X.

UNIVERSITY AND COLLEGE COPYRIGHT.

Copyright
at the
universities
and colleges.

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

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

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

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

As to their
registration
and sale.

A power is given to the universities to sell or dispose of the copyrights given or bequeathed to them, but if they delegate, grant, lease, or sell the copyright of any book, or allow any

(*a*) (1774). 4 Burr. 2408.

(*b*) 15 Geo. III., c. 53.

(*c*) The late Dr. Jowett bequeathed the copyright in his books to the University of Oxford in conformity with this Act.

person to print it, their privilege ceases to exist. The copyright of any work presented to the universities must be registered at Stationers' Hall within two months after any such gift shall come to the knowledge of the officers of the universities.

CAP. X.

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

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

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

It appears that in 1878 the University of Oxford possessed six copyrights, and the University of Cambridge had none. "This fact," says the Royal Commissioners in their Report in 1878 on Copyright, "shows that the privilege, which is by no means of recent origin, is of very little real value, and as it is undesirable to continue any special and unusual kinds of copyright, we are of opinion that this exceptional privilege should be omitted from the future law. We do not, however, think it would be right to deprive the institutions above named of the copyrights they already possess, without their consent, but should they be retained, we suggest that the universities and other institutions should be placed upon the same footing as regards protection of their copyrights as other copyright owners, and that the exceptional penalties and remedies given by the Act which was passed in the fifteenth year of the reign of his late Majesty King George III. should be repealed." Copyrights at present possessed by the universities.

(*a*) 15 Geo. III. c. 53, s. 2.

PART II.

MUSICAL AND DRAMATIC COPYRIGHT.

Copyright
and perform-
ing right.

MUSICAL and dramatic compositions have this point in common, that the author of either has, or may have, two different rights in his composition: one, that of copyright proper, the right to prevent the multiplication of copies of the piece itself; the other, what may be called the acting right or performing right—the right to prevent other persons from publicly representing or performing the piece without his (the author's) consent. These two rights are, as we shall see, quite distinct, each being a separate property and each capable of being assigned without the other, and they may expire at different times (*a*).

Such com-
positions
within the
Literary
Copyright
Act.

As to copyright proper, both musical and dramatic compositions, when in manuscript, are protected like other literary compositions (*b*); when printed and published they are books within the meaning of the Literary Copyright Act.

The point whether there could be copyright in a musical composition first came before Lord Mansfield in *Bach v. Longman* (*c*). It was a case sent out of Chancery for the opinion

(*a*) *Chappell v. Boosey* (1882), 21 Ch. D. 232.

(*b*) In *Gilbert v. Star Newspaper Co.* ((1894) 11 T. L. R. 515), the publication of the plot of a play in rehearsal was restrained.

(*c*) (1777), Cowp. 623. In *D'Almaine v. Boosey* (1835), 1 Y. & C. Exch. 299, Lord Abinger said: "I spent three or four days at Stationers' Hall in order to ascertain what entries were made under the Act of Parliament, and I found not only that short publications on single sheets of paper were entered as books, but also a great deal of music. There is no doubt, therefore, that printed music, in whatever form it may be published, is to be considered in reference to proceedings of this nature, as a book." Music copyrights are sometimes of great value. At a sale of Messrs. Hopwood and Crewe, the copyrights of that firm fetched a total of £15,000—Coote's 'Burlesque Valse,' £175 10s.; the 'Sweetly Pretty Valse,' £215; the 'Cornflower Valse,' £132; and the 'Prince Imperial Galop,' £990, the largest sum ever obtained, it is believed, for a single piece of dance music; Hobson's 'Popular Favourites for the Pianoforte' sold for £412 10s.; Buckley's song, 'Come where the Moonbeams Linger,' £157 10s.; and H. Clifton's 'Very Suspicious,' £330. Mr. Coote purchased his own 'Snowdrift Galop' for £561.

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

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

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

Now, by the interpretation clause of the 5 & 6 Vict. c. 45, the word "book," in the construction of the Act, is to mean and include "every volume, part or division of a volume, pamphlet, sheet of letterpress, *sheet of music*, map, chart, or plan separately published."

Until 1833 there was no statute dealing with the right of the author of a dramatic composition to represent it in public, and musical performing rights were not touched by statute till 1842. At common law the author had the exclusive right of public performance, if the work were not published as a book; but if it were so published he probably lost such right.

Performing
right at
common law.

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

(*a*) (1788), 2 Camp. 27, note a. (*b*) *Clementi v. Golding* (1809), 2 Camp. 32.

(*c*) *White v. Geroch* (1819), 2 Barn. & Ald. 298; see *Clayton v. Stone*, 2 Paine (Amer.) 383.

(*d*) In equity, injunctions have been granted to stop the performance of printed

PART II.
Formerly
representa-
tion not
equivalent to
publication.

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

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

American
law on this
subject.

Though the law on this point has been altered as to the English law by the 5 & 6 Vict. c. 45, s. 20 (c), the American law would appear to be in accordance with the above decision. In a case, in 1870, before the Superior Court of New York (d), the facts were as follows: The action was brought to obtain an injunction restraining the printing and publishing by the defendant of a drama or comedy called 'Play,' and the complaint, alleged that immediately prior to February, 1868, Mr. Robertson, of London, sold to the plaintiff his exclusive right of performing the drama upon the stage, and printing and publishing the same within and throughout the United States; that the first performance of it was at the Prince of Wales'

dramatic works at the request of the authors of them: *Morris v. Harris, Morris v. Kelly* (1820), 1 Jac. & W. 481; 21 R. R. 216; cited Golson on 'Patents and Copy-rights,' 390.

(a) *Macklin v. Richardson* (1770), Amb. 694; but see 5 & 6 Vict. c. 45, s. 20.

(b) *Coleman v. Wathen* (1793), 5 T. R. 245. Sheridan's opera of the 'Duenna' (*The Proprietors of Covent Garden v. Vandermere and others*) was also represented on the stage without the permission of the proprietor on similar grounds; see, however, 5 & 6 Vict. c. 45, s. 40.

(c) *Boucicault v. Delafield* (1863), 33 L. J. Ch. 38; 9 L. T. 709.

(d) *Palmer v. Dewett* (1870), 23 L. T. 823.

Theatre, in London, but that there had been no *publication* in any other way. The defendant, however, had obtained the words of the play, &c., from persons who had seen it acted in London, and he published it in the United States before the plaintiff. This the defendant justified on the ground that the tickets admitting the spectators to the performance in London contained no notice or prohibition against carrying the comedy away, by memory or otherwise, and using, printing, or publishing the same; nor was any notice to that effect posted in any of the theatres in view of the spectators. The question was, whether the performance in London was such a publication as would deprive the owner of his common law right of property in it, and the Court held that it was not. Mr. Justice Monell, in his judgment, after examining the case of *Keen v. Clark* (a), where it had been decided that it was not unlawful for a spectator to carry away in memory and give to the world an unpublished literary production, the performance of which he had witnessed, or to the recital of which he had listened, and after holding that the case of *Boucicault v. Delafield* (b) decided in England, was not an authority upon any question of actual or constructive publication not arising under the English copyright law, summed up as follows: "My conclusions upon the whole case are, that there was no such publication by the plaintiff, or by his assignor, of the play in question as to deprive the plaintiff of his common law right of property in it. That public representations of the play were not a publication of the play so as to take away the common law right. . . . I am, therefore, of opinion that the plaintiff is entitled to a judgment restraining the defendant from further printing or publishing the play, and requiring him to deliver up to be destroyed such as are now in print" (c).

That the author of a musical or dramatic composition who published in the form of a book thereby lost, at common law, his right to prevent the public performance of it without his consent seems to be involved in the decision in *Murray v. Elliston* (d). In that case Lord Byron's tragedy of 'Marino Faliero,' altered and abridged for the stage, was performed without the consent of the owner of the copyright, who applied for an injunction and it was laid down, that an action could not be maintained, "for publicly acting and representing the said tragedy, abridged in manner aforesaid." As, however, in the case cited, the

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

(b) *Ubi sup.*

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

(d) (1822), 5 Barn. & Ald. 657; and S. C. 1 Dowl. & Ryd. 24 R. R. 519. The law now been altered. *Chappell v. Boosey* (1882), 21 Ch. D. 232.

PART II. Courts seem to have held that the plaintiff, apart from the question of abridgment, had no exclusive right, it is difficult to see what stress they laid upon the fact of the alleged piracy being an abridgment.

Act to amend
the law
relating to
dramatic
copyright.

The many defects existing in the law as to performing rights led to the passing of the 3 & 4 Will. IV. c. 15 (a), which, however, only dealt with the performing rights in dramatic pieces. It enacted that the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment (b) *composed and not printed or published* should have the sole liberty of representing it, or causing it to be represented, in any part of the British dominions (c); and that the author of any such production which should be *printed and published* should have the sole right of representation from the time of publication, for a period of twenty-eight years, and also if the author were living at the end of that time, for the remainder of the author's life. And further enacted, that if any person should represent, or cause to be represented (d), without the consent in writing of the author or other proprietor (e), at any place of dramatic entertainment (f), any such production, or any part thereof, every such offender should be liable for each and every such representation to the payment of an amount not less than 40s. or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages, to the author or other proprietor of such production so represented, to be recovered, together with double costs of suit.

Double costs were taken away in all cases by 5 & 6 Vict. c. 97, s. 2, and the plaintiff can now only recover a full and reasonable indemnity as to all expenses incurred, to be taxed by the proper officer in that behalf (g).

Copyright
Act, 1842.

The 5 & 6 Vict. c. 45 deals with the performing rights

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

(b) In *Lee v. Simpson* (1847), 3 C. B. 871, 4 D. & L. 666, it was determined that a pantomime, or rather the introduction to one, which is the only written part of the entertainment, is protected from piracy under this Act.

(c) No period for the right of representation is here prescribed for an unpublished work, and it has been contended that the effect of this was to confer a perpetual right.

(d) *Russell v. Briant* (1849), 19 L. J. (C.P.) 33; 14 Jur. 201; 8 C. B. 836; *Lyon v. Knowles* (1863), 5 B. & S. 751; *Marsh v. Conquest* (1864), 17 C. B. 418; *Monaghan v. Taylor* (1885), 2 T. L. R. 685; *Duck v. Mayeu* (1892), 2 Q. B. 511; 8 T. L. R. 339; *French v. Day* (1892), 9 T. L. R. 548; *Kelly's Directories v. Gavin* (1902), 1 Ch. 631.

(e) *Eaton v. Lake* (1888), 20 Q. B. D. 378.

(f) *Wall v. Taylor*, *Wall v. Martin* (1882), 9 Q. B. D. 727; 11 Q. B. D. 102; *Duck v. Bates* (1884), 12 Q. B. D. 79; 13 Q. B. D. 843.

(g) *Reeve v. Gibson*, [1891] 1 Q. B. 652.

both in musical and dramatic compositions. Section 20, after reciting that it was expedient to extend the term of the sole liberty of representing dramatic pieces given by the 3 & 4 Will. IV. c. 15 to the full time provided by the 5 & 6 Vict. c. 45 for the continuance of copyright; and that it was expedient to extend to musical compositions the benefits of the 3 & 4 Will. IV. c. 15, provides that the sole liberty of representing or performing, or causing (a) or permitting to be represented or performed, any dramatic piece or musical composition shall endure and be the property of the author thereof and his assigns for the term in the Act provided for the duration of copyright in books (b); and the provisions thereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were therein expressly re-enacted and applied thereto (c), save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of the Act, to the first publication of any book: provided always, that in case of any dramatic piece or musical composition in manuscript, it shall be sufficient for the person having the sole liberty of representing or performing, or causing to be represented or performed, the same, to register only the title thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor thereof, and the time and place of its first representation or performance. Section 21 provides that the person who has the sole liberty of representing a dramatic piece or musical composition shall have and enjoy all the remedies given by the 3 & 4 Will. IV. c. 15 during the whole of his interest therein.

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

It is doubtful whether, supposing a dramatic piece or

(a) See *Parsons v. Chapman* (1831), 5 Car. & Payne, 33; *Monaghan v. Taylor* (1885), 2 T. L. R. 685.

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

(c) By virtue of this section the 5 & 6 Vict. c. 45, is retrospective as to the exclusive right to the performance of musical compositions published before the passing of the Act: *Ex parte Hutchins and Romer* (1878), 4 Q. B. D. 90, 483.

PART II.

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

The remedies provided by the Act of Will. IV. not affected by the 5 & 6 Vict. c. 45.

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

This was seen in a case which came before the Court of Exchequer in 1872. The facts were briefly these: The plaintiff purchased from a Mr. Elton all the property in the copyright in the words of a comic song called 'Come to Peckham Rye,' of which the latter was author, the sum given being £2. Mr. Clark was in the habit of singing this song at the Oxford Music Hall, and similar places of entertainment. In the course of his performance the song attracted much attention, and he was offered by a certain publisher ten guineas for his property in the composition. The defendant Bishop, who was a publisher in the East-End of London, contrived to obtain a copy of the song, which up to this moment remained in manuscript, and published the same with some slight alterations. The plaintiff, feeling himself aggrieved, brought an action for damages against Bishop for the infringement of his copyright. The case was tried before the common serjeant in the Lord Mayor's Court, when a verdict was returned against the defendant with £10 damages. A rule to set aside such verdict was, however, obtained on the ground that the plaintiff not having registered his copyright at Stationers' Hall, had no right to sue for damages in respect of it. The point having been fully argued, the court decided that the 24th section of the Act applied only to books, and had no reference to such productions as that in question: and that the other sections relating to songs and dramatic representations connected with them, did not make it obligatory to the owners to register them in order to preserve them against any infringement of their copyright (b). Consequently it may be taken that the omission to register will not prejudice the remedies which the

Omission to register does not affect the

(a) See *Boosey v. Fairlie* (1877), 7 Ch. Div. 301, 316. It has been held in America that the representation of a dramatic work which the proprietor has never caused to be printed and has not obtained a copyright of, if made without the licence of the proprietor, is a violation of his right, and may be restrained by injunction, although such representation is from a copy obtained by a spectator attending a public representation by the proprietor for money, and afterwards writing it from memory. *Tompkins v. Halleck*, 19 Lathrop. (Amer.) 32.

(b) *Clark v. Bishop* (1872), 25 L. T. 908.

proprietor of the sole liberty of representing any dramatic piece has by virtue of the Act 5 & 6 Vict. c. 45, or of the 3 & 4 Will IV. c. 15.

We propose now to consider the term of copyright conferred on the author of a musical or dramatic composition.

First, as to copyright strictly so-called, that is the sole right or liberty of multiplying copies of the composition :—By virtue of section 3 of the Copyright Act, 1842, the author will have copyright, where the work is published in his lifetime, for his life and a further term of seven years from the time of his death or for a single term of forty-two years, whichever be the longer period. The time runs from the date of publication. If the work be published after the author's death then the proprietor of the manuscript will have copyright for forty-two years, likewise calculated from the date of publication.

Secondly, as to the performing right :—(a) If the work has been published as a book, the author has the exclusive performing right for the same period as the copyright, except that the right dates from the first public representation or performance of the work ; (b) if the work has not been published as a book, but is in manuscript only, the term is doubtful, for the 3 & 4 Will. IV. c. 15 did not prescribe any term in such a case, and it is not clear that the 5 & 6 Vict. c. 45 has altered this. The right may, therefore, be perpetual, or, on the other hand, as seems more probable, the term may be the same as in the case where the work is printed and published.

These two rights—copyright and performing rights—may each reside in different persons simultaneously and may expire at different periods.

It is obvious that many questions of difficulty may arise with regard to the right of representation in manuscript plays.

Some of the general principles seem clear, but there are very nice distinctions on which little light is obtainable from the reported cases. When the right of representation has once been secured, it will be unaffected by any subsequent representation of the piece. Therefore, if first published in Great Britain and the copyright in the piece duly secured, the first representation of the play afterwards in a foreign country would not affect the copyright.

But a previous publication of the play in print in a foreign country would in the absence of any treaty defeat the claim to copyright in this, and the right of representation could not

PART II.

copyright or
the recovery
of penalties.Term of
copyright.Right of
representa-
tion in
manuscript
plays.

PART II.

be secured in this country, even though the first representation of the play were to take place here.

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

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

It therefore seems more likely that, should the question arise, it would be held that the right of exclusive representation would run from the date of the first representation of the play in manuscript, and not from the date of the publication of the same play in print. No limit is fixed for the duration of the exclusive right of representation of the play while yet in manuscript; and therefore if not perpetual, the right would seem to last for forty-two years or for the life of the author, and seven years after his death, whichever may be the longer period.

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

It has been thought that the right of representation, secured by registration in accordance with the Act, of a piece in manu-

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

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

As to dramatic pieces and musical compositions, the Royal Commissioners in their report in 1878 said: “While in books there is only one copyright, in musical and dramatic works there are two, namely, the right of printed publication and the right of public performance.”

Suggestions of the Copyright Commissioners as to musical and dramatic copyright.

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

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

“We further propose, in order to avoid the disunion between the literary and the performing rights in musical compositions and dramatic pieces, that the printed publication of such works should give dramatic or performing rights, and that public

(*a*) Drone's ‘Law of Copyright and Playright’ (Amer.) 607. The point was raised, but not decided, in the case of *Boosey v. Fairlie* (1877), 7 Ch. Div. 316.

PART II.

performance should give literary copyright. For a similar reason it would be desirable that the author of the words of songs, as distinguished from the music, should have no copyright in representation or publication with the music, except by special agreement" (a).

The doubt expressed in the above report as to the performing right when the piece has been first printed and published as a book is not well founded, it having been decided that the publication in this country of a dramatic piece or musical composition as a book before it has been publicly represented or performed, does not since the Act of 1842 deprive the author or his assignee of the exclusive right of representing it or performing it (b).

Musical performing rights must now be expressly reserved.

The performing rights in the case of dramatic compositions are, generally, more valuable than the copyright, but the author of a musical composition generally looks for his profits to the sale of copies of his work, and consequently is the better pleased the more often it is publicly performed. The fact, however, that strictly the public performance of a copyright song or piece of music was an infringement of the author's rights led to many abuses which were sought to be remedied by the Copyright (Musical Compositions) Act, 1882 (c), which requires that musical performing rights must be expressly stated to be reserved on the title page of every published copy of the work.

It is provided by section 1 of this Act that if the proprietor of the copyright in any *musical composition* first published after the passing of the Act, or his assignee, shall be desirous of retaining in his own hands exclusively the right of public representation or performance of the same, he must notify the same in print on the title-page of every published copy of such musical composition.

Where copyright and performing right in different persons.

By section 2 it is provided that if before publication the right of public representation or performance be, and the copyright be, vested in different owners, and the former desire to retain the right of public representation or performance, he must, before publication, give to the owner of the copyright notice in writing requiring him to print upon every copy of such musical composition a notice to the effect that the right of public representation or performance is reserved: and further, that if after publication, subsequent to the Act, the right of public representation or performance and the copyright, shall become separated and vested in different

(a) Par. 72-75.

(b) *Chappell v. Boosey* (1882), 21 Ch. D. 232.

(c) 45 & 46 Vict. c. 40.

owners, and such notice shall have been duly printed on all copies published after the Act previously to such vesting, then, if the owner of the right of public representation or performance desire to retain the same, he must before the publication of any further copies of such musical composition, give notice in writing to the person in whom the copyright is vested, requiring him to print such notice as aforesaid on every copy of such musical composition to be thereafter published.

By the 3rd section, if the owner of the copyright, after due notice being given to him or his predecessor in title at the time and generally in accordance with the last preceding section, neglect or fail to print legibly and conspicuously upon every copy of such composition published by him or by his authority, or by any person lawfully entitled to publish the same, and claiming through or under him, a note or memorandum stating that the right of public representation or performance is reserved, then the owner of the copyright at the time of the happening of such neglect or default is to forfeit and pay to the owner of the right of public representation or performance of such composition the sum of £20. This penalty is a fixed one; and in some cases will be too much and in others too little. But no discretion seems to be given to the court.

Failure of copyright owner to print notice of reserve.

Though it will be noticed that the above Act does not declare what is to happen if the owner of the performing right does not have printed upon every copy of a musical composition a notice that the right of public representation is reserved, yet it seems reasonably clear that the effect is that he only retains the right and is able to sue for infringement if he does so (*a*). A statement, "This song may be sung without fee or licence except at music-halls," is a reservation of the right of representation only so far as music-halls are concerned (*b*), and even if the musical piece in question be also a dramatic piece within the Act of William IV. the reservation must be made (*c*).

Effect of failure to print notice of reserve.

The penalties provided by section 2 of the Dramatic Copyright Act in the case of dramatic compositions are only incurred if the representation be without the *consent in writing of the author or other proprietor*. The consent may be given by the author's agent, and it has been decided that the Dramatic Authors' Society is agent to its members, for the purpose of

When penalties are incurred.

(*a*) *Fuller v. Blackpool Winter Gardens* (1895), 2 Q. B. 429, 441.

(*b*) *Ib.* In a case of *Moul v. Coronet Theatre* (Times, 11th Dec., 1901; on appeal, Times, 4th Feb., 1903), it was suggested that a notice in French, printed in small type, was not a compliance with the Act. This is important from an international point of view.

(*c*) *Fuller v. Blackpool Winter Gardens, supra.*

PART II.

authorising managers of theatres to perform pieces composed by its members (a).

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

Consent
where several
owners of
copyright.

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

Whether
performance
must be at a
place of
dramatic
entertain-
ment.
(a) Dramatic
pieces.

It will be observed that the 3 & 4 Will. IV. c. 15 limits the unlawful representation to a "place of dramatic entertainment," whereas the 5 & 6 Vict. c. 45, ss. 20 and 21, makes no mention of such a condition. In the case of a dramatic composition, however, the point is immaterial, for the mere performance of a dramatic piece makes the place where it is performed a place of dramatic entertainment. This was decided in the case of *Russell v. Smith* (d), where, indeed, the subject matter of the dispute was a song, but one which the court held to be a dramatic composition within the meaning of the 3 & 4 Will. IV. c. 15 (e).

Mr. Russell, who was the composer of a song called 'The Ship on Fire,' brought an action against a man of the name of Smith for singing the same song, among others, at an entertainment which he opened at Crosby Hall, Bishopsgate, and to which he gave admission by shilling and two-shilling

(a) *Moreton v. Copeland* (1855), 16 C. B. 517; S. C. 24 L. J. (C.P.) 169; *Fitzball v. Brooke* (1845), 2 Dow. & Lown. 477; *Shepherd v. Conquest* (1856), 25 L. J. (C.P.) 127; 17 C. B. 427.

(b) *Per Maule, J.*, in *Moreton v. Copeland*, *supra*.

(c) *Powell v. Head* (1879), 12 Ch. D. 686; 48 L. J. Ch. 731; 41 L. T. 70.

(d) (1848), 12 Q. B. 217.

(e) As to when a song is a dramatic composition see *post*.

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

The question whether an unauthorized performance of a musical composition is unlawful only when it takes place, at (b) Musical compositions. "a place of dramatic entertainment," was raised and decided in the negative in the case of *Wall v. Taylor* (b). There the plaintiff had the exclusive right of singing a song entitled the 'Will o' the Wisp.' The song was sung without the consent of the plaintiff at a concert, and at a place not used on any other occasion as a "place of dramatic entertainment." For the plaintiff it was said that the song was a "dramatic song" within the meaning of the 5 & 6 Vict. c. 45, and that it had been publicly performed or represented, and that therefore he was entitled to the penalty of 40s. On the other hand, it was argued that, assuming the song was one to the performance of which the plaintiff had an exclusive right, yet inasmuch as it was sung at a place which was not a "place of dramatic entertainment," the plaintiff was not entitled to recover any penalty, but only the amount of such damages as he had suffered.

(a) In the same case Patteson, J., remarked that "the street where 'Punch' is performed is for the time being a place of dramatic entertainment." See *Duck v. Bates* (1884), 12 Q. B. D. 79; 13 Q. B. D. 843; 49 L. T. 507; 32 W. R. 169.

(b) (1883), 9 Q. B. D. 727; 11 Q. B. D. 102; 47 L. T. 47; 51 L. J. (Q.B.) 547; 52 L. J. 213, 558; 31 W. R. 712. In *Duck v. Bates, supra*, it was thought that the *dicta* of Brett, M.R., in the above case were too wide.

PART II. The Court held that the proprietor of the right of performance was entitled to the penalty given by the Dramatic Copyright Act even though the musical composition had not been represented at "a place of dramatic entertainment."

Private performances not infringement.

But in order that the performance of a composition, whether it be musical or dramatic, may be an infringement of the rights of the proprietors, it is necessary that it takes place in public, a strictly private performance not entitling the proprietors to sue either for penalties or damages.

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

In a case, however, where the performance was in the room of a hospital by amateurs for the entertainment of the nurses and others connected with the institution, free, though the governors of the hospital paid for seats, the Court held that the room where the drama was represented was not a place of public entertainment, and consequently the performers were not liable to damages or penalties under the Acts (a).

In the case last referred to the Master of the Rolls said: "It is not necessary that there should be profit made by the representation." He considered that the place need not be habitually kept for the exhibition of dramatic entertainments. A representation in a nursery by children, or by grown-up persons in a drawing-room, is not an infringement because it is obviously domestic and private. So, too, a "representation for the amusement of friends in an unfurnished house hired for

(a) *Duck v. Bates* (1884), 12 Q. B. D. 79; 13 Q. B. D. 843; 49 L. T. 507; 32 W. R. 169; *Wall v. Taylor, Wall v. Martin* (1883), 9 Q. B. D. 727; 11 Q. B. D. 102; 47 L. T. 47; 51 L. J. (Q.B.D.) 547.

the occasion." The representation in that case is also "domestic and private." There must be present a sufficient part of the public who would also go to a performance licensed by the author as a commercial transaction. Suppose a member for a Parliamentary borough organizes dramatic entertainments to which the inhabitants are admitted without payment. Suppose an amateur company act some dramas for a charitable object, with admission upon payment of money or by tickets issued generally. In each of these cases an infringement of the Statute has been committed. Fry, L.J., while agreeing that the place need not be habitually used for dramatic entertainments and that the representation need not be for reward or hire, differed as to the necessity for publicity, holding that "there may be internal and domestic representations which are well within the purview of the statute, as when a nobleman gives a dramatic performance in his mansion to guests staying in his house, and to invited residents in the neighbourhood—what would be the chance of the next company which came to the adjoining town to perform the same piece, getting together as good an audience as they could get had the piece not been performed in the nobleman's mansion?" Though we would answer that in the case put by Lord Justice Fry we should conceive the chance to be very great indeed that the performance were all the better attended by reason of the approval in high society it had previously received, this is not the point. The point which might have been elucidated with a little less doubtful illustration is that the real test as to what is a place of dramatic entertainment is whether the representation diminishes the pecuniary gains of the proprietor of the copyright or not.

If amateurs forming a society or a club produce a dramatic composition amongst themselves, they are liable to pay fees to the author even though no money be received at the doors. The taking of money, though it is not a necessary, is an important, element in determining whether the place of representation is a public place or not.

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

PART II.

declaration, or to prove at the trial, that the defendant knew that the plaintiff was the author; thirdly, that the allegation in the declaration, that the same was represented at a certain place of dramatic entertainment, was sufficient (a).

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

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

Liability of person letting for hire a place of dramatic entertainment.

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

This doctrine was followed in *Lyon v. Knowles* (d). The defendant, the proprietor of a theatre, allowed one Dillon to have the use of it for the purpose of dramatic entertainments. The defendant provided the band, the scene-shifters, the supernumeraries, the money-takers, and paid for printing and advertising. Dillon employed his own company of actors and actresses, and selected the pieces which were to be represented, free from control on the part of the defendant. It was arranged that the money taken at the doors should be divided equally between the defendant and Dillon. During the period of such occupation of the theatre by Dillon, certain pieces were performed which the plaintiff had the sole liberty of representing or causing to be represented; and it was held, in an action to recover the penalties imposed by the above sections, that the plaintiff could not recover, inasmuch as, under the circumstances, the defendant was not shown to have represented, directly or indirectly, the said dramatic

(a) *Russell v. Briant* (1849), 19 L. J. (C. P.) 33; 14 Jurist, 201; 8 C. B. 836.

(b) *Ib.*

(c) *Ib.*

(d) (1863), 11 W. R. 266; 32 L. J. (Q.B.) 71; 10 L. T. (N.S.) 876; *French v. Day* (1893), 9 T. L. R. 548; *Kelly v. Garin* (1902), 1 Ch. 631.

pieces. If the representation of the pieces could have been considered a joint act of the defendant and Dillon, the defendant would have been liable. The defendant had no right to interfere in the choice of the pieces to be represented; and in short, though the proprietor, he was not the manager. Neither was he a partner; for the receipt of the moneys at the door was a receipt of gross proceeds, not net profits, and was merely a mode of receiving and securing the rent. There was an agreement between them to divide the gross receipts in lieu of payment of a specific sum as rent. But this did not make them partners. The defendant, then, having no control over the performances, could not be said to have caused them to be represented, and was consequently not liable. The defendant, to have been made liable, must have been shown to have been either the partner or principal of Dillon, the person who actually directed the representation (a).

In another case (b) the defendant was the owner and manager of the Grecian Theatre, and for £30 he had let for one night to his son, who was the stage manager, the use of the theatre, company, and all persons employed. The son selected and brought out a play, for which representation the court held the defendant liable. The judgment was based on the fact that the defendant had the control and management of the theatre and the company during that performance. "I think," said Erle, C.J., "the defendant is responsible for that representation. He was the proprietor of the theatre, and had entire control over the establishment and all belonging to it; and what was done by his son was done by his permission. The case of *Lyon v. Knowles* seems to me to recognise that distinction. There the defendant merely let his theatre with the scenery, scene-shifters, bands, lights, &c., to Dillon, who brought his own company to represent pieces of his own selection, the plaintiff having no control whatever over any person employed in the representation. Here, however, the piece is performed by the defendant's own *corps dramatique*, his son being one of them; and the performance takes place for the defendant's profit to the extent of £30. I think, therefore, it is impossible to say that the defendant did not cause the piece to be represented."

So in another case (c) the defendant was the proprietor of a music-hall, and had engaged a singer who on numerous occasions

(a) *Lyon v. Knowles* (1863), 11 W. R. 266; 3 B. & S. 556; affirmed on appeal 5 B. & S. 751; 12 W. R. 1083; 10 L. T. (N.S.), 876.

(b) *Marsh v. Conquest* (1864), 17 C. B. 418. See *Parsons v. Chapman* (1831), 5 C. & P. 33.

(c) *Monaghan v. Taylor* (1885), 2 T. L. R. 685.

PART II.

sang a song called 'We are going to reform some day,' the copyright of which was in the plaintiff as assignee. The defendant at the trial denied that he had directed the song to be sung; he was in the hall when it was being sung, but had never heard the whole of it. The court held, that inasmuch as the singer was hired by the defendant to sing what songs he liked and no supervision or control was exercised as to copyright, there was evidence of agency and authority to sing the song complained of.

It was argued that an authority to do an unlawful act could not be presumed, and that the presumption should be, that under a general or implied permission to sing what the artiste chose, only songs which could not be lawfully sung would be selected; but it was considered that there having been a general permission by the defendant to sing, the true inference was that he took the chance of the songs sung being such as could be lawfully or unlawfully sung.

Copyright
(Musical compositions)
Act, 1888.

As regards musical compositions these cases are now met by the recent statute, 51 & 52 Vict. c. 17, the Copyright (Musical Compositions) Act, 1888, the 3rd section of which provides that the proprietor, tenant, or occupier of any place of dramatic entertainment or other place at which any unauthorized representation or performance of any musical composition, whether published before or after the passing of the Act, shall take place, shall not by reason of such representation or performance be liable to any penalty or damages in respect thereof, unless he shall wilfully cause or permit such unauthorized representation or performance knowing it to be unauthorized. But the provisions of the Act are not to apply to any action or proceedings in respect of a representation or performance of any opera or stage play in any theatre or other place of public entertainment duly licensed in that respect.

"Wilfully"
causing or
permitting
performance.

In a recent case the proprietor of the performing rights in a valse called the 'Valse Bleu' sued the defendants, the proprietors of a theatre, for infringements of his rights by performing the valse at their theatre in the interval between the acts. There was a notice, printed in French, on every copy of the valse reserving the performing rights, but it was stated by the defendant's witnesses that they did not know of this, and that, when they heard of it, the performance of the music was immediately stopped. There was evidence that the conductor of the orchestra did know of the reservation, and that there had been some negotiations as to the fees that ought to be paid to the plaintiff for the right of performance; but

Mr. Justice Wright held that the plaintiff had not proved that the defendants had "wilfully" caused or permitted the performance of the music in question, knowing it to be unauthorized, and the Court of Appeal, holding the question to be one of fact, upheld this decision (a).

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

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

A work not intended for the stage may be in substance a drama, and may be easily adapted for representation. Is it excluded from the operation of the statute, because it is not in form and name a drama? Again, if fitness for public performance is the test of a dramatic composition, are songs within the purview of the statute? Though hardly dramatic compositions in the ordinary acceptation of the term, they seem to come within the words "musical entertainment." Whether a production is called a poem, or a tragedy, or novel, or a comedy, a history, or a drama, or whether its author did or did not intend it for public representation, is immaterial in ascertaining whether it is a dramatic composition. This question is determined by the character of the work, and not by what it is called, or the purpose for which the author has intended it. So also it is immaterial whether the words of a drama are spoken or sung; whether they are or are not accompanied with instrumental music. An opera, not less than a play without music, is a drama. The judicial construction given to "dramatic piece," as used and defined in the statute, is broad enough to embrace every composition which is dramatic in character and is suitable to be performed, recited, read, or sung for the entertainment of an audience. Thus it has been decided that a song which related the burning of a ship at sea, and the escape of those on board, describing their feelings in vehement language, and sometimes expressing them in the supposed words of the suffering parties, is dramatic, and consequently within the meaning of the statute, even though it be

(a) *Moul v. Coronet Theatre, Ltd.*, Times, 11th Dec., 1901; on appeal, Times, 4th Feb., 1903.

PART II.

sung by one person only, sitting at a piano, giving effect to the verses by the delivery, but not assisted by scenery or appropriate dress (*a*).

That the whole is expressed in music makes no difference. The early Greek drama was musical throughout; so in the modern Italian opera. Nor can any distinction arise from the want of scenery or appropriate dress: an oratorio has neither, yet it is often dramatic. Nor, again, is it material that no second person performs. No one would suggest that Mr. Mathews' representations, or the readings of Shakespeare by Mrs. Siddons or Mr. Charles Kemble, were not dramatic. The character of Elijah is essentially a dramatic one, requiring, however, not dramatic action, but dramatic sentiment, in order to delineate it. Sometimes the wrath and gloom of such a character must be displayed, at other times the most pathetic tenderness. If the character of drama were denied to this species of entertainment, nothing short of requiring all the ingredients of a play would be admitted as a dramatic representation. If the interpretation clause of statute 5 & 6 Vict. c. 45 be referred to, it will be remarked that the 2nd section declares that "dramatic pieces" within that Act include "tragedy, comedy, play, opera, farce," or "other scenic, musical, or dramatic entertainment." These words comprehend any piece which can be called dramatic in its widest sense; any piece which, on being presented by any performer to an audience, will produce the emotions which are the purpose of the regular drama, and which constitute the entertainment of the audience (*b*).

In *Clark v. Bishop*, the court held the song, 'Come to Peckham Rye,' which has little, if any, of the dramatic character, to be a dramatic piece (*c*). Some doubt, however, as to the correctness of the earlier decisions seems to be raised by the recent case of *Fuller v. Blackpool Winter Gardens* (*d*), where the court held that the song, 'Daisy Bell,' sung at the defendant's theatre, in costume and in a dramatic play or burlesque during the run of the piece, was not a dramatic piece. The point, however, does not appear to be of great importance, for it seems reasonably clear that all songs will be protected under either the Dramatic or the Literary Copyright Acts, and the court held, in the last cited case, that even if a song be a dramatic piece it is also a musical composition, the performing

(*a*) (1848), *Russell v. Smith*, 12 Q. B. 217.

(*b*) Lord Denman. C.J., in *Russell v. Smith* (1848), 12 Q. B. 217; 17 L. J. (Q. B.) 225.

(*c*) *Clark v. Bishop* (1872), 25 L. T. 908.

(*d*) (1895), 2 Q. B. 429.

rights in which ought to be expressly reserved under the Musical Compositions Act, 1882.

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

A spectacular piece is within the protection afforded by the statute. Thus in a case to be hereafter more fully considered, where it appeared that the defendant had taken from the plaintiff's play two scenes or situations, consisting more of scenic effects than of dialogue, Mr. Justice Brett said: "Now, it was first said that the subject matter of the action was not the subject matter of copyright; that the Act gives a property in words, and not in situations and scenic effects; but I think that these latter are more peculiarly the subject of copyright than the words themselves (b). Copyright in spectacular piece.

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

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

So in the case of musical compositions, not only an original composition but any substantially new arrangement or adaptation of an old piece of music is a proper subject of copyright; and the man who makes the new arrangement or adaptation is the "author" of it and entitled to the copyright. If A. makes New arrangement of music.

(a) See per *Stirling, J., Hanfstaengl v. Empire* (1894), 3 Ch. at p. 116.

(b) *Chatterton v. Cure* (1877), 33 L. T. 256; *Tree v. Bowkett* (1896), 74 L. T. 77.

(c) (1859), 7 C. B. 268.

PART II.

a pianoforte score of the music of B.'s opera (a), or if he writes words and accompaniments to an old non-copyright melody (b) A is, in either case, properly described as the author of the new composition.

The same remarks apply to the case of writing libretti to the music of non-copyright operas, oratorios, or cantatas.

The piano-
forte score of
an opera.

The pianoforte score of an already existing opera, whether arranged by the composer himself or by another person, is the subject of copyright; and as such is entitled to protection, provided the arranger had a right so to use the original. The arrangement of the opera score for the pianoforte, involving as it does labour as well as intelligence and skill, constitutes it a new work (c).

In deciding the point in the last cited case Sir A. Cockburn, C.J., said: "It seems impossible to believe that any musician, however great his talent, whether as a composer or an executant, from the mere circumstance of having the opera in its entirety before him, that is to say, with all the score for all the instruments, which neither eye nor mind could take in at the same time, could be able to play the accompaniment while singing the music of the opera at the piano. It requires time, reflection, skill, and mind so to condense the opera score as to compose the pianoforte accompaniment. . . . I cannot, therefore, bring myself to think that the pianoforte arrangement of the music of an opera, which originally consisted of vocal music and instrumentation to be executed by some half-hundred instruments, can be said to be anything else than a specific, separate, and distinct work from the opera itself. And it seems to me to hold otherwise would lead to very serious consequences. Operas are very frequently arranged sometimes by the composer of the opera himself, sometimes by other persons, with the consent or without the consent of the original composer. It may be, if the arrangement be made

(a) *Wood v. Boosey* (1868), L. R. 2 Q. B. 340; *Atwill v. Ferrett* 2 Blatch. (Amer.) 39.

(b) *Leader v. Purday* (1849), 7 C. B. 4.

(c) *Wood v. Boosey* (1868), L. R. 2 Q. B. 340; 7 B. & S. 869; 36 L. J. (Q.B.) 103; 15 W. R. 309; 15 L. T. (N.S.) 530; affirmed 9 B. & S. 175; L. R. 3 Q. B. 223; 37 L. J. (Q.B.) 84; 16 W. R. 485; 18 L. T. (N.S.) 105; *Boosey v. Fairlie* (1877), 7 Ch. Div. 301; 14 App. C. 714. In Renouard's '*Traité des Droits d'Auteurs*,' tome ii. p. 190, pt. iv. ch. 2, p. 78, it is said: "*Des arrangements, variations, valse, contredanses, etc., composés sur un thème, un air, un motif même appartenant au domaine public; des pots-pourris, sorte de compilation musicale, disposés dans un certain ordre et avec certaines liaisons ou transitions, sont-ils des objets de privilège? Je n'hésite pas à croire que la solution affirmative résulte des principes généraux sur la matière, exposés au commencement de ce chapitre. Il résulte des mêmes principes que ces compositions ne conféreront un privilège qu'autant qu'elles supposeront de l'art, du travail, un effort d'intelligence; qu'elles seront, en un mot, une production de l'esprit.*"

without the consent of the composer of the opera, such an adaptation would be an infringement of his copyright, which would subject the adapter to an action. It is not necessary to decide that. But it may be that, after the copyright has expired, an arrangement for the pianoforte may be made in the first instance, or some musical composer, thinking that an arrangement that already existed of some well-known and popular opera is not as good as it can be made, might apply his hand to the work and make a new arrangement. Can it be said that such an arrangement, useful as regards the musical world, shall not be the subject of protection under the Copyright Acts?"

And on appeal Sir Fitzroy Kelly, C.B. (a), in affirming the decision of the Queen's Bench, clearly pointed out the difference between the pianoforte score and the original score, and the fact that each might be the subject of copyright. "The opera," said he, "is composed and is published in score, and contains in each line of what is called the entire score, the music for some one particular instrument, these instruments being some twenty in number. Now let us come to what the arrangement is for the pianoforte. Undoubtedly there are portions of it which are identical, as in the case before the Exchequer, and might subject, as I have already observed, the author of the adaptation to an action if it had been published without the authority of the author of the opera. But what is the pianoforte arrangement? It is an arrangement of the whole of the music of this opera for the pianoforte, a part of which is the ordinary pianoforte accompaniment, the bass and the treble, played with both hands, and which is independent of the melody. There may be, as it appears, the line of music for one voice, or two or three voices, as the case may be; and there are separate and distinct lines for the accompaniment for the pianoforte; and no doubt, here and there throughout this accompaniment, and by going line by line through the score of the original opera, there may be found the same notes; but there are other parts of the accompaniment which are merely the pianoforte accompaniment, the notes forming which are nowhere to be found in the score at all. The accompaniment for the pianoforte is a work of greater or less skill. In some cases, perhaps in many cases—it may be in this for aught I know—the operation of adaptation is little more than mechanical, and what any one acquainted with the science of music, any composer of experience, might have been

Difference
between
pianoforte
score and
original score.

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

PART II.

able to do without difficulty; but it may be, and often is, as in the case of the six operas of Mozart, by Mazzinghi, a work—I would hardly use the term of great genius, but a work—of great merit and skill of that eminent composer and pianist, Mazzinghi. If such a work be published as the adaptation to the pianoforte by a composer, other than the composer of the original opera, no doubt it is a piracy of the opera, and the composer may maintain an action against the adapter or the publisher of the adaptation; but, whenever the copyright in the original opera has expired, if after that, and for the first time, another composer composes another adaptation of that opera to the pianoforte, it is a new substantive work, in respect of which he is just as much entitled to the benefit of the copyright in this country, as the original composer of the opera; and if any one had by an adaptation pirated that arrangement, he would be liable to an action for that piracy. I consider that an infallible test to show the difference between the one work and the other—between the original opera and the arrangement of it for the pianoforte. It is perfectly clear, therefore, that in point of fact—for it is rather a matter of fact than anything else—the adaptation to the pianoforte, or the arrangement for the pianoforte, of an opera already published, is itself a new and separate work, and is not one and the same with the original opera” (a).

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

Of late years the increase of mechanical devices for repro-

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

(b) *Leuder v. Purday* (1849), 7 C. B. 4.

ducing musical airs has led to the inquiry how far these devices are infringements of copyright. In the case of *Boosey v. Whight* the defendant sold for use in a mechanical wind instrument, called an "æolian," perforated rolls of paper, which represented the instrumental music of certain songs in the music of which the plaintiffs had the copyright. The rolls were inserted in the instrument, and were unrolled by its action, and the passage of air through the slots in the rolls into the pipes of the instrument produced musical sounds, the pitch and duration of which were determined by the position and length of the slots. The instrument also contained stops, swells, and pedals, whereby variations of time and expression could be effected at the will of the performer; and in the margin of some of the rolls there appeared directions as to time and expression which were also to be found in the plaintiffs' songs. For the plaintiffs it was contended that these perforated rolls were sheets of music within the Copyright Act, 1842, for the defendants that they were strictly part of a machine, and consequently not within the scope of the Copyright Acts. Mr. Justice Stirling held that the Act of 1842, fairly construed, did not prevent the defendants from making and selling these rolls, so far as they contained perforations, but that in adding to them words taken from the plaintiffs' music sheets, for the purpose of indicating to the player on the instrument the pace and expression at and with which the music ought to be played, the defendants had gone beyond their rights, and he granted an injunction to restrain them from so doing (a). On appeal, this decision was affirmed as to the perforations and reversed as to the words (b). The Master of the Rolls, in his judgment, after remarking that though the plaintiffs had the exclusive right of printing or otherwise multiplying copies of their sheets of music, they had no exclusive right to the production of the sounds indicated by or on those sheets of music; nor to the performance in private of the music indicated by such sheets; nor to any mechanism for the production of such sounds or music, went on to say: "Conceding for the sake of argument that a person might be trained to play or even to sing from the perforated sheets, it is clear that they are not made to be so used, nor are they ever so used, in fact; and we ought, in my opinion, to deal with the case on broad business lines and not on unpractical, though theoretically possible, assumptions. If these perforated rolls were new, it appears to me that their invention might be patented; and this could not, in my opinion, be said of any copy

Pianolas and
æolian
organs.

(a) *Boosey v. Whight* (1899), 1 Ch. 836.

(b) (1900), 1 Ch. 122.

PART II.

of any book. It may be true that the manufacture and sale of the perforated sheets diminish the sale of the plaintiffs' sheets of music. But it does not follow that the plaintiffs' copyright has been infringed; and I am of opinion that it has not. I regard the defendants' perforated sheets as part of a mechanical contrivance for producing musical notes; and I cannot think that manufacturers of musical instruments infringe any person's copyright by so constructing their machines and appliances to be used with them as to produce musical notes indicated on a sheet of music." As to the directions on the rolls he considered that they were not a "sheet of letterpress separately published," or if they were, they did not form a literary composition entitled to protection (a).

This decision, of course, does not touch the performing right.

The adaptation of words and accompaniment to an old air.

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

(a) Cf. *Hollinrake v. Truswell* (1894), 3 Ch. 420, and see Art. 3 Final Protocol Berne Convention.

(b) (1849), 7 C. B. 4.

(c) (1855), 2 K. & J. 117.

(d) *Ibid.* 123.

retail dealers purchasing from him would give the same information to their customers (a). But the court refused to extend the injunction to restrain the piracy of two bars of music which had been added by the plaintiff to the original air, until the fact had been established by a trial at law. The principle here expressed appears to be that where a great resemblance exists between a spurious article and the genuine, although the articles may not be exactly alike, yet if there be that which conveys the idea that the article is genuine, whereby the public is deceived, it is a colourable representation of the original, and a piracy of the author's copyright.

We will now consider what will be a piracy of a musical or dramatic work.

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

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

(a) See *Sykes v. Sykes* (1825), 3 B. & C. 441.

(b) (1836), 3 My. & Cr. 738; *Beere v. Ellis* (1889), 5 T. L. R. 330.

Principal
decisions on
questions of
piracy under
the Act of
Will. IV.

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

The two principal cases under the 3 & 4 Will. IV. c. 15, are the cases of *Planché v. Braham* (a), and *Chatterton v. Cave* (b). In the first of these cases the defendant used the words of two or three songs of the plaintiff as the vehicle of some airs in an English version of Weber's opera of 'Oberon,' and the action was brought under the above Act. The rest of the version had been written by another person. There was no question as to appropriation of the music; and Lord Chief Justice Tindal left it to the jury to say whether there had been a representation of a part of the plaintiff's dramatic production. The jury found that there had been; and gave a verdict accordingly for the statutory penalty. Serjeant Wilde moved to set aside the verdict on the ground that as there had been no representation of a part of the plaintiff's piece,—the words of the songs adapted to the music being immaterial to the development of the drama,—the defendant was entitled to a judgment. But the court affirmed the verdict, holding that the question before it must in all cases be determined by a jury. "It is difficult," said the Chief Justice, "to say what is or is not a representation of a part of a dramatic production, . . . and it must be left to a jury to determine the fact."

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

(a) (1837), 4 Bing. N. C. 17.

(b) (1878), L. R. 10 C. P. 572; 2 C. P. D. 42; 3 App. Cas. 483.

case that two scenes or points of the drama of the defendant have been taken direct from the drama of which Mr. Lewis was the author and the plaintiffs the assignees, without recourse to either the French novel or the French drama, originals common to the dramas of both the plaintiffs and defendant. I find this, first, in respect of the final scene of the defendant's drama; and secondly, of the appearance of the Wandering Jew, and the stage business connected with that appearance, which are to be found in the second scene of the second act of the defendant's drama, and in the fourth scene of the first act of the plaintiffs' drama. I find that the drama of the defendant is not, except in these respects, a copy from or a colourable imitation of the drama of the plaintiffs. I direct the verdict to be entered for the defendant. I assess the damages at 40s. if upon argument, as provided by the terms agreed to at the trial, the court should be of opinion that the verdict ought to be entered for the plaintiffs." The case was argued upon a rule obtained to enter the verdict for the plaintiffs. This rule was discharged (a), and on appeal this decision was affirmed (b). The plaintiffs appealed to the House of Lords, and it was argued that the scenes, or points, as they were called, were material, valuable, and striking points, and affected considerably the attractiveness of the drama, and no one doubted that they had been copied from the plaintiffs' production, but the House affirmed the decisions of the courts below, Lord Hatherley saying: "There is indeed one obvious difference between the copyright in books and that in dramatic performances. Books are published with an expectation, if not a desire, that they will be criticised in reviews, and if deemed valuable, that part of them will be used as affording illustrations by way of quotation or the like, and if the quantity taken be neither substantial nor material, if, as it had been expressed by some Judges, 'a fair use' only be made of the publication, no wrong is done and no action can be brought. It is not, perhaps, exactly the same with dramatic performances. They are not intended to be repeated by others, or to be used in such a way as a book may be used, but still the principle *de minimis non curat lex* applies to a supposed wrong in taking a part of dramatic works, as well as in reproducing a part of a book. The minimum of damages, to be awarded when the fact of damage and the right to damages have been once established, was no doubt fixed because of the difficulty of proving with definiteness what amount of

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

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

PART II.

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

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

In another case the defendant had dramatized a story of the plaintiff and had extracted almost verbatim from the tale very considerable passages for introduction into his play. Thus Act I. consisted of 674 lines: 47 of these were stage directions; of the remaining 627, 125 were taken verbatim from the novel. Some of the passages extracted were prominent and striking parts of the dialogue contained in the novel. It was held that an infringement had been committed, and that all passages from the plaintiff's book must be cancelled (b).

As to what amounts to such substantial identity as to constitute piracy is well illustrated by an American case (c). The matter alleged to have been pirated was the "railroad scene"

What amounts to substantial identity.

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

(b) *Warne v. Seeholm* (1888), 39 Ch. D. 73.

(c) *Daly v. Palmer* (1868), 6 Blatch. (Amer.) 256; see *Bouicault v. Wood*, 2 Biss. (Amer.) 34; *Martinetti v. Maguire*, 1 Deady (Amer.) 216.

in Daly's play 'Under the Gaslight.' In this scene is represented a surface railroad and a signal station-shed, in which a woman, at her own request, is locked by the signalman, who then disappears. Next are seen two men, one of whom binds the other with a rope, fastens him to the railroad track, and leaves him to be killed by an expected train. From a window in the shed the woman sees what is done, hears the noise of the approaching train, breaks open the door with an axe, and frees the intended victim an instant before the train rushes by.

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

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

“The series of events so represented, and communicated by movement and gesture alone to the intelligence of the spectator, according to the directions contained in parentheses, in the two plays in question here, embraces the confinement of A. in a receptacle from which there seems to be no feasible means of egress: a railroad track, with the body of B. placed across it in such a manner as to involve the apparent certain destruction of his life by a passing train; the appearance of A. at an opening in the receptacle, from which A. can see the body of B., audible indications that the train is approaching, successful efforts by A. from within the receptacle, by means of an implement found within it, to obtain egress from it upon the track; and the moving of the body of B. by A., from the

PART II.

impending danger, a moment before the train rushes by. In both of the plays the idea is conveyed that B. is placed intentionally on the track, with the purpose of having him killed. Such idea is, in the plaintiff's play, conveyed by the joint medium of language uttered, and of movements which are the result of prescribed directions, while in Boucicault's play it is conveyed solely by language uttered. The action, the narrative, the dramatic effect and impression, and the series of events in the two scenes, are identical. Both are dramatic compositions, designed or suited for public representation. It is true that in one A. is a woman, and in the other A. is a man; that in one A. is confined in a surface railroad station-shed, and in the other A. is confined in a cellar abutting on the track; that in one A. uses an axe, and in the other A. uses an iron bar; that in one A. breaks down a door, and in the other A. enlarges a circular hole; that in one B. is conscious, and is fastened to the rails by a rope, and in the other B. is insensible, and is not fastened; and that in one there is a good deal of dialogue during the scene, and in the other only a soliloquy by A. and no dialogue. But the two scenes are identical in substance, as written dramatic compositions, in the particulars in which the plaintiff alleges that what he has invented, and set in order, in the scene, has been appropriated by Boucicault.

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

any particular scene, is his invention, and a piracy is committed if that in which the whole merit of the scene consists is incorporated in another work, without any material alteration in the constituent parts of the series of events, or in the sequence of the events in the series.

“The adaptation of such series of events to different characters who use different language from the characters and language in the first play is like the adaptation of the musical air to a different instrument, or the addition to it of variations or of an accompaniment. The original subject of invention, that which required genius to construct it and set it in order, remains the same in the adaptation. A mere mechanic in dramatic composition can make such adaptation, and it is a piracy, if the appropriated series of events, when represented on the stage, although performed by new and different characters using different language, is recognised by the spectator, through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in the mind, in the same sequence or order. Tested by these principles, the railroad scene in Boucicault’s play is, undoubtedly, when acted, performed, or represented on a stage or public place, an invasion and infringement of the copyright of the plaintiff in the railroad scene in his play.”

Where the similarity between two pieces arises from the fact of their being taken from a source open to all there is no piracy. Common source. As Lord Eldon said: “All human events are equally open to all who wish to add to or improve the materials already collected by others.” There can be no plagiarism in dramatizing the same incidents. In a case of *Seman v. Copeland*, where the action was for having caused to be represented the plaintiff’s play, or a portion thereof, proof that the plot had been taken from the same source, namely, that of a newspaper report of some stirring events which took place during the Indian Mutiny at Delhi, was a good defence. Here the narrative suggested the plot, and most of the characters, alike in the minds of both parties; but when a scene only from the play of another, mixed up with that which is not original, is infringed, the court will protect the author. Copyright, therefore, may be said to exist in the incidents of a play. Thus in *Boucicault v. Egan* an injunction was granted to restrain the representation of the water-cave scene in the plaintiff’s drama of ‘The Colleen Bawn.’ The defendant had represented a play dramatized from Gerald Griffin’s novel of ‘The Collegians,’ the parent of the plaintiff’s

PART II.

play also ; but the scene in question, of which the defendant's representation was a colourable imitation, was original, and the most important and effective in the plaintiff's piece, and not contained in the novel (a).

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

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

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

(a) Cf. *Reichardt v. Sapte* (1893), 2 Q. B. 308 ; *Tree v. Bowkett* (1896), 74 L. T. 77.

(b) Assumption of the name and description of a song, see *Chappell v. Sheard* (1855), 2 K. & J. 117.

(c) (1835), 1 Y. & C. 288.

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

The author of a dramatic work which has been first represented in a foreign country (such country not being a country within the International Copyright Acts) is not entitled to any exclusive right of representation in this country, the representation of a dramatic work being a publication of it within the meaning of the statute 7 Vict. c. 12, s. 19. This section provides that no author or composer of any dramatic piece or musical composition which shall, after the passing of the Act, be first published out of her Majesty's dominions, shall have any copyright therein, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under that Act.

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

The only question which seems to have arisen upon this section has been as to the meaning to be attached to the word "published." In 1863 the point came before Vice-Chancellor Wood with reference to the piece known as 'The Colleen Bawn.' Mr. Boucicault filed his bill against Mr. Delafield, the proprietor of a theatre in the provinces, to restrain his performing this play. It appeared that 'The Colleen Bawn' had been performed in New York, and the Vice-Chancellor decided that the public performance in New York was a publication, and that having published it in that way, Mr. Boucicault was, under the 19th section of the 7 Vict. c. 12, absolutely deprived of the exclusive right in this country (a). After referring to the 19th section the Vice-Chancellor says: "If Mr. Boucicault had first represented his piece in the country, he would have been entitled to the copyright given by the earlier statutes. So, also, if he had given his first representation in any country

(a) *Boucicault v. Delafield* (1863), 1 H. & M. 597.

PART II.

with which a convention had been made under the International Copyright Act, he would have been entitled under that Act to all the same privileges. But in no case is a person to enjoy any rights conferred by the old Acts concurrently with those created by the International Copyright Act. This is the effect of the 19th section. . . . The plain purpose of the statute is to secure for this country the benefit of the first publication of new works, and certain conditions are made without which works first published abroad are not to be entitled to copyright. These conditions have not been complied with. The plaintiff, therefore, fails in his demand, and the bill must be dismissed."

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

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

(a) *Boucicault v. Chatterton* (1876), 5 Ch. Div. 267.

Malins considered himself bound by the decision in *Boucicault v. Delafield*, and held that the acting of the play in New York was a publication within the meaning of 7 Vict. c. 12, s. 19, and that by that publication Mr. Boucicault had lost his exclusive right of performance.

On appeal this view was confirmed, Lord Justice James saying: "The 19th section of the International Copyright Act has a limited purpose only, expressed in terms showing the meaning of the word 'published, which must express something that can be predicated of a book, of a dramatic piece, of a musical composition, of a print or article of sculpture, or any other work of art; that is to say, its being made public by those means which are appropriated to the particular thing. A book is published by being printed and issued to the public, a dramatic piece or a musical composition is published by being publicly performed, a piece of sculpture or other work of art by being multiplied by casts or other copies. That, as it appears to me, is the natural meaning of the word 'published' in that section, and that is the meaning attributed to it by the Vice-Chancellor." And Brett, J.A., saying: "A dramatic composition differs from many compositions in this, that it can be made use of in two different ways. It may be made use of by printing it, and distributing it as a written composition or a book. It may also be used by having it acted on the stage of a theatre. If the author be an Englishman, no doubt he has certain rights given to him by the statute 3 & 4 Will. IV. c. 15, but a foreign author has no rights at all under that statute. If, therefore, a foreign author's play was first acted abroad, he could not afterwards claim any protection in England. He would by acting it abroad have made it *publici juris* in England, and, therefore, anybody in England might act it here. It is said, that an English author, although he allows his compositions to be acted abroad, does not come under the same difficulty, because he is protected by the statute of 3 & 4 Will. IV. c. 15. That may be, and although I have some doubts whether the limitation of the meaning of the word 'published' which has been contended for applies even to that statute, I will assume that it does, and that an Englishman, although his piece was first acted abroad, could claim the protection given by the statute of 3 & 4 Will. IV. c. 15. A foreigner, however, certainly could not claim that protection. Then, if that be the state of things before the statute 7 Vict. c. 12, we have two sets of people to deal with as regards dramatic compositions, that is, foreign authors who had no protection in England, and English authors

PART II.

who might first of all have their pieces acted abroad, and yet have protection under 3 & 4 Will. IV. c. 15. The statute of Victoria begins by giving the Queen power to give protection to foreign authors and dramatic composers, and that is done under section 5, which has regard to their protection against performances. Their protection against publication by printing is given to them under other sections. The 5th section provides that where the authors of dramatic pieces have first publicly represented or performed them in any foreign country, the Queen shall have the power of giving them sole liberty of representing or performing the same in any part of her Majesty's dominions. The statute is dealing with several kinds of things to be protected, which may be published in different ways, and with different persons, with foreigners, and, as we shall presently see, with Englishmen. Then the 19th section provides in perfectly general words, 'That the author of no dramatic piece or musical composition which shall after the passing of this Act be first published out of her Majesty's dominions shall have any copyright therein respectively, or any exclusive right to the representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act.' Now, it is said that the word 'published' ought to be restricted to the meaning which is said to have been affixed to it in the statute 3 & 4 Will. IV. c. 15. If so, the word 'published,' when applied to English authors, must have one meaning, and another when applied to foreign authors under precisely similar circumstances. That seems to me to be contrary to the common canon of the construction of statutes, for it requires us to introduce into the statute the proviso that in the case of English authors representation out of her Majesty's dominions shall not be considered a publication. That would be to introduce words which we have no right to introduce, unless there be something in the nature of the case which makes it obvious that such must have been the object of the legislature. It is endeavoured to make out this to have been the object by saying that it is unjust to take away the right of an English author. I see nothing contrary to reason or justice in saying that if an English author chooses to go abroad and there represent, or allow to be represented, his composition for the first time, he shall be in the same position as a foreigner who has done the same thing. If that be so, the word 'published' must have its natural construction, whether it is applied to the compositions of Englishmen or foreigners. That ordinary meaning is 'made public,' and a dramatic com-

position is made public the moment it is represented or acted. If Englishmen have their plays first represented abroad, they are by this statute placed on the same footing as foreigners; if they have them first represented in England they do not come under this statute at all; but their rights will be governed by 3 & 4 Will. IV. c. 15, and 5 & 6 Vict. c. 45."

The Court will not protect any person in the exclusive right of representing an immoral play (*a*). Immoral play.

The proprietor of a drama whether published or unpublished, may license one or more persons to perform it anywhere, without giving to any one the exclusive right of representation. But in such case only the owner of the copyright could maintain an action in respect of unlicensed performances. The owner may grant the exclusive right of representation for any named part of the country, or any town, city, or county, and within such limits, no one without the consent of the licensee has the right to perform the play; and if the infringement occurs in a place where such exclusive right has been granted, the author cannot sue in respect of such infringement, without making the licensee a co-plaintiff (*b*). Licences.

By the 22nd section of the 5 & 6 Vict. c. 45, it is enacted that no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition, shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the registry book, to which reference has already been made (*c*), shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment. Under an assignment of "all present and future vested and contingent copyright in a musical composition," together with "all property" therein, the exclusive right of performance passes (*d*). Assignment of the right of representation.

It is competent for an assignee of the sole right of representing a dramatic piece to sue for penalties under 3 & 4 Will. IV. c. 15, notwithstanding the assignment is not made by deed, or registered under 5 & 6 Vict. c. 45, s. 22 (*e*).

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

(*b*) *Tree v. Bowkett* (1896), 74 L. T. 77; cf. *Holt v. Woods* (1896), 17 New South Wales Reports, where it was held that the assignee of the colonial right could sue in his own name.

(*c*) *Ante*, chapter on Registration.

(*d*) *Ex parte Hutchins v. Romer* (1878), 1 Q. B. D. 90, 483; 27 W. R. 261, 857; 48 L. J., Q. B. 29, 505.

(*e*) *Marsh v. Conquest* (1864), 17 C. B. 418; 10 L. T. 717; *Edwards v. Cotton* (1903), 19 T. L. R. 34.

PART II.

and so too it is competent for the author or his assign to sue for unauthorized performances if the performing rights have not been transferred (a).

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

That section in fact applies only to the effect of an assignment of the copyright, limiting its operation as such, and was intended to correct what had probably been an omission in previous legislation; for upon the construction of statute 3 & 4 Will. IV. c. 15, s. 1, the Court of Queen's Bench in *Cumberland v. Planché* (c) had held that the assignment of the copyright of a dramatic piece, carried with it, incidentally, the exclusive right of representation. Section 22 of statute 5 & 6 Vict. c. 45, was intended to meet that decision by enacting that no assignment of the copyright of a dramatic piece or musical composition should be holden to convey the right of representing or performing it, unless an entry was made in the registry book that it was the intention of the parties that such right should pass by the assignment (d). That enactment does not apply to a case in which there is an express assignment of the *right of representing or performing*. In the case of *Lacy v. Rhys*, there was an assignment of the right of acting, as well as of the copyright; and it was held, that it did not follow that, because section 24 required registration of an assignment of the copyright, and there was such an assignment there, therefore the assignment of the *right to represent* was in any way affected: *Utile per inutile non vitiatur*. When a person professes to convey two things, one of which he has a right to convey and the other he has not, the instrument operates

(a) But as to the recovery of penalties see 45 & 46 Vict. c. 40; 51 & 52 Vict. c. 17.

(b) *Marsh v. Conquest, supra*; *Edwards v. Cotton, supra*.

(c) (1834), 1 Ad. & E. 580.

(d) *Chappell v. Boosey* (1882), 21 Ch. D. 240.

to pass the property in that which he has a right to convey, and the rest is surplusage (a). PART II.

It is clear, therefore, that an assignment merely of the right of representation does not need to be registered under the 22nd section; but the consent must be in writing. The provision of this section applies only to cases where the copyright in a dramatic or musical composition is assigned without any mention of the right of representation, and where consequently it may be doubtful whether the latter right was intended to be passed (b). Any doubt as to whether the consent within the Act must be in writing is removed by the decision in *Eaton v. Lake* (c), that oral permission to perform is not sufficient to constitute a binding assignment or consent to representation of a composition. Assignment of the right of representation need not be registered.

The legal assignment either of the right to represent a dramatic piece, or perform a musical composition must be in writing (d), but need not be attested (e) or sealed (f). This was decided in *Shepherd v. Conquest* (g), where it appeared that the plaintiffs, being proprietors of the Surrey Theatre, verbally agreed with one Courtney that the latter should go to Paris for the purpose of adapting a piece there in vogue for representation on the English stage; that the plaintiffs should pay all Courtney's expenses, and should have the sole right of representing the piece in London, Courtney retaining the right of representation in the provinces. Courtney accordingly proceeded to Paris, produced a piece called 'Old Joe and Young Joe,' and was paid by the plaintiffs as agreed. The piece was brought out at the Surrey Theatre by the plaintiffs, and afterwards at the Grecian Saloon by the defendant, who had obtained an assignment from Courtney. The representations by the defendant at the Grecian Saloon were the infringements of the plaintiffs' right complained of. The defendant objected that, as there was no assignment in writing from Courtney to the plaintiffs, the action was not maintainable. The plaintiffs contended that no assignment was necessary, for The legal assignment must be in writing.

(a) *Per* Cockburn, C.J., in *Lucy v. Rhys* (1865), 4 B. & S. 873, 883; 12 W. R. 309; 33 L. J. (Q.B.) 157; 10 Jur. (N.S.) 612. See *Marsh v. Conquest* (1861), 10 L. T. 717; 17 C. B. (N.S.) 418.

(b) See *Wood v. Hoosey* (1868), 7 B. & S. 869.

(c) (1888), 20 Q. B. D. 378; *Edwards v. Cotton* (1903), 19 T. L. R. 34.

(d) See *ante*, p. 144, as to what is an assignment, see *Leader v. Purday* (1819), 7 C. B. 4; *Lucy v. Toole* (1857), 15 L. T. 512.

(e) *Cumberland v. Copeland* (1861), 1 Hurl. & C. 191.

(f) *Marsh v. Conquest* (1864), 17 C. B. 418; 10 L. T. 717.

(g) (1856), 17 C. B. 427; 25 L. J. (C.P.) 127; *Eaton v. Lake* (1888), 20 Q. B. D. 378; 57 L. J. (Q.B.) 227; 59 L. T. 100; 36 W. R. 277 (C.A.). When A. agrees with B. to "let B. have" a particular drama in discharge of €10 due from A. to B., this is a complete assignment of A.'s whole property in the drama; *Lucy v. Toole, supra*.

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

In the course of the delivery of the judgment, Jervis, C.J., doubted whether, under any circumstances, the copyright in a literary work, or the right of representation of a dramatic one, could become invested *ab initio* in an employer other than the person who had actually composed or adapted the work. But he was clearly of opinion that no such effect could be produced when the employers merely suggested the subject, and had no share in the design or execution of the work, the whole of which, so far as any character of originality belonged to it, flowed from the mind of the person employed. It appeared to him to be an abuse of terms to say that, in such a case, the employers were the authors of a work to which their minds had not contributed an idea; and it was upon the author, in the first instance, that the right was conferred by the statute which created it. Literary property stood upon a different and higher ground from that occupied by mechanical invention. The intention of the legislature in the enactments relating to copyright was to elevate and protect literary men; such an intention could only be effectuated by holding that the actual composer of the work was the author and proprietor of the copyright, and that no relation existing between him and an employer, who himself took no intellectual part in the production of the work, could, without an assignment in writing, vest the proprietorship of it in the latter (a).

This case was followed in *Eaton v. Lake* (b). The plaintiff was employed by the defendant, the proprietor of a music-hall, as the conductor of the orchestra at a weekly salary, and had been in the habit of composing the music for ballets performed there, receiving payments of varying amounts from the defendant in respect of such compositions. The plaintiff composed the music for a Christmas ballet, to be performed at the

(a) *Ante* pp. 109 *et seq.*

(b) (1888), 20 Q. B. D. 378; 57 L. J. (Q.B.) 227; 59 L. T. 100; 36 W. R. 277 (C.A.); 4 T. L. R. 96, 230.

defendant's music-hall, but while the piece was running he threw up his engagement as conductor and took away the musical score and band parts necessary for the performance of the music. It was subsequently arranged orally between the plaintiff and the defendant that the plaintiff should give up the score and band parts to the defendant in consideration of a payment of £20. The defendant afterwards continued to perform the piece with the plaintiff's music, and the plaintiff brought an action to recover penalties in respect of such subsequent performances. The jury found that the music composed for the ballet by the plaintiff was a substantial, independent musical composition, and that the plaintiff had not sold his rights therein to the defendant. The Court of Appeal (reversing the judgment of the Divisional Court) held that in the absence of any assignment or consent to the representation of the composition in writing given by the plaintiff, the performances were contrary to the right of the author and the action was maintainable.

These cases must be distinguished from those in which one person forms the original and general design of a piece, and another merely carries out that design, as in *Hutton v. Kean* already referred to (a), where the defendant verbally employed the plaintiff to compose music as part of the representation of one of Shakespeare's plays, adapted to the stage by the defendant, with the aid of scenery, dresses, music, and other accompaniments, the general design of which was formed by the defendant. There it was held that, as between the parties, the defendant had the sole liberty of performance without assignment or consent in writing from the plaintiff. Nor is there any conflict with the principle laid down by Sir John Leach in *Barfield v. Nicholson* (b): "That the person who forms the plans and who embarks in the speculation of a work, and who employs various persons to compose different parts of it, adapted to their own peculiar acquirements, that he, the person who so forms the plan and scheme of the work, and pays different artists of his own selection, who, upon certain conditions, contribute to it, is the author and proprietor of the work, if not within the literal expression, at least within the equitable meaning of the statute of Anne, which, being a remedial law, is to be construed liberally."

No assignment necessary where work executed for another.

The enactments upon which literary property and patents for inventions are respectively founded differ widely in their

(a) (1859), 29 L. J. (C.P.) 20.

(b) (1824), 2 Sim. & Stu. 1 ; 25 R. R. 111.

PART II.

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

What constitutes joint authorship.

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

(*a*) Jervis, C.J., in *Shepherd v. Conquest* (1856), 25 L. J. Ch. 127.

(*b*) (1820), 1 Jac. & W. 481; 21 R. R. 216.

(*c*) (1871), Law Rep. 6 C. P. 523; *Shelley v. Ross*, L. R. 6 C. P. 531, note (1).

in s. 1, dealing with the duration of copyright, speaks of 'the author or authors, or the survivor of the authors.' But I fail to discover any evidence that there was any co-operation of the two in the design of this piece, or in its execution, or in any improvements either in the plot or the general structure. All the plaintiff claims to have done is to vary some of the dialogue, so as to make it more suitable for his company or for his audience. If the plaintiff and the author had agreed together to re-arrange the plot, and so to produce a more attractive piece out of the original materials, possibly that might have made them joint authors of the whole. So, if two persons undertake jointly to write a play, agreeing in the general outline and design, and sharing the labour of working it out, each would be contributing to the whole production, and they might be said to be joint authors of it. But to constitute joint authorship, there must be a joint common design. Nothing of the sort appears here. The plaintiff made mere additions to a complete piece, which did not in themselves amount to a dramatic piece, but were intended only to make the play more attractive to the audience."

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

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

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

(*a*) (1788), *Storace v. Longman*, 2 Camp. 27.

(*b*) *Reade v. Conquest* (1861), 9 C. B. 755; S. C. 30 L. J. (C.P.) 209; 9 W. R. 434; 7 Jur. (N.S.) 265.

(*c*) *Ibid.*

PART II

infringement of the plaintiff's copyright therein; and the Court of Common Pleas was of opinion that the defendant was right (a).

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

But the
drama may
not be
printed.

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

In a subsequent case, in 1862 (b), Lush, as counsel for the defendant, submitted that he had a right to print and publish such a drama, with the exception of any passages which were mere copies of the novel; but the circumstances of the case did not render it necessary that the point should be decided. "If that question should arise," said Erle, C.J., "it would then be time to decide whether the defendant could find any defence; but it is clear he could not in that case defend himself on the ground that he was the author of the parts which he copied."

The question, however, arose in the case of *Tinsley v. Lacy* (c). A bill was filed by the publishers and owners of the copyright in two novels, called 'Aurora Floyd' and 'Lady Audley's Secret,' written by Miss Braddon. The novels had been dramatized by a Mr. Suter, and performed at the Queen's Theatre. The defendant, Mr. Lacy, had *published* the two plays as they were performed. It was proved that a large portion of the dramas, including the most striking incidents and much of the actual language of the novels, had been taken bodily from the novels. Vice-Chancellor Wood, in passing judgment, admitted that the defendant was entitled to dramatize the novels for the purpose of a mere acting drama; but held that he was not so entitled for the purpose of printing or selling his compilation. "He

(a) In a French case cited in Le Blanc on 'Piracy,' p. 233, under the name of *Lefranc v. Paul de Brussel*, a different principle was followed. The defendant there had dramatized a tale written by the plaintiff, and represented it upon the stage for profit: the plaintiff claimed to be entitled, as *collaborateur*, to a portion of the profits, and the court decided that, although he could not claim it in that capacity, inasmuch as the adaptation of the tale to the stage was without his knowledge or consent, still he had a good claim for damages against the defendant for the piracy, and it mulcted the defendant in damages and costs.

(b) (1862), *Reade v. Conquest*, 31 L. J. (C.P.) 153; 8 Jur. (N.S.) 764; 11 C. B. (N.S.) 479.

(c) (1863), 32 L. J. (Ch.) 535; 11 W. R. 876; 1 Hem. & Mill. 747.

has taken," said the Vice-Chancellor, "to use the language of Lord Cottenham in *Bramwell v. Halcomb* (a), the vital portion of the novels, the leading incidents of the plot, and in many instances the very language of the novel itself. He reprints in his books (and I confine myself to what appears in the books, and say nothing as to the represented drama), the very words of the most stirring passages of the novels. It is no answer to say that similar infringements have often been committed. Although Sir Walter Scott and other authors did not choose to assert any claim of this kind, this does not affect the rights of the plaintiff; and it is to be observed, moreover, that there has been a considerable alteration of the law since the time referred to by the extension of copyright to dramatic performances. . . . The question of the extent of appropriation which is necessary to establish an infringement of copyright, is often one of extreme difficulty; but, in cases of this description, the quality of the piracy is more important than the proportion which the borrowed passages may bear to the whole work. Here it is enough to say, that the defendant admits that one-fourth of the dramas is composed of matter taken from the novels. In *Campbell v. Scott* (b), which has a strong bearing on this point, the defendants had published a work containing biographies and selections from the works of a large number of modern poets, and, among others, six short poems, and extracts from larger poems written by the plaintiff. The defence was, that the poems were *bonâ fide* selections, forming a very small proportion of the writings of the plaintiff; that such compilations were cautiously made by the most respectable publishers; that the price of the compilation was £1 1s., while the plaintiff's entire works were published at 2s. 6d.; and that the plaintiff would be rather benefited than injured by the defendants' work, which contained 10,000 lines, of which only a few hundreds were taken from the plaintiff's poems." The Vice-Chancellor, after observing that in the case of the 'Encyclopædia Londinensis' the jury found for the plaintiff, though the matter taken formed but a very small proportion of the work into which it was introduced, adds, "that it is not necessary to consider whether the selections were the cream and essence of all that Mr. Campbell ever wrote. There is no doubt that in this case, as in that of Campbell's poems, the passages taken were the striking passages, and these have been taken by the author of the defendant's publications for the

(a) (1836), 3 My. & Cr. 738.

(b) (1842), 11 Sim. 31; 11 L. J. (N.S.) Ch. 166; 6 Jur. 186.

PART II.

express purpose of using Miss Braddon's property for his own benefit. So long as he confined himself to dramatic representations he could not be interfered with; but when he printed his plays he brought himself within the letter of the law."

Neither may
the drama be
otherwise
multiplied.

This was followed in the case of 'Little Lord Fauntleroy.' There the defendant dramatized the novel of this name and caused his play to be performed on the stage. The infringement of copyright complained of was that for the purpose of producing the play the defendant made four copies of it, one for the Lord Chamberlain and three for the use of the performers, either in MS. or by the aid of a typo-writer. Very considerable passages in the play were extracted almost verbatim from the novel. Thus in the first act there were 674 lines, of which forty-seven consisted of stage directions. Deducting them, there were 627, of which 125 (or about one-fourth) were taken from the novel. Some of the passages so extracted were prominent and striking parts of the dialogue contained in the novel. The defendant claimed the right to make more copies, if it should be necessary, to enable him to give further representations of the play in London and elsewhere, but the court denied this right, and held that what had been done by the defendant constituted an infringement of the plaintiffs' copyright, and that they were entitled to an injunction to restrain the defendant from printing or otherwise multiplying copies of his play containing any passages from the plaintiffs' book; also that all passages from the plaintiffs' book in the four copies must be cancelled (a).

In this case the defendant had not "printed," nor had he "exposed for hire" within section 15 of the Act of 1842, but the author is given, by section 2 of that Act, the exclusive liberty of "printing or *otherwise multiplying copies*" of his work, and the plaintiffs were held entitled to an injunction restraining an infringement of this exclusive liberty, though the defendant had not infringed any performing rights, and it was admitted that he had the right to dramatize the tale, if he could succeed in performing it without "multiplying copies" of the plaintiffs' book.

Author may
protect his
novel by
dramatizing
before pub-
lication.

The author of a play who makes use of its plot and dialogue in the composition of a novel, does not thereby forfeit his right to restrain infringement of his copyright in the play, although such infringement takes place through the medium of the novel, by a person who was ignorant of the existence of

(a) (1888), *Warne & Co. v. Seeborn*, 39 C. D. 73; 57 L. J. (Ch.) 689; 58 L. T. 928; 36 W. R. 686; cf. *Trec v. Bowkett* (1896), 74 L. T. 77.

the original play. The indirect appropriation, then, of any portion of the novel taken from the play, is an infringement of the copyright in the play. The plaintiff in *Reade v. Lacy* (a), wrote a play called 'Gold,' which he afterwards adapted as a novel, embodied a portion of the dialogue, and called it, 'Never too Late to Mend.' The novel was dramatized by another person, and, in doing so, portions of the original play were copied word for word, and in that form published by the defendant. It was held that ignorance would not justify the infringement of a right in one case more than in another, and that the publication of the play was an infringement of the copyright in 'Gold,' although the existence of that play was not known to the author, who took his materials from the novel (b).

So in a recent case where an action was brought by the executors of an author to restrain the defendant from representing a certain drama in infringement of the author's stage copyright, and it appeared that the author had first published a drama and afterwards a novel founded upon it, and the defendant's drama was dramatized directly from the novel and without the aid of the author's drama, still it was held that the author having published the drama before the novel, no person had a right to infringe the stage copyright in the drama, even though the passages complained of were taken from the novel and not from the drama of the author (c).

But, according to the authority of *Toole v. Young* (d), an author cannot protect his novel from dramatization by dramatizing it after its publication, it must be effected before publication of the novel. In the case referred to John Hollingshead had published in 1863, in the magazine called 'Good Words,' a story entitled 'Not Above his Business,' which he had written in dramatic form, that it might, with slight alterations, be performed on the stage. Soon after, the author adapted the piece for representation and called the play 'Shop,' which was substantially the same as the published story. In 1865, the play was bought from the author by the comedian Toole; and, when the action was brought, it had not been published or acted. In 1870, Grattan dramatized the story, which had

Author cannot protect his novel by dramatizing it after publication.

(a) (1861), 1 J. & H. 524.

(b) So in *Lee v. Simpson* (1817), 3 C. B. 871; 4 D. & L. 666, where the defendant had purchased the piece which he represented and believed he had a right to, but on proof by the plaintiff that he, the plaintiff, had the right, the judgment was against the defendant. If the plaintiff had been bound to show the defendant's knowledge, the protection conceded by the statute would be illusory.

(c) *Schlesinger v. Bedford* (1890), 63 L. T. 764; W. N. (1890), 224.

(d) (1874), L. R. 9 Q. B. 523; *Schlesinger v. Bedford*, *supra*.

PART II.

appeared in 'Good Words,' and afterwards sold the play to the defendant, by whom it was repeatedly performed on the stage under the name of 'Glory.' It was admitted that the plays were substantially the same, and that the defendant's had been obtained from the story, and not from the plaintiff's 'Shop.' The judgment of the court was that no rights, either in the work dramatized or in the plaintiff's play had been invaded by the defendant's dramatization; but, that by first publishing his composition as a book, an author forfeits the exclusive right to dramatize and to represent it on the stage; and though he should afterwards dramatize his own published composition, he cannot thereby bar others from exercising the same privilege.

It seems doubtful how far the distinction drawn by the court between the publication of the novelist's drama preceding the novel and succeeding the same is sound, but the distinction was admitted in the case of *Schlesinger v. Bedford* (a).

The only way, therefore, according to the authorities, in which it appears possible for an author to prevent other persons from reciting or representing as a dramatic performance the whole or any portion of a work of his composition, is himself to publish his work in the form of a drama, before publishing the novel and thus bring himself within the scope of the dramatic copyright clauses (b).

(a) (1890), 63 L. T. 762; W.N. (1890), 224.

(b) As to the dramatization of novels, the Royal Commissioners on Copyright in their report in 1878 said: "With reference to the drama, our attention has been directed to the practice, now very common, of taking a novel and turning its contents into a play for stage purposes, without the consent of the author or owner of the copyright. The same thing may be done with works of other kinds if adapted for the purpose, but inasmuch as novels are more suitable for this practice than other works, the practice has acquired the designation of dramatization of novels. The extent to which novels may be used for this purpose varies. Stories have been written in a form adapted to stage representation almost without change. Sometimes certain parts and passages of novels are put bodily into the play, while the bulk of the play is original matter; and at other times the plot of the novel is taken as the basis of a play, the dialogue being altogether original.

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

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

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

The 3 & 4 Will. IV. c. 15, secures no other right and prohibits no other act than that of representation. The right secured by this statute is re-affirmed, its duration enlarged, and its application extended to musical compositions by the 20th section of the Act of 1842; but the remedies prescribed by the latter statute for the unlawful publication of a book do not apply, and are not extended to the unlicensed representation of a play. For the latter wrong, the penalties given by the statute of William are re-enacted by the 21st section of the 5 & 6 Vict. c. 45. This section gives to the proprietors of the right of dramatic or musical representation or performance, during the term of their interest, all the remedies provided by the 3 & 4 Will. IV. c. 15. By the second section of this latter Act it is enacted, that if any person, during the continuance of the exclusive right of representing a dramatic piece, cause to be represented, without the author's or the proprietor's previous written consent, such production at any place of dramatic entertainment within the British dominions, every such offender shall, for each representation, be liable to the payment of not less than 40s., or of the full amount of the advantage arising from the representation, or of the loss sustained by the plaintiff, whichever shall be the greater damages.

Remedy in cases of infringement.

The section originally provided that a successful plaintiff should receive double costs of his suit, but double costs have been abolished in all cases by the 5 & 6 Vict. c. 97, s. 2, and a plaintiff is now only entitled to his taxed costs; but his costs are still part of his statutory remedy, so that if he brings his action in the High Court and recovers less than £10 he will not be deprived of his costs by reason of section 116 of the County Courts Act, 1888, which enacts that a plaintiff bringing his action in the High Court, when he might have brought it in the County Court, and recovering less than £10

Costs.

bill introduced by Lord Lyttleton in 1866 and supported by Lord Stanhope was defeated.

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

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

PART II. in an action of tort, shall not be entitled to any costs of action unless the judge certifies that there was sufficient reason for bringing his action in the High Court (a).

The action may be brought in any Court having jurisdiction in such cases in that part of the British dominions where the offence is committed (b).

Interrogatories.

The 40s., though styled a penalty in the margin of the Act, is not one strictly speaking. It was held in *Adams v. Batley* and *Cole v. Francis* (c) that the section does not impose a penalty upon the offender so as to preclude the plaintiff in an action to recover the specified amount, from administering interrogatories to the defendant. "The word 'offender,'" said Mr. Justice Day, "is only used as a convenient expression, and is in no way meant to designate a criminal. I am of opinion that this sum of 40s. is not a penalty." The decision was affirmed on appeal, when Lord Esher, M.R., said, "I see no characteristic of a penalty in this payment. I am of opinion that this case is not brought within any rule of law which prevents interrogatories from being administered to the defendant."

Where material part taken actual damage need not be proved.

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

(a) See *Reere v. Gibson*, 7 T. L. R. 285; [1891] 1 Q. B. 652.

(b) See *Beere v. Ellis* (1889), 5 T. L. R. 330.

(c) (1887), 18 Q. B. D. 625, and compare the case of *Saunders v. Wiel* [1892], 2 Q. B. 18 (a design case), an action brought for penalties under sec. 58 of the Patents, &c., Act, 1883, in which *Adams v. Batley* was approved and distinguished.

(d) *Planché v. Braham* (1837), 4 Bing. N. C. 19; and see *Chatterton v. Cave* (1878), 3 App. Cas. 498.

(e) *Chatterton v. Cave*, *supra*.

The Royal Commissioners in their report in 1878 on Copyright say (a): "This provision for the 40s. penalty has lately been much abused. Copyright in favourite songs from operas and in other works has been bought, and powers of attorney have been obtained to act apparently for the owners of the copyright in such works, and to claim immediate payment of £2 for the performance of each song. These songs are frequently selected by ladies and others for singing at penny readings and village or charitable entertainments, and they sing them, not for their own gain, but for benevolent objects. In such cases there is manifestly no intention to infringe the rights of any person; the performers are unconscious that they are infringing such rights, and no injury whatever can be inflicted on the proprietors of the copyrights. In many cases of this kind, and under a threat of legal proceedings, in default of payment, the penalty has been demanded, and we have reason to believe that the money so demanded has been generally paid. Many instances of this proceeding have been brought to our notice from various parts of the country. . . . The amendment in the law which we propose as most likely to preserve control for the composers, and at the same time to check the existing abuse, is that every musical composition should bear on its title-page a note stating whether the right of public performance is reserved, and the name and address of the person to whom application for permission to perform is to be made. The owner of such composition should only be entitled to recover damages for public performance when such a statement has been made; and instead of the minimum penalty of not less than 40s. at present recoverable for any infringement of musical copyright by representation, the court should have power to award compensation according to the damage sustained."

The Copy-
right Com-
missioners'
suggestions.

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

The alteration suggested by the copyright commissioners has since been carried into effect by the 45 & 46 Vict. c. 40, the Copyright (Musical Compositions) Act, 1882, the 4th section of which gave a discretion to the court, as to costs where the plaintiff did not recover more than forty shillings as penalty or

The Copy-
right (Musical
Compositions)
Act, 1882.

(a) Pars. 169, 171, 172.

PART II.

damages. This Act had the effect of giving a check to the vexatious proceedings referred to by the Commissioners, and a final stop was put to them by the 51 & 52 Vict. c. 17, which repeals the 4th section of the Copyright (Musical Compositions) Act, 1882, and provides that notwithstanding the provisions of the Dramatic Copyright Act (a) or any other Act in which those provisions are incorporated, the penalty or damages to be awarded in respect of each and every unauthorized representation or performance of any musical composition, whether published before or after the passing of the Act, shall be such a sum as shall in the discretion of the court or judge, before whom such action or proceedings shall be tried, be reasonable, and the court or judge may award a less sum than 40s., in respect of each and every such unauthorized representation or performance, or a nominal penalty or nominal damages as the justice of the case may require (b). By the 2nd section, the costs of all such actions or proceedings as aforesaid, are to be in the absolute discretion of the judge before whom such actions or proceedings may be tried.

It must be remembered, however, that musical compositions only are provided for, and that there is no discretion in the court as to the damages and costs (c) for the unauthorized performance of dramatic compositions which are still governed by the Act of William IV.

Actions to be brought within twelve months.

The 3rd section of the 3 & 4 Will. IV. c. 15, provides that all proceedings for any offence or injury under that Act shall be brought within twelve months from committing of the offence, or else the same shall be void and of no effect. This limitation seems to apply only to proceedings for penalties under the Act and not to actions for damages or in equity.

Not necessary to show defendant knowingly invaded plaintiff's right.

It is sufficient in an action upon this statute to describe the offence in the words of the Act; and it is not necessary, in order to constitute the offence, to show that the defendant knowingly invaded the plaintiff's right (d). The object of the legislature was to protect authors against the piratical invasion of their rights, and in construing the law the Judges have given it the fullest interpretation. Therefore in an action of debt to recover penalties under the 3 & 4 Will. IV. c. 15, s. 2, for representing a pantomime, of which the plaintiff was the

(a) 3 & 4 Will. IV. c. 15.

(b) S. 1.

(c) *Roberts v. Bignell, Asher and Robertson* (1887), 3 T. L. R. 552, where the case is reported as an action for penalties under "5 & 6 Vict. c. 45, s. 11," which must be a mistake for 3 & 4 Will. IV. c. 15, s. 2.

(d) *Lee v. Simpson* (1847), 4 D. & L. 666; 3 C. B. 871; *Reade v. Lucy* (1861), 1 J. & H. 521.

author, without his licence, at a place of dramatic entertainment, upon *nil debet* by statute pleaded, it was held that the plaintiff's undertaking to give material evidence in Middlesex was fulfilled by proof of an offer to sell the pantomime in Middlesex by the plaintiff's agent, acting under his direction (*a*).

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

The proprietors of the copyright in musical compositions have suffered considerable injury at the hands of street hawkers, who have been in the habit of selling pirated copies of songs and music in the streets for a few pence. These pirated copies, in direct contravention of the 39 Geo. III. c. 79, s. 29, have not had the name of the printer printed on them, and the proprietors of the copyright have had a difficulty in finding a substantial person to proceed against. With a view to putting a stop to this practice the Musical (Summary Proceedings) Act, 1902, was passed, which came into force on the 1st October, 1902.

Musical
(Summary
Proceedings)
Act, 1902.

Section 1 of this Act provides that a court of summary jurisdiction, upon the application of the owner of the copyright in any musical work may, if satisfied by evidence that there is reasonable ground for believing that pirated copies of such musical work are being hawked, carried about, sold, or offered for sale, by order authorise a constable to seize such copies without warrant and to bring them before the court, and the court, on proof that the copies are pirated, may order them to be destroyed or to be delivered up to the owner of the copyright if he makes application for that delivery.

Section 2 authorizes a constable to seize without warrant pirated copies of musical works when they are being hawked, carried about, sold, or offered for sale, on the request in writing of the apparent owner of the copyright or of his agent thereto authorized in writing, and at the risk of such owner. On seizure of such copies they are to be conveyed by the constable

(*a*) *Lee v. Simpson* (1847), 4 D. & L. 666 ; 3 C. B. 871.

(*b*) *Taylor v. Neville* (1877), 47 L. J. Q. B. 254 ; 26 W. R. 299 ; 38 L. T. 50 ; *Tree v. Bowkett* (1896), 74 L. T. 77.

PART II.

before a court of summary jurisdiction, and on proof that they are infringements of copyright, they are to be forfeited or destroyed or otherwise dealt with as the court may think fit.

“Musical copyright” is defined by the Act to mean the exclusive right of the owner of such copyright under the Copyright Acts in force for the time being to do or authorise another person to do all or any of the following things in respect of a musical work: (1) to make copies by writing or otherwise of such musical work; (2) to abridge such musical work; (3) to make any new adaptation, arrangement, or setting of such musical work, or of the melody thereof, in any notation or system. “Musical work” is defined as any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced, and a work is said to be pirated when it is reproduced without the consent lawfully given by the owner of the copyright.

Failure of Act.

This Act has not had the effect of putting a stop to the practices above referred to. Section 2 is obviously the most convenient section to proceed under, but it has been held that before an order can be made for forfeiture or destruction of pirated copies seized under this section, the person from whom they have been seized must be served with a summons notifying the intention to apply for such order (a). As there is no power to compel the person in whose possession the copies are found to give his name and address, or to ascertain, if he gives them, that they are correct, this decision has rendered the Act practically nugatory. Another defect in the Act that has been discovered is that the magistrates have no power to issue a search warrant for shops and premises where pirated copies are printed or stored and thus enable the proprietor of the copyright to get at the real offender, though under section 1 a magistrate is bound to issue his warrant to seize copies of all alleged pirated music, even if it appear that the music is being sold at a private house (b). The practice of the magistrates as to the proof of copyright required from the proprietor has varied in different courts.

At the time of writing, a Bill to amend the Act of 1902 has passed its second reading in the House of Commons, and been

(a) *Ex parte Francis* (No. 1) (1903), 1 K. B. 275; 72 L. J. K. B. 120; 88 L. T. 176; 51 W. R. 267.

(b) *Ex parte Francis* (No. 2) (1903), 88 L. T. 806; 51 W. R. 698; 67 J. P. 301.

referred to a committee to consider its clauses. The Bill proposes to constitute it an offence to print, publish, sell, or have in possession pirated music, and prescribes penalties for such offences. It also proposes to give power to magistrates to issue search warrants and to proceed without summons twenty-eight days after seizure of pirated copies, unless in the meantime a claim to them is received. The prospects of this Bill becoming law do not, however, seem very bright.

PART III.

ARTISTIC COPYRIGHT.

CHAPTER I.

COPYRIGHT IN ENGRAVINGS, PRINTS, AND LITHOGRAPHS.

Nature and
origin of the
right.

STRANGE, yet true it is, that an art of so much importance—one which has exercised such an influence on the refinement of the people, and tended so apparently, yet indirectly, to the formation of the polished character of civilized Europe—should have remained for years without any protection whatever from the legislature.

In England, protection was not afforded to the artist until that great engraver and designer, Hogarth, arose like a giant from the most elevated of his associates in the art, and with the aid of his keen and penetrating intellect discovered, that, toil and labour how much soever he might, the product of his intellectual genius was by no means regarded as solely his, nor he deemed to have acquired a more permanent property in it, than the purchaser or imitator of one his numerous works of art,

Engravings resemble literary works as regards the incorporeal right in them accruing to the author by the exertion of his mental powers in their production; but differ, as they also require a considerable amount of his manual skill and labour; they are, therefore, his property upon the same general principles as any other manufacture.

In handling the present state of the law on this branch of the fine arts we may properly investigate, under one view, the various Acts of Parliament which are particularly appurtenant to the collective arts of designing, engraving, and etching, inasmuch as they, unlike those respecting literary copyright, have not yet been consolidated.

Engravings are works having a commercial value, and as

such have a double claim upon the protection of the legislature. On the one hand, the artist claims that the productions of his genius may be protected, and injury to his fame and reputation, by the circulation of inferior imitations, prevented or guarded against; and on the other hand, security in the possession of the money value of the creation of his own mind.

During the reign of the Stuarts the fine arts received more or less patronage, and engraving and other productive arts began to flourish accordingly. George I. knighted the engraver of the cartoons. Line engraving, however, had been most cultivated, and the amount of skill required to imitate a plate must have nearly equalled that of its first production; every stroke of the graver would have to be repeated, so that the pirate could hardly undersell the original; and from the costliness of this style and its refinement few could afford to purchase, and perhaps, fewer could appreciate. As so much talent had to be spent by the engraver in transferring the forms to a new medium, from the canvas to the copper-plate, the value of the right of engraving to the owner of the picture was small; and the picture itself, whether a portrait or work of imagination, was executed solely as an individual work of art. Gradually, however, it became the practice to publish small prints, not for the profit on them, but to assist in spreading the reputation of the painter, and this was done in the case of portraits of public men. Of course the name of the artist was not omitted; it was attached to the corner, to secure, not, as now, the property in the print, but the fame of the picture. The diffusion of some new mechanic or chemic arts of engraving or etching facilitated this (a).

Unpublished engravings are protected at common law (b), but the first Act recognising engraving as an art, and extending towards its professors the protection they so unquestionably deserved, was that of the 8 Geo. II. c. 13, entitled "An Act for the Encouragement of the Arts of designing, engraving, and etching historical and other Prints, by vesting the Properties thereof in the Inventors and Engravers during the time therein mentioned" (c). After reciting that "divers persons had, by their genius, industry, pains, and expense, invented and engraved, or worked, in mezzotinto or chiaro-oscuro, sets of

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

(b) *Prince Albert v. Strange* (1849), 1 Hall & Tw. 1; 1 M. & G. 25; 18 L. J. Ch. 120.

(c) This Act by the Short Titles Act, 1892, may be cited as "The Engraving Copyright Act, 1734."

CAP. I.

historical and other prints, in hopes to have reaped the sole benefit of their labours, and that printsellers and other persons had of late, without the consent of the inventors, designers, or proprietors of such prints, frequently taken the liberty of copying, engraving, and publishing, or causing to be copied, engraved, and published, base (a) copies of such works, designs, and prints, to the very great prejudice and detriment of the inventors, designers, and proprietors thereof," it enacted, that from and after the 24th of June, 1735, every person who should invent and design, engrave, etch, or work in mezzotinto or chiaro-oscuro any historical or other print or prints, should have the sole right and liberty of printing and representing the same for the term of fourteen years, to commence from the day of the first publishing thereof, which should be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints. And the Act provided penalties for piracy, but enacted that it should be lawful for any person who should thereafter purchase any plate for printing from the original proprietor, to print and reprint from the said plates without incurring any penalty.

Under this Act Lord Hardwicke refused relief to a person complaining of the piracy of a drawing or design which he had only procured to be made; "for," said he, "the case was not within the statute, which was made for the encouragement of genius and art; if it was, any person who employs a printer or engraver would be so too. The statute is, in this respect, like the statute of new inventions, from which it is taken" (b).

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

No provision, it will be seen, is in this Act made for the protection of any work of which the engraver is not also the designer; and this has been accounted for by the fact that Hogarth, by whose influence the Act was introduced, was invariably the designer as well as the engraver of his celebrated works.

The 7 Geo. III. c. 38, was made to remedy this oversight, and extend protection to any person making an engraving from the original work of another. Its title is, "An Act to

The second
Act.

(a) See *Graves v. Ashford* (1867), L. R. 2 C. P. 419.

(b) *Jefferys v. Baldwin* (1753), Ambl. 164; see *Pierpont v. Fowle*, 2 Wood. & Min. (Amer.) 46; *Birch v. Woodruff*, 4 Wash. (Amer.) 53.

(c) (1740), 2 Atk. 93.

amend and render more effectual an Act made in the 3 Geo. II., for Encouragement of the Arts of designing, engraving, and etching historical and other Prints, and for vesting in and securing to Jane Hogarth, widow, the Property in certain Prints" (a). The first section recites that the former Act had been found ineffectual for the purposes thereby intended, and enacts that all and every person and persons who shall invent or design, engrave, etch, or work in mezzotinto or chiaro-oscuro, any historical print or prints, or any other print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, shall have the benefit and protection of the said Act and this Act, under the restrictions and limitation thereafter mentioned. The second section enacts that all and every person and persons who shall engrave, etch, or work in mezzotinto or chiaro-oscuro, or cause to be engraved, etched, or worked, any print taken from any picture, drawing, model, or sculpture, either ancient or modern, shall have the benefit and protection of the said Act and this Act for the term thereafter mentioned (twenty-eight years), in like manner as if such print had been graven or drawn from the original design of such graver, etcher, or draftsman; and, if any person shall engrave, print, and publish, or import for sale, any copy of such print, contrary to the true intent and meaning of this Act and the said former Act, every such person shall be liable to the penalties contained in the said Act, to be recovered as in the said Acts mentioned. The sixth section extends the period of protection to twenty-eight years from the first publication of the work (b).

By the next statute of 17 Geo. III. c. 57 (c), it was enacted, that if any person should within the times limited by the aforesaid Acts or either of them, engrave, etch, or work, or cause, or procure to be engraved, etched, or worked in mezzotinto, or chiaro-oscuro or otherwise, or in any other manner copy in the whole or in part, by varying, adding to, or diminishing from the main design, any copy or copies of any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, which had been or should be engraved, etched, drawn, or designed in any part of Great Britain,

The third Act.

(a) This Act may by the Short Titles Act, 1892, be cited as "The Engraving Copyright Act, 1766."

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

(c) This Act may by the Short Titles Act, 1892, be cited as "The Prints Copyright Act, 1777."

CAP. I.

without the express consent of the proprietor or proprietors thereof, the proprietor should, by a special action on the case, recover damages against the person so offending.

Period of protection.

The period of protection which the authors of engravings, etchings, or prints enjoy under these Acts is therefore twenty-eight years to commence from the day of the first publishing thereof.

Who is the author?

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

In the case of *Stannard v. Harrison* (d), relating to a map, an engraver was examined. He proved that the plaintiff had brought to him his rough sketch or draft, a drawing of the same size as the stone upon which it was to be engraved, pointing out a rough sketch of the forts and towns to give the engraver an idea; he furnished him also with a large French

(a) *Stannard v. Harrison* (1871), 19 W. R. 811; 24 L. T. 570; see *Kenrick v. Lawrence & Co.* (1890), 25 Q. B. D. 99; 38 W. R. 779; *Petty v. Taylor* (1897), 1 Ch. 465.

(b) *Copy*, 145.

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

map, and some maps published in the 'Times' and 'Daily Telegraph'; he also gave him notice daily of the earthworks that were made, and produced besides a picture published in the 'Illustrated London News.' The plaintiff could not draw himself—and the Vice-Chancellor said: "That the plaintiff cannot draw himself is a matter wholly unimportant if he has caused other persons to draw for him. He invents the subject of the design beyond all question. He prescribes the proportions and the contents of the design; he furnishes a part of the materials from which the drawing has to be made in the first instance, and afterwards collects daily from the proper sources, and even, if it be necessary to say so, from official sources, the decrees, the reports, the bulletins, and accounts contained in the newspapers of the different phases of the war, and especially of the places in which earthworks are thrown up. These he communicates to the man whom he has employed to make a drawing for him. . . . Can there be anything more plainly within the words of the Act of Parliament than that Mr. Stannard did himself invent, that he did procure another person to design and draw for him, and do that which he himself could not do?"

In order to vest the copyright of an engraving in the designer or engraver of the same, no registration, such as is necessary in the case of literary copyright, is required; the Acts above enumerated have merely to be strictly complied with. In the first place, it is therefore important that engravings should contain the date of publication and name of the proprietor, in order to entitle the party to the penalties imposed by the statute Geo. II. The reason assigned by the Court in *Sayer v. Dickey* (a) being, "that any person may know when the proprietor's exclusive right ceases, and when, and against whom, he may be guilty of offending contrary to the statute." Lord Hardwicke, in an early case, doubted whether the clause on this subject in the Act ought to be construed as directory or descriptive, but he was of opinion that the property was vested absolutely in the engraver, although the *day* of publication was not mentioned, and compared it to the clause under the statute of Anne, which required entry at Stationers' Hall, upon the construction of which it had been determined that the property vested although the direction had not been complied with (b). However, it has subsequently been taken for

Name and date must be put on engravings.

(a) (1770), 3 Wils. 60.

(b) *Blackwell v. Harper* (1740), 2 Atk. 95; Barn. Ch. Rep. 210. See *Jefferys v. Baldwin* (1753), Amb. 164; *Roworth v. Wilkes* (1807), 1 Camp. 94; *Harrison v. Hogg* (1794), 2 Ves. Jun. 323; *Thompson v. Symonds* (1792), 5 T. R. 41.

CAP. I.

granted by the Court of King's Bench that both the name and date should appear; the *date*, Lord Kenyon observed, is of importance, that the public may know the period of the monopoly; the *name* should appear, in order that those who wish to copy it may know to whom to apply for consent (a).

As to the date.

So in *Harrison v. Hogg* (b) Lord Alvanley differed from Lord Hardwicke, considering the insertion of the name and date essential to the plaintiff's right; that the correct date is a *sine qua non* was expressly decided in *Bonner v. Field* (c). It was an action for pirating a print of the seal of the Countess of Talbot. The plaintiff had been employed by Lady Talbot to engrave this plate for her, which he executed on the 1st of June, 1778, when he took off some impressions for her use. On the *following day* she gave the plate to the plaintiff, who engraved on the bottom of it, "Drawn and engraved by J. Bonner; published on the 1st June, 1778, as the Act directs." The declaration having stated that the plaintiff was the proprietor on the 1st of June, Lord Mansfield nonsuited the plaintiff on the ground that he had no title on the day when he claimed it.

The cases were fully reviewed and commented on in the leading case on the subject of *Newton v. Cowie* (d), and it was held that the proprietor's name and the date of publication must appear on the original print, but that it was not necessary that the designation "proprietor" should be added to the name; and that the words on the print "*Newton del., 1st May, 1826, Gladwin sculp.,*" was a sufficient compliance with the provisions of the 8 Geo. II. c. 13. Best, C.J., on the occasion saying: "Looking at the subject-matter of the law, at the language employed by the legislature, and the practice which has uniformly been followed by engravers, we cannot hesitate to determine that the proprietors of these prints are entitled to the protection which is afforded by the statutes; a decision we have come to with satisfaction, seeing that they exercise a branch of art eminently useful and which in no slight degree *emollit mores nec sinit esse feros*. They contribute also by the

(a) *Thompson v. Symonds, supra*; *Mackmurdo v. Smith* (1798), 7 T. R. 518; *Harrison v. Hogg, supra*.

(b) (1794), 2 Ves. Jun. 323; *Newton v. Cowie* (1827), 4 Bing. 234; *Brooks v. Cook* (1835), 3 Ad. & E. 138; 4 N. & M. 652; *Colnaghi v. Ward* (1843), 12 L. J. (Q.B.) 1; 6 Jur. 969; *Bogue v. Houlston* (1852), 5 De G. & Sm. 267; *Graves v. Ashford* (1867), 15 W. R. 495; L. R. 2 C. P. 410; *Rock v. Lazarus* (1872), L. R. 15 Eq. 104; 27 L. T. 744. So the proprietor of a foreign print must have printed his name and the date of publication on the plate as required by 8 Geo. II. c. 13, in order to claim copyright under the International Copyright Act, 1844; *Aranzo v. Mudie* (1856), 10 Exch. 203.

(c) Cited 5 T. R. 44.

(d) (1827), 4 Bing. 234; 29 R. R. 541.

same means to the circulation of a knowledge of mechanics so necessary to our manufactures, and so useful to the best interests of the country."

The name of the first proprietor should be continued on the print, but it is not necessary or proper to place the name of an assignee on it (*a*).

These essentials, in order to secure to the artist the copy-right in engravings or etchings when published separately, are not requisite where the engravings form part of a book in which there is copyright, and the copyright in both the book and the print is vested in the same person; for the Copyright Act, 1842, gives a copyright in "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, manuscript, map, plan, or chart, separately published," and this definition, though it would not, of course, extend to prints or designs separately published, yet is sufficiently comprehensive to include prints and designs forming part of a book. The book is not less a book because it contains prints or designs, or other illustrations of the letter-press. A book must include every part of the book; it must include every print, design, or engraving which forms part of the book, as well as the letter-press therein, which is another part of it. If, therefore, the publisher of a book containing letter-press and engravings complies with the requisitions of the Copyright Act, 1842, he can restrain the copying of the engravings, though he has not complied with the requisitions of the Copyright Engravings Acts (*b*). It has been held, too, that if the proprietor of a periodical publishes a coloured supplement, the registration of the periodical will cover the supplement, though not physically attached to the periodical, if there is clear evidence that they are to be sold together and as parts of each other (*c*); but if the owner of the copyright in the letter-press is not the owner of the copyright in the engraving, then the requirements of both the literary and artistic Copyright Acts must be complied with (*d*).

Engravings
or etchings
when pub-
lished with
letter-press.

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

Maps published together or in connection with letter-press,

(*a*) See *Bonner v. Field* (1778), cited 5 T. R. 44.

(*b*) *Bogue v. Houlston* (1852), 5 De G. & Sm. 267; *Maple v. Junior Army & Navy Co.* (1882), 21 Ch. D. 369; *Marshall v. Bull* (1901), 85 L. T. 77.

(*c*) *Comyns v. Hyde* (1895), 43 W. R. 266; W. N. (95) 9.

(*d*) *Petty v. Taylor* (1897), 1 Ch. 465.

CAP. I.

obviously come within the head "book," and as such are included in the former Act.

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

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

In *Stannard v. Lee* (d), where the plaintiffs printed and published on the 21st of July, 1870, a map described as 'No. 1, Stannard & Son's Panoramic Bird's-eye View of France and Prussia, and the surrounding countries likely to be involved in the war, with the railways and strategic positions of each army, and the great fortresses of the Rhine provinces,' and filed affidavits alleging in substance that they had formed a design of publishing maps illustrating the seat of war, and had "designed a map," and on the date

(a) *Stannard v. Lee* (1871), 19 W. R. 615; L. R. 6 Ch. 346; 23 L. T. 306.

(b) *Bogue v. Houlston* (1852), 5 De Gex & Sm. 267.

(c) See *Stannard v. Harrison* (1871), 19 W. R. 811.

(d) *Ubi supra*.

above mentioned had "in accordance with the Acts of Parliament in that behalf," printed and published the said map by the above description, and that they were proprietors of the map; it was held, reversing Bacon, V.-C., that maps were now governed by the 5 & 6 Vict. c. 45, and that the plaintiffs not having registered under that Act, and in their pleadings alleging that their production was a "map," could not succeed in their action.

Vice-Chancellor Bacon, however, evidently adhered to his original decision in *Stannard v. Lee*, or rather to the exposition of the law there given, and in the case of *Stannard v. Harrison (a)*, which was decided after the Lords Justices had reversed his decision in that case, he explained that they held the map in question not to be protected "because the plaintiff had alleged in his bill that he had invented a design," and published a "map," and the defendants there pleaded, relying on the large interpretation of the word "book" in the last Act, that the statute prohibited the institution of any suit before registration had been performed. But in the case then before him the facts were different. The plaintiffs carried on the business of lithographers and publishers, and had acquired a reputation as publishers of maps and lithographic views in the nature of maps during the American War, giving bird's-eye views in apparent relief of the seat of war. During the war between France and Germany the plaintiffs published a series of bird's-eye views or plans illustrating the seat of war, of which they sold a great number of copies. On the 1st of September, 1870, the plaintiff's published a bird's-eye view of Paris and its fortifications under the following description: "No. 8, Stannard & Sons Perspective View of Paris and its Environs, showing all the fortifications and redoubts, together with the lines of defence recently thrown up, and the roads, rivers, and railways communicating with the interior, compiled from the latest official sources by Alfred Concanen." The plaintiffs alleged that this view was duly designed, or caused to be designed and lithographed, and was duly printed and published by them in accordance with the provisions of the several Acts of Parliament made in that behalf, and that the lithographed copies of this view were prints within the meaning of these Acts. The defendants were the proprietors of a weekly periodical called the 'Gentleman's Journal and Youth's Miscellany,' and with the number of that journal of the 1st of November, 1870, they published a bird's-eye view of Paris and

(a) (1871), 19 W. R. 811; 24 L. T. 570.

CAP. I.

its fortifications, which the plaintiffs alleged was an imitation of their view and an infringement of their copyright. The plaintiffs accordingly filed their bill, and on the 19th of November, 1870, a decree was made by consent, by which a perpetual injunction was granted restraining the defendants from printing, publishing, or selling these views, directing an inquiry as to damages, and ordering the defendants to pay the plaintiffs' costs.

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

The result of the two cases appears to be that what is popularly called a "map" may be so artistic as to fall within the Engravings Acts, but that, if it is not artistic, then the proprietor of the copyright must comply with the requisitions of the Literary Copyright Act. This is certainly not a very satisfactory position, and proprietors of maps ought always to take the precaution of registering under the last-named Act before suing for infringement.

Christmas cards.

As to Christmas cards and pictorial post-cards, the mode in which the copyright should be secured depends to a certain extent on their nature and general character. Some are of such a nature as that protection may be found under the Engravings Acts of Geo. II. and Geo. III.; or the 25 & 26 Vict. c. 68, if in the nature of a painting, drawing, or photograph; others again may be registered under the Patents, Designs, and Trade Marks Act, 1883 (b).

As to what is an infringement.

What is an infringement is, in many cases, a difficult matter to solve. There can be no reason why a person should not be

(a) These cases are more fully dealt with *ante* pp. 132-135.

(b) In *Hildesheimer v. Dunn* (1891), 64 L. T. 452, a Christmas card was held rightly registered under both the Act of 5 & 6 Vict. c. 45, as a "sheet of letter-press," and the Act 25 & 26 Vict. c. 68, as a painting.

liable where he sells a copy with a mere collusive variation, for a copy is defined to be that which comes so near to the original as to give to every person seeing it the idea created by the original (*a*).

Great solicitude is requisite to guard against two extremes equally prejudicial: the one, that men of ability, who have employed their energies for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the community may not be deprived of improvements, nor the progress of the arts retarded. The Act which secures copyright to authors, guards against the piracy of the words and sentiments, but it does not prohibit writing on the same subject. As in the cases of histories and dictionaries: in the first, a man may give a relation of the same facts, and in the same order of time; in the latter, an interpretation is given of the identical words. In all these cases the question of fact to come before a jury is, whether the alteration be colourable or not? There must be such a similitude as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a mere transcript. So in the case of prints, no doubt different men may take engravings from the same picture. There is no monopoly of the subject here any more than in the other instances, but upon any question of this nature, the jury will have to decide whether it be a servile imitation or not (*b*).

The first engraver does not claim the monopoly of the use of the picture from which the engraving is made; he says: Take the trouble of going to the picture yourself, but do not avail yourself of my labour, who have been to the picture and have executed an engraving (*c*).

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

An engraver has no monopoly in the subject.

(*a*) *West v. Francis* (1822), 5 Barn. & Ald. 737. See *Roworth v. Wilkes* (1807), 1 Camp. 94; *Moore v. Clark* (1842), 9 M. & W. 692.

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

(*c*) *De Berenger v. Wheble* (1819), 2 Stark. N. P. C. 548.

(*d*) *Blackwell v. Harper* (1740), 2 Atk. 94; S. C. Barn. 210.

CAP. I.

form as they are represented here; for they are represented in all their several gradations, the flower, the flower-cup, the seed-vessel, and the seed."

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

An engraver is almost invariably a copyist, and if engravings from drawings were not to be deemed within the intention of the legislature these Acts would afford no protection to that most useful body of men, the engravers. The engraver, although a copyist, produces the resemblance he is desirous of obtaining by means very different from those employed by the painter or draughtsman from whom he copies: means which require great labour and talent. The engraver produces his effects by the management of light and shade, or, as the term of his art expresses it, the *chiaro-oscuro*. The due degrees of light and shade are produced by different lines and dots; he who is the engraver must decide on the choice of the different lines or dots for himself, and on his choice depends the success of his print. If he were to copy from another engraving, he might see how the person who engraved that had produced the desired effect, and so without skill or attention become a successful rival (*a*).

Foreign engravings.

It is not enough to entitle prints to protection under the Engraving Acts that they have been published in Great Britain. In a case where the prints had been struck off abroad from plates engraved abroad, it was held that they were not entitled to protection, though the first publication had been in England (*b*).

Engraving Acts extended to Ireland.

The engraving Acts were extended to Ireland in 1837. By the 6 & 7 Will. IV. c. 59 (*c*), it was enacted that, from and after the passing of that Act, if any engraver, etcher, print-seller, or other person should, within the period limited for the protection of copyright in engravings, engrave, etch, or publish, or cause to be engraved, etched, or published, any engraving in print of any description whatsoever, either in

(*a*) *Newton v. Cowie*, per Best, C.J. (1827), 4 Bing. 246; *Martin v. Wright* (1833), 6 Sim. 297.

(*b*) *Page v. Townshend* (1832), 5 Sim. 395. As to protection under the International Copyright Acts see *post*.

(*c*) This Act may, by the International Copyright Act, 1886, be cited as "The Prints and Engravings Copyright Act, 1836." By the Short Titles Act, 1892, this Act may be cited as "The Prints and Engravings Copyright (Ireland) Act, 1837," and by the same Act the whole group of Copyright Acts may be cited by the collective title of "The Copyright Acts."

whole or in part, which might have been or which should thereafter be published in any part of Great Britain or Ireland, without the express consent of the proprietor or proprietors thereof first had and obtained in writing signed by him, her, or them respectively with his, her, or their own hand or hands in the presence of and attested by two or more credible witnesses, then every such proprietor might, by and in a separate action upon the case, to be brought against the person so offending in any court of law in Great Britain or Ireland, recover such damages as a jury on the trial of such action, or on the execution of a writ of inquiry thereon, should give or assess.

The 15 & 16 Vict. c. 12, s. 14 (*a*), declares that the provisions of this Act and the Engravings Acts collectively are intended to include prints taken by lithography or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely, and the said Acts shall be construed accordingly.

Engravings Acts to include lithographs.

It is therefore an infringement of the copyright given by the Engraving Acts to copy by photography, or sell a photographic copy of a print in which a copyright has been acquired under these Acts (*b*). The question arose some years ago.

The right in engravings may be infringed by photography.

It was in an action for the infringement by the defendant of the plaintiff's copyright in two engravings, the one from Rosa Bonheur's 'Horse Fair,' and the other from Holman Hunt's 'Light of the World.' It was proved that the plaintiff was the proprietor of these two engravings, and that the defendant had copied them on a very reduced scale by means of photography, and sold a great number of copies. The point was argued before the Court of Common Pleas, and it was unanimously decided that all processes for the indefinite multiplication of copies, whether mechanical or otherwise, were within the Acts for the protection of artists and engravers; and that when they declare mechanical processes of multiplying copies to be within them, no doubt they would have also thus declared the multiplication by means of photography, if the art of photography had then been known. If the object of the Acts of Parliament on the subject were, not simply to protect the reputation of the artist or the engraver, but to protect him against the invasion of his substantial commercial property in the work of his genius or of his industry, it is

(*a*) The International Copyright Act, 1852.

(*b*) *Gambart v. Ball* (1863), 14 C. B. 306; 9 Jur. (N.S.) 1059; 11 W. R. 699; 32 L. J. (C.P.) 166; *Graves v. Ashford* (1867), 15 W. R. 495; L. R. 2 C. P. 110; 16 L. T. 98; 36 L. J. (C.P.) 139.

CAP. I.

plain that he sustains an injury by another offering a photographic copy which is capable of exciting in the mind of the beholder the same or somewhat similar pleasurable emotions as would be communicated by a copy of the engraving itself. The value of the artist's property would be sensibly diminished were the multiplication of copies by means of photography held to be lawful. In the case above referred to, Chief Justice Erle, in passing judgment, said: "In the representation of 'The Horse Fair,' we feel the same degree of pleasure in looking at the forms and attitudes of the beautiful animals there portrayed, whether we see them in the size in which they are drawn in the original picture, or in the reduced size of the engraving, or in the still more diminished form in which they appear in the photograph. . . . The object of the statute to my mind, was, not merely to prevent the reputation of the artist from being lessened in the eyes of the world, but to secure to him the commercial value of his property, to encourage the arts, by securing to the artist a monopoly in the sale of an object of attraction. . . . It seems to me that the making of copies in that way and selling them is within the words as well as the meaning of the Act" (a).

Though the language of the statute includes, as we have seen, copies made by mechanical or chemical process, and capable of being multiplied indefinitely, yet it has been doubted whether it would include copies made by hand or designs transferred to an article of manufacture.

Whether statute includes designs transferred to articles of manufacture.

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

The point, however, subsequently arose in the case of *Dicks v. Brooks* (c). Plaintiffs were the publishers and proprietors of a weekly periodical called 'Bow Bells.' Defendants were the proprietors by assignment of the copyright of a print called 'The Huguenot,' engraved from Millais' picture, and of a photograph taken from the print. The plaintiffs had published for their Christmas number of 1877 a chromo-printed pattern for wool-work, called 'The Huguenot,' taken, as they stated, from a Berlin wool pattern which had been imported by a German warehouse. The leading incident of Millais' picture, the farewell of two lovers of different creeds on the eve of the massacre of St. Bartholomew, was to be found in the Berlin wool pattern,

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

(b) See remarks of Byles, J., in *Gambart v. Ball* (1863), 32 L. J. (C.P.) 166, 168.

(c) (1880), 1 Q.B. 214, 215, 216, 217, 218, 219, 220, 221, 222.

but a different background had been introduced, and the colours were not the same as those of the picture. In December 1877, the defendants issued a circular containing a warning against the sale of any copy of the subject, 'The Huguenot,' without the stamp or imprint of their firm, in whom the sole subsisting copyright existed, and that all such unstamped copies were imitations and unlawfully made. The plaintiffs, alleging that the publication of this circular was a false and malicious libel on their print and pattern, which was not an imitation of any picture to the copyright of which the defendants were entitled, and that their sale of the publication had been greatly damaged by such circular, brought an action to restrain, and obtain damages for, this alleged libel and slander of title. The defendants by their statement of defence and counterclaim asserted their title to the engraving, averring that the plaintiffs had unlawfully copied it in whole or in part, and greatly damaged the defendants' property therein; and they claimed an injunction and the penalty of 5s. under the Act 8 Geo. II. c. 13, for every copy sold by the plaintiffs, and damages.

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

In delivering the judgment of the Court of Appeal, Lord Justice James said: "The question before us resolves itself into this, whether this pattern for working in Berlin wool is a

piratical copy of the print of which the defendants are the proprietors. It appears to me that the Vice-Chancellor fell into (if I may venture so to call it) the error of supposing that the case was within the Act 8 Geo. II. c. 13, which gave a protection, not to a mere engraver, but to a man of genius who by his industry, pains, and expanse, invented a design, 'or engraved, etched, or worked, or from his own work and invention caused to be designed and engraved, etched, or worked,' and so on, 'any historical print.'

"Those words were intended to give protection for the genius exhibited in the invention of the design, and the protection was commensurate with the invention and design. That Act was afterwards extended to embrace the case of persons engraving from something which was not the design of the engraver. Now it appears to me that the protection given by the subsequent Acts to the mere engraver was intended to be, and was commensurate with, that which the engraver did, and the engraver did not acquire against anybody in the world any right to that which was the work of the original painter, did not acquire any right to the design, did not acquire any right to the grouping or composition, because that was not his work but the work of the original painter. What, as it seems to me, the Act gave him, and intended to give him, was protection for that which was his own meritorious work. The art of the engraver is often of the very highest character, as in the print before me. It is difficult to conceive any skill or art much higher than that which has by a wonderful combination of lines and touches reproduced the very texture and softness of the hair, the very texture and softness of the dress, and the expression of love and admiration in the eyes of the lady looking up at her lover. That art or skill was the thing which, as I believe, was intended to be protected by the Acts of Parliament, and what we have to consider is, whether the wool pattern before us (the maker of which must have been aided in the production of it by having before him the defendant's print, or some kind of copy of it, because the wool pattern follows the print in some particulars in which the engraving differs from the picture) is a copy of the engraver's work? It appears to me that without going into any etymological definitions of the word 'copy,' and using the word in the ordinary sense of mankind as applied to the subject-matter, the question is, Is this a copy, is it a piracy, is it a piratical imitation of the engraving—of that which was the engraver's meritorious work in the print? I am of opinion, as

a matter of fact, that the wool pattern is not a copy, is not a piratical imitation, with colourable variations of the defendant's engraving. The alleged copy is not a thing intended as a print in the ordinary sense of the word. It was intended to be printed, and was printed, as a pattern for Berlin wool, not put forward in any way fraudulently or as a sham, but really in truth intended solely for that purpose. Now, I am of opinion that whatever may be the similarities between the one and the other, the attempt not to reproduce the print, but to produce something which has some distant resemblance to the print, not by anything in the nature of the engraver's work, but by what I may call a mosaic of coloured parallelograms, is not in any sense of the word a piratical imitation of the print. Nobody would ever take it to be the print, nobody would ever buy it instead of the print, nobody would ever suppose that it was, to use the language of the first Act, a base copy of the print. It is a work of a different class, intended for a different purpose, and, in my opinion, no more calculated to injure the print *quæ* print, or the reputation of the engraver, or the commercial value of the engraving in the hands of the proprietor, than if the same group were reproduced from the same engraving by waxwork at Madame Tussaud's, or in a plaster of Paris cast, or in a painting on porcelain. I cannot conceive that such a reproduction of the subject in tapestry, or Berlin wool, or upon china, or in earthenware, is within the meaning of the Act of Parliament. Whether dealing with it as a matter of law, or dealing with it, as we must do, as a matter of fact, I am satisfied that the appellant's pattern is not a copy or piracy of any part of that which constituted the real merit and labour of the engraver of the defendant's print" (a).

The defendants in this case were not the proprietors of the copyright in the original picture 'The Huguenots,' but it is doubtful whether if they had been the decision would have been in their favour. In a recent case where the proprietors of the copyright in a picture under the 25 and 26 Vict. c. 68 complained that certain tableaux vivants, or 'Living Pictures,' were infringements of their rights, it was held, following *Dicks v. Brooks*, that such performances were copies neither of the picture nor of its design (b).

The words of the 17 Geo. III. c. 57 are: "If any person What not an infringement.

(a) (1880), 15 Ch. Div. 22.

(b) *Hanfstaengl v. Empire Palace* (1894), 3 Ch. 109; S.C. *sub nom. Hanfstaengl v. Baines & Co.* (1895), A. C. 20. This case is more fully considered in the Chapter on Paintings, Drawings and Photographs, *post*.

CAP. I.

shall copy in the whole, or in part by varying, adding to, or diminishing from the main design," but where the print or engraving differs materially from the original in character, and is dealt with in a different manner, the former cannot be considered a piracy of the latter within the Engraving Acts. Thus in 1821, plaintiff, a celebrated artist, composed and painted from sketches he had designed a picture called 'Belshazzar's Feast,' which he shortly afterwards sold. In 1826 he engraved and published from the sketches a print of the same name, having previously done all necessary acts for securing to himself the copyright of the print. The defendant having purchased one of the prints, had it copied on canvas in colours on a very large scale, with dioramic effect; and he publicly exhibited such dioramic copy at the Queen's Bazaar in Oxford Street for money, describing it, in his handbills and advertisements, as "Mr. Martin's grand picture of 'Belshazzar's Feast,' painted with dioramic effect. The plaintiff applied for an injunction, but the Vice-Chancellor refused to grant one on the ground that exhibiting for profit was in no way analogous to selling a copy of the plaintiff's print, but was dealing with it in a very different manner. The Engravings Acts were not intended to apply to a case where there was no intention to print, sell, or publish, but to exhibit in a certain manner. "If, however," added the Vice-Chancellor, "Martin had exhibited his picture as a diorama, then he might have been entitled to an injunction" (a).

The statutes do not apply to the sale of prints taken from the original plate with the consent of the proprietor. In *Murray v. Heath* (b) where the defendant, an engraver, took a number of impressions from a plate engraved by himself, but for the use of the plaintiff, he being permitted to retain certain copies, but not to sell them; afterwards defendant became bankrupt, and his assignees advertised the copies retained for sale. In an action for damages in which the assignees were co-defendants, the defence was set up that the copies had not been unlawfully printed or imported, and therefore their sale was not piracy. The court held that the sale complained of, though a breach of contract, was not a violation of copyright, and consequently that no action was maintainable under the 17 Geo. III. c. 57.

(a) *Martin v. Wright* (1833), 6 Sim. 297; *Page v. Townsend* (1832), 5 Sim. 395.

(b) (1831), 1 Barn. & Adol. 804. As to rights of purchasers of blocks for reproducing illustrations, see *Cooper v. Stephens* (1895), 1 Ch. 567; *Marshall v. Bull* (1901), 85 L. T. 77.

So, upon a similar principle, it was held in *Mayall v. Higbey* (a) that a person who lends photographs to another for a particular purpose, may prevent him from taking and selling copies, except in pursuance of the purpose for which they were lent, and this, although the photographs have been published, and irrespective of the question of copyright. The above was a case in which the plaintiff had lent photographs of eminent persons to Tallis, the proprietor of the 'Illustrated News of the World,' for the purpose of engraving them for that newspaper. Tallis became bankrupt, and the assignees sold the photographs to the defendant; and it was held that the plaintiff was not only entitled to the photographs but to the unsold copies, and to an injunction to restrain the further sale. The court said that there was no question of copyright, and compared it to the case of a valuable statue, which a friend to whom it is lent had no right to get copied.

No copyright can exist in any obscene, immoral, or libellous engraving (b); and were one to destroy such a print or engraving, he would merely be liable at law to pay the value of the paper and print (c). In what class of engravings no copyright.

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

The Engraving Acts do make any express provisions as to assignment, but a licence must be in writing signed by the proprietor of the copyright in the presence of two or more credible witnesses. It will be advisable, therefore, that an assignment, which confers a higher right, be accompanied by similar formalities (f). Assignment.

The remedies for piracy under the Engraving Acts are (a) Penalties; (b) damages; (c) an injunction. Remedies for infringement.
(a) Penalties.

The penalties imposed by the 8 Geo. II. c. 13, s. 1, are five shillings for every copy and destruction of the prints and

(a) (1862), 1 H. & C. 148.

(b) See 5 Geo. IV., c. 83, s. 4; 1 & 2 Vict. c. 38, s. 2; 20 & 21 Vict. c. 83; *Fores v. Johns* (1802), 4 Esp. 97; *Buschet v. London Illustrated Standard Co.* (1900), 1 Ch. 73.

(c) *Du Bost v. Beresford* (1810), 2 Camp. 511. In *The Emperor of Austria v. Day and Kossuth* (1862), 7 Jur. 641, Ch.; on appeal, 4 L. T. 494, the Lord Chancellor stated that the cases of *Burnett v. Chetwood* (2 Mer. 441, note) and *Du Bost v. Beresford*, *supra*, were wrongly decided. Compare the fact of the liability of the destroyer for the amount of the paper, with the maxim in Moor. 813: "*Inveniens libellum famosum et non corrumpens punitur*," and, if possible, reconcile the two.

(d) *Thompson v. Symonds* (1792), 5 T. R. 41.

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

(f) See *Jefferys v. Boosey* (1854), 4 H. L. C. 815, 994, 995, and see *ante* p. 143 *et seq.*

CAP. I.

plates. The persons who are liable for the penalties are, first, the person who engraves, etches, or otherwise copies the print, and sells such copies or prints or imports the same or any part thereof for sale without the proprietor's consent; and, secondly, the person who, without such consent, publishes, sells, or exposes to sale any copy of such print, knowing that it has been printed without the proprietor's consent. Under this section, therefore, the print must be for sale, and a mere vendor is only liable for penalties if he had guilty knowledge.

(b) Damages. If the print has been copied, but not for sale, then the only remedy of the proprietor of the copyright is in damages; but if the copies have been made for sale, then he can obtain both penalties and damages. The remedy by action for damages is conferred by the 17 Geo. III. c. 57, which enacts that a special action on the case may be brought against a person who pirates another's engraving, to recover such damages as a jury on the trial of such action, or on the execution of a writ of inquiry, may give. The section also applies to a mere seller of the prints, and though, as we have seen, such a person is only liable for penalties if he had guilty knowledge, in an action for damages ignorance will be no excuse (a).

Limitation of actions. The time within which proceedings must be taken to recover penalties is six calendar months after the offence (b); but there is no limitation for an action for damages (c).

Summary proceedings for the recovery of penalties. In concluding, we will offer a few remarks on the remedy afforded by a later Act of Parliament for the recovery of the penalties for infringement under the Engravings Acts. The mode of recovery was much simplified by the 8th section of the 25 & 26 Vict. c. 68, commonly known as the Copyright (Works of Art) Act (d). By this clause all pecuniary penalties which shall be incurred, and all such unlawful copies, imitations, and all other effects and things as shall have been forfeited by offenders pursuant to any Act for the protection of copyright engravings, may be recovered by the person empowered to recover the same, and thereafter called the complainant or the complainer, as follows:

In England and Ireland. In *England* and *Ireland*, either by action against the party

(a) *West v. Francis* (1822), 5 Barn. & Ald. 737; 1 D. & R. 400; *Gambart v. Sumner* (1859), 1 L. T. 13; 5 Hurl. & Nor. 5; *Clement v. Maddick* (1859), 1 Giff. 98; 5 Jur. (N.S.) 592.

(b) Either under the 17 Geo. III. c. 38, s. 3, or under the Public Authorities Protection Act, 56 & 57 Vict. c. 61.

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

(d) By the Short Titles Act, 1892, citable as "The Fine Arts Copyright Act, 1862."

offending, or by summary proceedings before any two justices having jurisdiction where the party offending resides (a).

In *Scotland*, by action before the Court of Session in ordinary form, or by summary action before the sheriff of the county where the offence may be committed or the offender resides, who, upon proof of the offence or offences, either by confession of the party offending or by the oath or affirmation of one or more credible witnesses, shall convict the offender, and find him liable to the penalty or penalties aforesaid, as also in expenses; and it shall be lawful for the sheriff, in pronouncing such judgment for the penalty or penalties and costs, to insert in such judgment a warrant, in the event of such penalty or penalties and costs not being paid, to levy and recover the amount of the same by pounding; provided always that it shall be lawful to the sheriff, in the event of his dismissing the action and assoilzicing the defender, to find the complainer liable to expenses; and any judgment so to be pronounced by the sheriff in such summary application shall be final and conclusive, and not subject to review by advocacy, suspension, reduction, or otherwise.

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

Further, it is declared lawful for the superior courts of record in which any action may be pending, or if the courts be not then sitting, then for a judge of one of such courts, on the application of either the plaintiff or defendant, to make an order for an injunction, inspection, or account, as to such court or judge may seem fit.

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

The evidence to be adduced at the trial on behalf of the plaintiff is simply that he is the proprietor of the print or engraving pirated; and it is sufficient that he produce one of the prints taken from the original plate. The production of the plate itself is not requisite.

(a) A magistrate sitting at a police court within the metropolitan police district, and every stipendiary magistrate appointed or to be appointed for any other city, town, liberty, borough, or place, or the Lord Mayor, or an alderman of London, sitting at the Mansion House, or Guildhall Justice Rooms, has power, when sitting alone, to exercise the jurisdiction given by this Act to two justices. 2 & 3 Vict. c. 71, s. 14; 11 & 12 Vict. c. 43, ss. 29, 33, 34; see also 21 & 22 Vict. c. 73; 42 & 43 Vict. c. 49, and 47 & 48 Vict. c. 43.

(b) *West v. Francis* (1822), 5 Barn. & Ald. 737; and 1 Dowl. & Ry. 400, cited Godson on Patents, &c., 301.

Orders for
inspection or
account.

Evidence on
behalf of
plaintiff.

CHAPTER II.

COPYRIGHT IN SCULPTURE AND BUSTS.

The art of
sculpture.

THE art of sculpture has never been particularly favoured by the English nation. It is an art which ought certainly to be patronized more extensively, for it refines and improves the public mind and taste.

The erection of national monuments to the memory of individuals who by their works or their virtues have conferred lasting benefit or honour on mankind in general or their own country in particular, or in order to commemorate important public events, is a means by which the art produces the most influential moral effects.

These mementoes or memorials, though in the present age the unphilosophical and sciolistic spirit of some have led them to regard with contempt this method of honouring the illustrious great, excite a laudable admiration for the service or benefit to which they testify, and are living realities to perpetuate at once the respect entertained by the nation, both for the individual himself and the performance that has entitled him to their gratitude. When efficiently executed, they not only perpetuate the memory of the individual himself and record his good deeds, but appeal continuously to the national mind, and encourage and stimulate all posterity to follow in his footsteps. The person represented seems to be ever present. The deeds commemorated appear still in vivid force, and although we have not the actual presence of the departed, we retain his remembrance and preserve much of his influence.

“Public monuments, moreover,” says Mr. Harris (*a*), “give a character to a nation and record the existence of what are in reality its noblest treasure,—the great men who have adorned it. They much influence the genius of a people, and in their turn exhibit the national feeling and genius. Indeed, the moral effect of these erections, both in ancient and modern times, has been made obvious. . . . The essential advantage

(*a*) “Civilization considered as a Science.”

in regard to civilization arising from the national veneration paid to heroes and great men, results from the stimulus which it excites to emulate their virtues, and to shun all those vices which are opposed to the latter, and by which lustre like theirs would be tarnished. The use of monuments in this respect is two-fold: first, to preserve the memory of those great men to whom they are erected, and of their virtues also; secondly, to testify the regard of the nation for those great men and for the virtues which they displayed. In both these respects, they are extensively and directly conducive to civilization, and are calculated to carry it to its highest point."

On these social grounds, therefore, it is incumbent upon the legislature to cherish and encourage an art yielding fruit such as this is capable of bearing.

Busts of private individuals are not likely to have much value as copyright, but busts of great men have a general interest and value. The demand for copies is so small that seldom is it that piracy takes place. The only case till recent years in which we remember the Sculpture Act being applied, is that of a bust of Fox (*a*).

The means of reproduction by a cast is very simple and merely mechanical (at least, after a single copy has been obtained), and this fact accounts for the limited application of the Act. Most of the ornamental casts in request are taken from foreign works of art, or from such as have been dedicated to the public by exposure or become public property; seldom is the licence of the original designer required. There is little skill in the preparation of the type-mould, which corresponds to the plate of the engraver, unless, perhaps, where the scale is reduced (*b*).

The copyright in busts and sculptures depends upon the 54 Geo. III. c. 56 (*c*). This Act amended and extended the provisions of the 38 Geo. III. c. 71 (repealed by the Statute Law Revision Act, 1891), which had been found ineffectual for the purposes thereby intended. So ineffectual had it proved that although avowedly passed for the preventing the piracy of busts and other figures made and published by statuaries, it was decided to be no offence to *sell* a pirated cast of the bust if the piracy had any addition to or diminution from the original; nor was it an offence to *make* a pirated cast if it were a perfect *fac-simile* of the original (*d*). Lord Ellenborough

Extent and
duration of
Acts.

(*a*) *Gahagan v. Cooper* (1811), 3 Camp. 111.

(*b*) Turner on 'Copyright in Design.'

(*c*) By the Short Titles Act, 1892, citable as "The Sculpture Copyright Act, 1814."

(*d*) *Gahagan v. Cooper, supra*.

CAP. II.

thought the statute had been passed with a view to defeat its own object, and taking advantage of the opportunity of making a joke, which the bar, as a matter of duty, had to imagine exceedingly good, advised artists when they applied to Parliament for further protection, not to *model* the new Act themselves as they appeared to have done the one in question.

The 54 Geo. III. c. 56 (18th of May, 1814), enacts that every person or persons who shall make or cause to be made (1) any new and original sculpture, or model, or copy, or cast of the human figure or human figures, or of any bust or busts, or of any part or parts of the human figure, clothed in drapery or otherwise, or of any animal or animals or any part or parts of any animal, combined with the human figure, or otherwise, or of any subject being matter of invention in sculpture (*a*); or (2) of any alto- or basso-relievo representing any of the matters or things thereinbefore mentioned; or (3) any cast from nature of the human figure, or of any part or parts of the human figure, or of any cast from nature of any animal, or of any part or parts of any animal, or of any such subject containing or representing any of the matters and things thereinbefore mentioned, whether separate or combined, shall have the sole right and property of all and in every such new and original sculpture, model, copy, and cast of the human figure and human figures, and of all and in every such bust or busts, and of all and in every such part or parts of the human figure, clothed in drapery or otherwise, and of all and in every such new and original sculpture, model, copy, and cast, representing any animal or animals, and of all and in every such work representing any part or parts of any animal combined with the human frame or otherwise, and of all and in every such new and original sculpture, model, copy, and cast of any subject being matter of invention in sculpture, and of all and in every such new and original sculpture, model, copy, and cast in alto- or basso-relievo, representing any of the matters or things thereinbefore mentioned, and of every such cast from nature, for the term of fourteen years from first putting forth or publishing the same.

Period of protection.

After the expiration of this term of fourteen years the copyright shall return to the person who originally had the copyright, if he be then living, for the further term of fourteen years.

Conditions on which copyright depends.

In all and every case the proprietor or proprietors of the copyright must cause his, her, or their name or names, with the date, to be put on all and every such new and original

(*a*) *Caproni v. Alberti* (1891), 8 T. L. R. 146; 65 L. T. 785.

sculpture, model, copy, and cast, and on every such cast from nature, before the same shall be put forth or published. CAP. II.

If a recent decision of Mr. Justice Wright is to stand as good law, the courts will not require these conditions to be strictly complied with. In the case referred to (a) it was held that an approximate date, and the name of one member of a partnership firm, being the actual maker and designer of the cast, was a sufficient compliance with the provisions of the Act; but sculptors may not meet with such leniency in other cases and they cannot be advised to rely on the decision.

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

The question was recently raised (d) whether the casts of flowers and fruit were within the protection afforded by the Act. The plaintiffs, since 1880, had carried on the business of modellers, sculptors, and makers of casts, and supplied casts to schools and art classes entitled to grants in aid from the Department of Science and Art. The defendant copied three of the plaintiffs' designs upon the application for casts made to him by a person connected with one of the art schools in Manchester, and sold the casts so copied for 3s. or 5s. each cast, being considerably under the price charged by the plaintiffs. What protected by the Act.

(a) *Britain v. Hanks* (1902), 86 L. T. 765.

(b) *Turner v. Robinson* (1860), 10 Ir. Ch. 516.

(c) The Royal Commissioners proposed that the term of copyright in all works of fine art other than photographs should be the same as for books, music, and the drama, namely, the life of the artist, and thirty years after his death; par 95. It was so provided in Lord Thring's Copyright (Artistic) Bill, 1900.

(d) *Caproni v. Alberti* (1890), 8 T. L. R. 146; 65 L. T. 785; W. N. (91) 200.

CAP. II.

On one of the casts some of the letters contained in the name of the plaintiffs appeared, that name having been partly scratched out. On the others no name appeared, the name having been scratched out after the cast had been taken. The defendant, whilst admitting having copied the designs, contended that that was no cause of action, as the 54 Geo. III. c. 56 did not apply to a cast of flowers or fruit. The plaintiffs had not registered under the Designs Act, 1850, 13 & 14 Vict. c. 104, s. 6, or under the Patents, Designs, and Trade Marks Act, 1883. The court held that the productions in question came within the Act, and were within the words "being matter of invention in sculpture," and granted an injunction.

Toy soldiers.

It has been held that toy soldiers may be entitled to protection. In the case referred to, Mr. Justice Wright remarked: "The question is whether this toy representation of a soldier is an artistic thing—an artistic production within the meaning of the Sculpture Copyright Act, 1814. It is tolerably certain that some toys would not fall within the protection of the Act; and the question whether this soldier or mounted yeoman's figure comes within it must be decided upon evidence of its artistic character. The evidence before me is all one way. A war correspondent has been called, who is at the same time an artist and has shown several of these figures to be artistic productions, in that the anatomy is good and that the modelling shows both technical knowledge and skill. I see nothing to quarrel with in this statement. On the whole, therefore, although I have great doubt as to the meaning of the Act, I am prepared to hold that the production of a metal figure of a mounted yeoman such as this is good enough to be protected by the provisions of the Act" (a).

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

The conditions under which the copyright is acquired are almost identical with those required to be performed in order to obtain a copyright under the Engravings Acts. When a sculptor models a design for himself, and afterwards executes from such model a finished bust for another in marble or any other material, it is not sufficient for the sculptor, in order to acquire the copyright therein, to affix his name and the year when the finished copy from the model was executed (as is frequently the case); he must conform strictly to the letter of the Acts (b), and therefore engrave on the *model*, as well as on every cast or copy thereof, his name (c), and the day of the

(a) *Britain v. Hanks* (1902), 86 L. T. 765.

(b) As under the Designs Act, see *Pierce v. Worth* (1869), 18 L. T. 710; but see *Britain v. Hanks* (1902), 86 L. T. 765.

(c) The name need not necessarily be the baptismal and surname of the proprietor, but such as he or his co-proprietors are commonly known by or trade under.

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

By the 54 Geo. III. c. 56, s. 4, it was further provided that no person who should thereafter purchase the right or property of any new and original sculpture, or model, or copy, or cast, or of any cast from nature, of the proprietor, expressed in a deed in writing signed by him in the presence of and attested by two or more witnesses, should be subject to any action for copying, or casting, or vending the same (a). Assignment of the right.

Sculptures and models had to be registered under the Designs Act (13 & 14 Vict. c. 104, s. 6); but this is one of the Acts repealed by the Patents, Designs, and Trade Marks Act, 1883. The only section in this last Act at all affecting registration of sculptures seems to be the 114th, by which it is provided that the register of designs kept under any enactment repealed by the Act of 1883 shall respectively be deemed parts of the same book as the register of designs under that Act. The result apparently is that it is not now necessary to register the copyright or proprietorship in sculptures or busts. Registration.

To make or import, or cause to be made or imported, or exposed for sale or otherwise disposed of any pirated copy or pirated cast, whether it be produced by moulding or copying from or imitating in any way the original is an infringement of the copyright given by the Act (b); but apparently it is not an infringement to draw or photograph the model or cast. How right infringed.

In a recent case, the plaintiff had invented a certain process for producing brass model casts of her Majesty the Queen, for which he obtained a considerable sale. In April 1902, an imitation of one of the busts manufactured by the plaintiff came into his possession. On behalf of the plaintiff a wholesale importer of toys was called, who stated that the defendant had brought him a model similar to the model which the plaintiff's were in the habit of making, and asked him for orders to supply him with model busts of the same character; but the witness refused, and warned the defendant that the model was an infringement of the plaintiff's copyright. Though Mr. Justice Wright had no doubt that the plaintiff's models possessed such artistic merit as to entitle them to protection, he held that there was no evidence of the defendant having "caused to be exposed for sale or otherwise disposed of" the

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

(b) Sect. 3.

CAP. II. pirated copy, and he refused either damages or an injunction (a).

Remedies. The remedies for infringement are (a) an action for damages under section 3 ; (b) an injunction.

The 7th section of the 13 & 14 Vict. c. 104 provided penalties for infringement, but this provision, as we have already seen, has been repealed by the Patents, Designs, and Trade Marks Act, 1883.

Actions for damages must be brought within six months from the discovery of the offence (b).

Proposed
alterations
in the law.

In conclusion, we must express a hope that protection will before long be afforded to the sculptor against drawings or engravings of any description, which may now be taken from his work with impunity. If the sculpture be a production of any merit and value, if well designed and engraved, it might be profitable to the author in various ways ; while, on the contrary, if it be badly or carelessly executed, it may be alike annoying to him and injurious to his reputation and fame.

On this subject the Royal Commissioners in their report on Copyright, 1878, say : " Upon the whole we are disposed to think that every form of copy, whether by sculpture, modelling, photography, drawing, engraving, or otherwise, should be included in the protection of copyright. It might be provided that the copying of a scene in which a piece of sculpture happened to form an object should not be deemed an infringement unless the sculpture should be the principal object, or unless the chief purpose of the picture should be to exhibit the sculpture.

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

The recent Copyright (Artistic) Bill, 1900, proposed that the term of copyright in sculpture as well as in paintings should be the life of the person to whom the same is given,

(a) *Britain v. Kennedy* (1903), 19 Times L. R. 122.

(b) Sect. 5.

(c) Pars. 99, 100.

and thirty years next after his death. Sculptors have, however, under the present law an advantage over painters inasmuch as the copyright in a sculpture will remain after sale of the work in the sculptor, even if the work be a commissioned one, unless there is an express assignment of the copyright. The Bill referred to proposed to put sculptors on the same footing as painters in all respects.

CAP. II.

CHAPTER III.

COPYRIGHT IN PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.

The arts of
painting and
drawing.

OF all the branches of the fine arts this was the last recognised as worthy of protection by the legislature. On what ground it is difficult to comprehend. Where is the difference in principle between a picture and a poem?

The claims of the artist to a copyright in his works are quite as valid as those of the literary author in his; and if the principle were once admitted that a man should be protected in the enjoyment of his intellectual productions, and a certain period of exclusive possession allowed to the author for his benefit, before the public were in full and free enjoyment of the work, on what ground could Parliament so long withhold the same privilege from the artist as it had already granted to the author?

It is a strange anomaly that while the law gave a portion to that which was, in the ordinary way, the work of a man's hands, and allowed a copyright in inventions and designs, it should have afforded no protection to those productions which were more exclusively the creations of the mind. It was thought but an act of justice and right that a copyright should exist in literary productions, but when it was proposed, as late as 1862, to give a similar right in pictures, a cry was raised that it was derogatory on the part of jurisprudence to protect the works of those who contributed by their art to the honour of their country, the elevation of the national taste, and the amusement, instruction, and delight of the community at large.

With respect to the fine arts, two series of Acts had been passed, giving a copyright of a limited and special nature in sculptures and engravings: hence this unaccountable opposition to the bestowing a copyright in paintings appears the more extraordinary. For while an engraving enjoyed protection, the picture from which it was taken was without. A man might make any number of copies of the best work of

the artist—sell them, and there was no remedy. Not unfrequently these copies were sold as originals, and even the name of the original artist forged upon them, but the injured party was without redress.

The evil was almost peculiar in this country. In most European countries the principle of copyright extended through the whole range of the fine arts, and, unlike our law, especially protected the work of painters.

At the present day, if one purchases the copyright of a picture he holds the picture free from any interference, and with the perfect right of dealing with it as he pleases. If, however, he buys the picture simply as a picture, the copyright being reserved to the artist by some note in writing, he, the purchaser of the picture, will then have the gratification and delight resulting from its contemplation—he cannot make copies or engravings from it, or use it for a different purpose from that for which the artist sold it (*a*). The same rule applies to authors. When a person buys a book he can read it, but cannot multiply copies of it unless he purchases the copyright. This appears but fair, especially if we bear in mind that the greater part of the artist's remuneration probably arises from the reproduction of his work (*b*).

The existence of copyright in paintings is a protection also to the purchaser of a picture. It was formerly well known that after a person had purchased a picture the artist might have made a copy and multiplied it to any extent, although the purchaser might have been under the impression that he had bought a picture as being the single work of the artist. Of course such an action would not have become an honourable man, but still the right remained to the artist to act in such a manner had he thought proper. It is not a desirable thing to have a great work of art multiplied indefinitely, and hawked about for sale. It is well known that the frequent repetition of a work of art diminishes the worth of the original; indeed, nothing detracts so much from its commercial value.

At length the wished-for day arrived, and the artists succeeded in obtaining for their protection an Act of Parliament.

The Act (25 & 26 Vict. c. 68) is entitled, "An Act for amending the Law relating to Copyright in Works of the Fine Arts, and for repressing the commission of Fraud in the Production

Creation of
copyright in
works of art.

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

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

CAP. III.

and Sale of such works' (a). After reciting that by law as then established, the authors of paintings, drawings, and photographs had no copyrights in their works (b), it provides that the author (c), being a British subject or resident within the dominions of the Crown, of every original painting, drawing (d), and photograph which shall be or shall have been made, either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of the Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing and the design thereof, or such photograph and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death; provided that when any painting or drawing or the negative of any photograph shall for the first time after the passing of this Act be sold or disposed of, or shall be made or executed for or on behalf of any person for a good or a valuable consideration, the person so selling or disposing of or making or executing the same shall not retain the copyright thereof unless it be expressly reserved to him by agreement in writing, signed at or before the time of such sale or disposition by the vendee or assignee of such painting or drawing or of such negative of a photograph, or by the person for or on whose behalf the same shall be so made or executed, but the copyright shall belong to the vendee or assignee of such painting or drawing or of such negative of a photograph, or to the person for or on whose behalf the same shall have been made or executed; nor shall the vendee or assignee thereof be entitled to any such copyright, unless at or before the time of such sale or disposition an agreement in writing, signed by the person so selling or disposing of the same, or by his agent duly authorized, shall have been made to that effect.

Effect of section.

This remarkable section places artists in a most peculiar position in regard to copyright, and numerous cases of hardship have been known to arise through artists, architects, and others entertaining a mistaken impression as to the rights conferred on them by this Act. Artists must particularly bear in mind that, except where their work is executed upon commis-

(a) By the Short Titles Act, 1892, this Act may be cited as "The Fine Arts Copyright Act, 1862."

(b) But, *semble*, he had copyright at common law in his unpublished works. See *Prince Albert v. Strange* (1849), 1 M. & G. 25, 46; *Turner v. Robinson* (1860), 10 Ir. Ch. Rep. 121.

(c) *Kenrick & Co. v. Lawrence & Co.* (1890), 25 Q. B. D. 99.

(d) An architectural design is protected under this word: but otherwise the English copyright law affords no protection to architects.

sion, the copyright is absolutely lost if at the time of the first sale a disposition of their work there is no agreement as to whom the copyright shall belong. A struggling artist is perhaps reluctant to frighten a possible purchaser of his work by suggesting a reservation of copyright, yet, unless he obtains such a reservation in writing, the copyright cannot belong to him, nor has he the satisfaction of feeling that at any rate the copyright will belong to the purchaser, who in a generous mood may re-assign it to him; for if the purchaser does not, at the time of first sale or disposition, take an assignment in writing of the copyright, it cannot belong to him. The work has fallen into the public domain, and any one may copy it unless he can be restrained on the ground of breach of faith!

The only case in which the statute seems to take a sensible view (and this is rather done by implication than otherwise) is where the work is executed on commission, in which case the copyright vests, without any agreement, in the party for whom the work is executed (*a*).

The Royal Commissioners in their report on copyright were of opinion that it was clearly undesirable that copyrights which were in many cases of great value should in this way be left to piracy, and thought that the law, therefore, should strictly define to whom, in the absence of an agreement, the copyright should belong. They also referred to the expediency of making a distinction between pictures painted on commission and others, but they experienced a difficulty in defining what a commission was, and looking to the evidence before them on the point, they arrived at the conclusion that no distinction could practically be made. The majority of the Commissioners came to the conclusion that, in the absence of a written agreement to the contrary, the copyright in the picture should belong to the purchaser or the person for whom it was painted and follow the ownership of the picture (*b*).

It is not always easy to decide whether there has been a sale or disposition of the picture. What is a sale?

A case on this point is *Levi v. Champion & Co., Limited* (*c*). The plaintiff, Mr. Levi, was a chromo-lithographer, and the defendants the well-known mustard and vinegar manufacturers. The plaintiff was one evening instructing himself by reading

(*a*) *Petty v. Taylor* (1897), 1 Ch. 465.

(*b*) In the Copyright (Artistic) Bill, 1900, it was proposed to provide that the copyright should remain in the artist, except in the case of portraits; but the artist was not to be entitled to make replicas without the consent in writing of the owner of the picture. Under the present law, the copyright in a sculpture remains in the sculptor, unless there is an express assignment.

(*c*) (1887), 3 T. L. R. 286.

CAP. III.

'Midsummer Night's Dream,' when he came across the well-known passage, "Good Master Mustard-seed, I know your patience well: that same cowardly giant-like ox-beef, hath devoured many a gentleman of your house; I promise me your kindred hath made my eyes water ere now. I desire your more acquaintance, good Master Mustard-seed" (a) On reading these lines it occurred to him that the words, accompanied by a suitable illustration, would form a good label or trade-mark for a firm of merchants in or manufacturers of mustard. He accordingly had prepared by his artist an oil painting on millboard of a weird moonlight scene, in which a sprite was pictured presenting a tin of something, presumably mustard, to Bottom and to Titania, who were seated on a green bank, with Puck hovering over their heads. In the lower part of the picture was a label containing the above Shakesperian lines and the word 'Mustard.' This picture was in 1879 shown to a person in Messrs. Champion & Co.'s employment by the plaintiff's traveller, and Messrs. Champion & Co. ordered 250,000 reduced coloured copies as labels for their mustard tins, and the name 'Champion' affixed to the picture, which were duly supplied. The picture itself remained for some time in the possession of the defendants. A second issue of the labels was printed by the plaintiff for the defendants in 1883 at a reduced charge. Subsequently the defendants employed other people to print similar labels, and the plaintiff (having registered the copyright in the picture under the Act of 1862 in 1879) brought his action, alleging that by issuing the labels which were not printed by the plaintiff the defendants had infringed his copyright. Mr. Justice Kekewich came to the conclusion, on the evidence, that the agent for Messrs. Champion did mean to buy the picture, and that the plaintiff's traveller did intend to sell it. Then and there, when the order was given, the property in the picture passed to Messrs. Champion, Levi being intrusted with the task of printing a number of copies, without any reservation of a right on his part to print future issues of the label. His lordship held that there was a contract for sale of the picture, and that the property passed to Messrs. Champion: that section 1 of the Act was applicable, and that a person so selling was not entitled to the copyright. Messrs. Champion did not claim the copyright in the picture, but Levi had not got it—that was to say, he had not got the sole or exclusive right; and therefore could not prevent Messrs. Champion or other persons from multiplying copies.

(a) Act iii. sc. 1.

The Act of 1862 confers copyright upon a painter, drawer, or photographer for the term of his natural life and seven years after his death, but it does not expressly state when the statutory copyright is to commence and the common law right to protection cease. In the case of *Tuck v. Priester*, Lord Esher, M.R., expressed the opinion that, no time being mentioned, statutory copyright begins from the making of the work (a), and whatever difficulties may attend such a construction, there seems no escaping from it. The alternative suggestion is that statutory copyright commences on publication, but the statute lends no support to this view.

CAP. III.

When
copyright
commences.

The difficulties of section 1 of the Act seem to have mainly arisen from the attempt to legislate in one section for such different artistic works as a painter's masterpiece and a photograph. In the case of a photograph there is no difficulty in determining the time when and place where the negative was made, but it may be more difficult in the case of a picture. Yet the section confers copyright on a foreigner "resident within the dominions of the Crown." If it be correct that the statutory copyright commences on the making of the work, then the residence within the dominions of the Crown must no doubt be at the "making" of the work, and his residence at the time of publication is immaterial. The length of the author's residence is probably immaterial (b), so long as he is resident at the time of making, but this might extend over a considerable period.

It seems probable, then, that the common law copyright in a painting, drawing, or photograph before publication is merged in the statutory copyright, so that, even before publication, an artist who has not registered his work cannot sue in respect of infringements, unless these have been committed in breach of faith (c). The point is, however, not free from doubt.

A British artist "making" his work either in the British dominions or elsewhere is entitled to copyright; and a foreign or colonial artist "making" his work during a residence in the British dominions is also entitled to copyright under the Act of 1862. But a foreigner "making" his work outside the British dominions is not entitled to copyright, except under the International Copyright Acts, nor does a British subject commissioning a foreigner to paint a picture for him obtain copyright by virtue of the clause in section 1 relating to

Application
to foreigners.

(a) *Tuck v. Priester* (1887), 19 Q. B. D. 629, 636.

(b) Cf. *Low v. Ward* (1868), L. R. 6 Eq. 415; and see *ante* p. 92. as to literary copyright.

(c) *Tuck v. Priester* (1887), 19 Q. B. D. 629.

CAP. III.

commissioned works, unless the work is "made" within British dominions (a).

Copyright does not extend to the colonies.

It has recently been decided that a British artist cannot sue under the Act of 1862 for infringements of his artistic copyright committed in Canada (b). The Act confers on British subjects and persons resident in British dominions copyright in pictures, drawings, and photographs. Such copyright extends to the whole of the United Kingdom, but there is nothing in this Act, as there is in the Literary Copyright Act, to indicate any intention on the part of the Legislature to extend the limits within which the copyright is to be enjoyed to any part of the British dominions outside the United Kingdom. There are clauses, especially section 4, relating to registration, and section 10, prohibiting importation, which negative any such intention. The Judicial Committee of the Privy Council were therefore of opinion, in the case referred to, that, in the absence of language clearly showing an intention to confer copyright in such dominions, the contention of the plaintiff that he could sue in Canada for infringement of his copyright could not be supported.

This decision clearly is applicable to the other colonies and dependencies of the United Kingdom, and the result is that those who desire copyright in Canada, or any other colony, must obtain such copyright by complying with the laws of the colony.

Who is the author?

Where a person employs another to execute for him an artistic work, the employer may be the proprietor of the copyright, but is not necessarily the author within the meaning of the Act.

Thus where the plaintiffs were a firm of printers, J., a member of the firm, conceived the idea of printing and publishing cards, bearing a representation of a hand holding a pencil in the act of completing a cross within a square, with a view to such cards being used at parliamentary and other elections for the guidance and instruction of illiterate voters in the marking of their ballot papers. J., being unable to draw, employed an artist in the service of the firm to make under his direction a drawing of the representation above described. The plaintiffs registered the drawing under the Act of 1862, and in the memorandum stated J. to be the author of the drawing. The Court, however, held that J. was not the author of the drawing, and that the registration was consequently void (c).

Mr. Justice Wills in the case last cited said: "I do not see

(a) *Geissendorfer v. Mendelssohn* (1896), 13 Times L. R. 91.

(b) *Graves & Co. v. Gorrie* (1903), A. C. 496.

(c) *Kenrick & Co. v. Lawrence & Co.* (1890), 25 Q. B. D. 99 : 38 W. R. 779.

how a gentleman who is incapable of drawing even such a very simple picture as a rough sketch of the human hand, and who did not in fact set pencil to paper in the matter, can be called the author of the drawing. He suggested the subject and made such limited suggestions as to the treatment as the subject admitted of; but it seems to me that in an Act which gives copyright to drawings the author must mean a person who has at least some substantial share in putting the touches on to paper" (a).

The copyright given by the first section is qualified by the following section, to the extent that nothing shall prejudice the right of any person to copy or use any work in which there is no such copyright, or to represent any scene or object, notwithstanding that there may be copyright in some representation of such scene or object.

This must refer to and include all works of ancient and deceased masters, and all paintings of living artists sold before the passing of this Act, or since, without the statutory provisions having been complied with for the creation and transfer of copyright.

There is ordinarily no difficulty in determining who is the author of a painting or drawing, but the question has several times come before the court as to who is the author of a photograph within the meaning of the Act. In *Nottage v. Jackson* (b), the explanation of the Master of the Rolls as to who was the author was this: "The nearest I can come to, is, that it is the person who effectively is as near as he can be the cause of the picture which is produced, that is, the person who has superintended the arrangement, who has actually formed the picture by putting the people into position, and arranging the place in which the people are to be"; and Lord Justice Cotton said: "In my opinion 'author' involves originating, making, producing as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph"; and Lord Justice Bowen said: "The true definition of 'author' for the purpose of the Act, keeping in mind that photography is to be treated for the purpose of the Act as if it were an art, is that the author is the man who really represents, or creates, or gives to the ideas, or fancy or imagination the local habitation—the man, in fact, who, in the words of the Master of the Rolls, is most nearly the effective cause of the representation" (c).

(a) *Kenrick & Co. v. Laurence & Co.* (1890), 25 Q. B. D. 99, 106.

(b) (1883), 11 Q. B. D. 627.

(c) And see *Wooderson v. Raphael Tuck & Sons* (1887), 4 T L. R. 57.

CAP. III.

The "author" of a photograph is, therefore, not necessarily the person who supplies the apparatus and pays the wages of the person who takes the negative. Thus, where A. and B., who carried on business in co-partnership, under the firm of the L. Company, sent one of the artists in the employ of the firm to take a photograph of the Australian cricketers at the Oval, it was held that A. and B. were wrongly registered in their individual names as the proprietors and authors of the photograph. According to the opinion expressed by the court, the person who took the negative was the author (a).

In the case of *Melville v. Mirror of Life Co.* (b), the plaintiff and his son were both present at the taking of a photograph of C. The son posed C. and performed all the manual acts, while the plaintiff stood by and looked on, and at the proper moment held up his hand so as to indicate to C. the direction in which he was to look. Mr. Justice Kekewich held that the plaintiff was the author of the photograph. "The father," he said, "being the principal photographer, the question is whether he is to be held to be the 'author' of this photograph? The evidence is somewhat conflicting; but my conclusion is that the son assisted the father—that whatever the son did was merely as assistant of the father; he was throughout the agent, and not the principal; the father was the principal throughout. Whether the son arranged the furniture, posed the subject, went to the dark room for the plate and put it into the camera, or eventually took off the cap, seem to me to be matters of detail. What I have to inquire into is the real relation of the father to the son in the matter. I have no doubt that the son, though according to his own view perfectly competent to do it all himself, did, as regards this particular portrait, act under the direction and as agent of his father. It seems to me that that makes the father the 'author' of the photograph directly within such definition as is to be found in *Nottage v. Jackson*, and takes the father outside the criticism of the Master of the Rolls and the Lords Justices in that case, which would go to show that an agent is not an author within section 1 of the Fine Arts Copyright Act, 1862, and that the principal cannot be the author unless he is the active principal. In that case, no doubt, the principal was the gentleman who sent some one to Kennington Oval to take the photographs of the Australian cricketers playing there, and the court did not see

(a) *Nottage v. Jackson* (1883), 11 Q. B. D. 627; 52 L. J. Q. B. 760; 32 W. R. 106; 49 L. T. 339; *Burrow Giles v. Sarony*, 4 Davis' Rep. (Amer.) 53.

(b) (1895), 2 Ch. 531; 65 L. J. Ch. 41.

its way to saying that a gentleman sitting in his room in Regent Street could be the author of a photograph which was being taken at Kennington Oval. . . . I think the right conclusion is that the plaintiff was the 'author' of the photograph."

This decision does not tend to lessen the difficulty of discovering the author of a photograph, but the basis of the decision seems to be that the father was the proprietor of the business. If the positions had been reversed, and the father had done what the son did, it is conceived that the father would still have been the "author." In fact, the result of the two decisions in *Nottage v. Jackson* and *Melville v. Mirror of Life*, is conceived to be that the proprietor of the business will be considered the author of the photograph if he be present at the time of its being taken, and in any way superintend the operation, but that if he be not present, then the assistant who takes the photograph will be the author.

Though the photographer is the "author" he is not necessarily entitled to the copyright. Where a sitting is given to a photographer without payment, the copyright vests in the employer, and the sitter cannot restrain the sale of the photograph. Where, however, a sitter pays value to the photographer, the sitter is the person "for and on whose behalf" the photograph is "executed for valuable consideration," and the copyright, apart from any agreement to the contrary, vests in the sitter, who will be entitled to restrain the multiplication and sale of copies, and even to restrain the exhibition of copies in the photographer's studio (a), on the ground either of copyright or of breach of contract.

This subject was exhaustively dealt with by Mr. Justice North in the case of *Pollard v. Photographic Co.* (b). "The question," he said, "is whether a photographer who has been employed by a customer to take his or her portrait is justified in striking off copies of such photograph for his own use, and selling and disposing of them or publicly exhibiting them by way of advertisement or otherwise, without the authority of such customer, either express or implied. I say 'express or implied,' because a photographer is frequently allowed, on his own request, to take a photograph of a person under circumstances in which a subsequent sale by him must have been in

11. whom the copyright in a photograph vests.

(a) *McCosh v. Crow* (1903), 5 Sc. Sess. Cas. (4th Ser.) 670; *Bolton v. London Exhibition* (1898), 13 T. L. R. 550; *Steddall v. Houghton* (1901), 18 T. L. R. 126.

(b) (1888), 40 Ch. D. 345; 58 L. J. Ch. 251; 60 L. T. 418; 37 W. R. 266; 5 T. L. R. 157; *Bolton v. Aldin* (1895), 65 L. J. Q. B. 120; *Ellis v. Ogden* (1894), 11 T. L. R. 50; *Ellis v. Marshall* (1895), 64 L. J. Q. B. 757; *Boucas v. Cooke* (1903), 2 K. B. 227.

the contemplation of both parties, though not actually mentioned. To the question thus put, my answer is in the negative, that a photographer is not justified in so doing. Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained; and an injunction is granted, if necessary, to restrain such one; as, for instance, to restrain a clerk from disclosing his master's accounts, or an attorney from making known his client's affairs, learned in the course of such employment. Again, the law is clear that a breach of contract, whether express or implied, can be restrained by injunction, and, in my opinion, the case of the photographer comes within the principles upon which both these classes of cases depend. The object for which he is employed and paid is to supply his customer with the required number of printed photographs of a given subject. For this purpose the negative is taken by the photographer on glass; and from this negative copies can be printed in much larger numbers than are generally required by the customer. The customer who sits for a negative thus puts the power of reproducing the object in the hands of the photographer; and, in my opinion, the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer; and further, I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only.

“The principles upon which I rest my judgment are well known, and of familiar application.”

Then after examining the cases of *Murray v. Heath* (a), *Tuck v. Priester* (b), and remarking that the phrase “gross breach of faith” used by Lord Justice Lindley in the latter case applied with equal force to the present, when a lady's feelings were shocked by finding that the photographer she had employed to take her likeness for her own use was publicly exhibiting and selling copies thereof, the learned Judge continued:

“It may be said, that the cases to which I have referred are all cases in which there was some right of property infringed, based upon the recognition by the law of protection being due for the products of a man's own skill or mental labour; whereas, in the present case the person photographed has done nothing to merit such protection, which is meant to prevent legal

(a) (1831), 1 B. & Ad. 804.

(b) (1887), 19 Q. B. D. 629.

wrongs, and not mere sentimental grievances. But a person whose photograph is taken by a photographer is not thus deserted by the law; for the Act of 25 & 26 Vict. c. 68, s. 1, provides that when the negative of any photograph is made or executed for or on behalf of another person for a good or valuable consideration, the person making or executing the same shall not retain the copyright thereof, unless it is expressly reserved to him by agreement in writing, signed by the person for or on whose behalf the same is so made or executed; but the copyright shall belong to the person for or on whose behalf the same shall have been made or executed."

In the case of *Melville v. Mirror of Life* (a), Kekewich, J., was of opinion that the sitter could not obtain copyright in the photograph unless he were the purchaser of the negative. "A man cannot," he said, "be said to make a photograph for or on behalf of another when that other is not entitled to have the negative of the photograph when made. My conclusion, therefore, is that, though the photograph was of [the sitter], yet, as the negative was not made or executed for or on behalf of him, the proviso has no application to the present case."

Sitter may have copyright though not owner of negative.

With this expression of opinion, however, the Court of Appeal in the recent case of *Boucas v. Cooke* (b) were not prepared to agree.

Boucas v. Cooke.

The plaintiff carried on business as a photographer, and the defendant was a youth known as the "boy preacher." The defendant came to the plaintiff's studio saying that he wanted his photograph taken, which must be of a particular kind, as it was required for a block in order to make a reproduction of the photograph for distribution at meetings where the defendant was preaching. Nothing was said as to payment. The plaintiff then took two negatives for the photograph, and on the following day sent a silver print of one of the negatives, by the directions of the defendant, to a printer who was to make a block for the purpose of reproducing it. The photograph was approved by the defendant, who gave an order for twenty-four copies, eighteen of which were subsequently delivered, and though no payment had been made for these copies, the plaintiff admitted in cross-examination that he expected to be paid for them. Before the delivery of these copies the defendant asked the plaintiff to quote a price for a large number of the photographs, but terms were never agreed, and the plaintiff never got the order. The photograph was

(a) (1895), 2 Ch. 531.

(b) (1903), 2 K. B. 227; 72 L. J. K. B. 741; 88 L. T. 760; 52 W. R. 99.

CAP. III.

eventually re-produced, and copies sold by the defendant at his mission-hall, whereupon the plaintiff issued his writ claiming damages for alleged infringement of his copyright, an injunction and penalties. At the trial before Ridley, J., the jury found that the negative was the property of the plaintiff, and judgment was entered for the plaintiff. Upon appeal, the Court of Appeal directed that this judgment should be discharged and judgment entered for the defendant, being of opinion that the circumstances were such as to raise an implied promise on the defendant's part to pay for the photographs, that they were therefore "made or executed for or on behalf of any other person for a good or a valuable consideration" within the meaning of section 1 of the Fine Arts Copyright Act, 1862, and that the copyright was in the defendant, notwithstanding that the property in the negative might remain in the plaintiff. "It is contended on behalf of the plaintiff," said the Master of the Rolls, "that the only matter dealt with by section 1 is the sale or disposition of the negative, and that the other clause is pleonastic—that is, that it is only another way of speaking of the sale or disposition of the negative. That is the view taken by the learned judge below, who in effect directed the jury that the one test of the right to the copyright was whether the customer had bought the negative; and that if the negative had been sold or disposed of, the author had no copyright, but the person to whom it was sold would have it. It is said that the evidence shows that in this case the negative was not bought, and that, therefore, the copyright remained in the author, and the plaintiff can sue any person who multiplies copies of the photograph. But that view is, in my judgment, contrary to the express words of the section, and altogether ignores the second alternative, which *prima facie* takes the copyright out of the maker of the photograph, and it substitutes for the alternative given by the section a mere purchase of the negative; in other words, it ignores the distinction between the purchaser of the negative and the person for or on whose behalf for a good or valuable consideration the photograph is made. That the statute regarded the latter as different from a mere vendee or assignee is clear from the following words, which deal with the vendee or assignee as different from the other person, and impose conditions on them which they do not impose on him; a clear distinction is thus drawn between the purchaser of the negative and the person for or on whose behalf the photograph is taken for a good or valuable consideration."

If, therefore, a photographer solicit a celebrity to have his photograph taken without making any charge for the actual taking of the photograph, the right of multiplication of copies of the photograph *primâ facie* belongs to the photographer even though the sitter subsequently purchases some copies (a). But, if a person comes to a studio and asks the photographer to take his photograph, this generally implies a contract to pay for the sitting, and *primâ facie* the copyright will vest in the sitter (b).

All formalities, such as are required under the Engraving or the Sculpture Copyright Acts, are unnecessary in the assignment and transfer under this Act. Copyright is declared to be personal property, and capable of being assigned by any note or memorandum in writing, signed by the proprietor of the copyright, or by his agent appointed for that purpose in writing. Assignment and registration.

Where S., the proprietor of a periodical called 'Good Words,' agreed verbally with G. to purchase the right to engrave certain photographs to illustrate 'Good Words,' G. reserving the right to use them in any other publication, and subsequently signed a receipt for "the use of photographs in 'Good Words' reserving all rights to issue the same in any other publication," and afterwards S. commenced publishing in a separate volume these articles, illustrated by engravings from the same photographs, and G. brought an action under the 25 & 26 Vict. c. 68, for damages and for a writ of injunction; and S. filed a bill for a declaration that under the verbal agreement he was entitled to republish the engravings taken from G.'s photographs, for specific performance of an alleged verbal agreement to grant a licence to use the photographs for the purpose of engraving and publishing in 'Good Words,' or in any republication of the articles which they illustrated, and that the action at law might be restrained; Vice-Chancellor Malins held, that the verbal agreement extended to the use of the photographs in 'Good Words' only, that there was no part performance by G. of a contract or licence by G. to publish in a separate form, and that S. had no equity, inasmuch as by the 25 & 26 Vict. c. 68, s. 3, every leave or licence for the publication of photographs must be in writing, and dismissed the bill with costs (c).

And an assignment in terms of the copyright in a picture Assignment of the copyright when

(a) *Ellis v. Ogden* (1894), 11 Times L. R. 50; *Ellis v. Marshall* (1895), 64 L. J. Q. B. 757; 11 T. L. R. 91; *Melville v. Mirror of Life* (1895), 2 Ch. 531.

(b) *Boucas v. Cooke* (1903), 2 K. B. 227; *Pollard v. Photographic Co.* (1888), 40 Ch. D. 345.

(c) *Strahan v. Graham* (1867), 16 L. T. 87; (1868), 17 L. T. 457; 15 W. R. 487.

CAP. III.
 limited in
 effect.

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

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

In 1879 the defendant published a chromo-lithograph which the plaintiff alleged to be an infringement of his copyright. This picture was called 'Holiday Time,' and it also represented a girl on the sea-shore, with bare feet, with a spade in one hand over her shoulder, and a bucket in the other hand. But her dress was different from that of the girl in the picture, and she was standing still instead of walking. The evidence showed that the chromo-lithograph was derived from a photograph published in New York, and that neither the defendant nor the artist whom he employed to produce the chromo-lithograph had, before its production, seen either the picture or the engraving. There was no evidence to show how the photograph was produced, or whether the photographer had, before he produced it, seen either the picture or the engraving. The photograph was evidently taken from life.

Mr. Justice Fry held that the letter of the 9th November, 1870, amounted only to an assignment of the copyright of the picture or a licence to copy it, for the limited purpose of producing an engraving of one size, and that the right of producing copies in other ways and of other sizes remained in Halford, and could be assigned by him to any one else. And by section 11 of the 5 & 6 Vict. c. 45, the registration gave only a

(*a*) *Lucas v. Cooke* (1880), 13 Ch. Div. 872; *Tuck v. Canton* (1882), 51 L. J. Q. B. 363.

prima facie title which could be rebutted, and here the assignment itself rebutted the *prima facie* title. The result was that the plaintiff was only the proprietor of the engraving. It was very possible that the photograph might have been in substance copied from either the picture or the engraving, but there was no evidence on which the court was entitled to assume that it was copied from either. But, even if it was copied from one or the other, it might have been copied from the picture, in which the plaintiff had no right, just as well as from the engraving, and the court could not assume without evidence that it was copied from the latter. Before the plaintiff could succeed, he must show that the photograph had been taken from the engraving, and this he had not done.

It has been decided (a) that a licence not amounting to an assignment of the whole copyright need not be registered. The document which was said to amount to a licence ran thus: "The sole right to reproduce the picture in chromos or in any other form of colour painting to be vested in you for the term of two years," and on certain other conditions absolutely. It is questionable, however, whether this was not an assignment of part of the copyright; and an assignee must be registered before he can sue for infringement (b). If a recent decision be correct, a licensee runs a risk of losing the benefit of his licence by reason of the licensor subsequently assigning the entire copyright to a third person without notice of the licence. In the case referred to, the painter of a picture, after giving a licence to A. to publish it in monochrome, assigned the entire copyright to B. without notice of the licence, and then A., without notice of the assignment, published in monochrome, and it was held by Mr. Justice Vaughan Williams that B. could sue A. for infringement (c). With deference, however, the decision seems questionable.

If the proprietor of the copyright in a picture supplies to a customer blocks for printing copies of the picture, this does not amount to any assignment of the copyright, but, apparently, confers a personal licence upon the customer to print from the blocks and to use the copies for the purposes for which the blocks were ordered. Thus, where the plaintiffs' Sale of blocks.

(a) *Tuck v. Canton* (1882), 51 L. J. Q. B. 363. See *London Printing and Publishing Alliance, Limited v. Cox*, [1891] 3 Ch. 291; 60 L. J. Ch. 707; 65 L. T. 60; 7 T. L. R. 738.

(b) *Liverpool General Brokers' Association v. Commercial Press* (1897), 2 Q. B. 1, not following diction of Cockburn, C.J., to the contrary in *Wood v. Boosey* (1867), L. R. 2 Q. B. 340.

(c) *London Printing Alliance v. Cox* (1891), 3 Ch. 291.

CAP. III.

business was to supply drawings to persons in the carriage trade for advertising purposes, and for such purposes they sold electro blocks to L. without any written agreement or licence, it was held that L. could not authorise a third party to print from the blocks and publish the drawings (a).

Register.

By the 4th section it is declared that a book of registry shall be kept at Stationers' Hall, entitled 'The Register of Proprietors of Copyright in Paintings, Drawings, and Photographs,' in which shall be entered a memorandum of every copyright to which any person shall be entitled under this Act (b), and also of every subsequent assignment; and that such memorandum shall contain (1) a statement of the date of the agreement or assignment, and (2) of the name and place of abode of the person in whom such copyright shall be vested, and (3) of the author of the work, together with (4) a short description of the subject of the work; and, if the person registering shall so desire, (5) a sketch, outline, or photograph of the work.

It has been doubted whether in this memorandum of registration "abode" is sufficiently described by giving the place of business (c).

Who to be registered.

Registration may be in the name of a trustee for the proprietor (d), but a mere agent or nominee is not such a trustee. Accordingly where the copyright in a picture which belonged to a limited company was registered in the sole name of their managing director, and it was not shown that he was a trustee of the copyright for them, it was held that he was wrongly on the register, and that joinder of the company with him as co-plaintiffs did not render an action for infringement maintainable (e).

Description of work.

It is not a valid objection that the registration does not give such a description of the work as may enable a person from it alone to ascertain whether he is about to sell the copy of a registered work, for that knowledge may be gained from other sources, and the object of the legislature, as pointed out by the statute, is that there shall be such a description of the picture as to enable a person who has it before him to

(a) *Cooper v. Stephens* (1895), 1 Ch. 567; 72 L. T. 390; followed, *Marshall v. Bull* (1901), 85 L. T. 77; as to engraving blocks, see sect. 1 of Engraving Copyright Act, 1734.

(b) See *London Printing and Publishing Alliance, Limited v. Cox* [1891], 3 Ch. 291; 60 L. J. Ch. 707; 65 L. T. 60; 7 T. L. R. 738.

(c) Per Field, J., in *Nottage v. Jackson* (1883), 11 Q. B. D. 627; 52 L. J. Q. B. 769; 32 W. R. 106; 49 L. T. 339. The judgment of Field, J., is given in the Law Journal and Law Times Reports.

(d) *London Printing Alliance v. Cox, supra.*

(e) *Petty v. Taylor* (1897), 1 Ch. 465.

judge whether or not the registration applies to the one he is about to copy. This was decided in 1868. Mr. Henry Graves, being the proprietor of the copyright in two paintings in oil and in a photograph, entered them under this section, thus: "Painting in oil, 'Ordered on Foreign Service'; painting in oil, 'My First Sermon'; photograph, 'My Second Sermon.'" The first picture represented an officer taking leave of a lady; the second, a young child sitting in a pew, apparently listening with her eyes wide open; the photograph represented the same child asleep in a pew; and it was considered that the nature and subject of the works were sufficiently described under this section. "If we consider it as a question of fact," observed Mr. Justice Blackburn, "there can be no reasonable doubt that the description of each of the pictures is sufficient. The picture, 'Ordered on Foreign Service,' represents an officer who is ordered abroad, taking leave of a lady, and no one can doubt that is the picture intended. So again 'My First Sermon' describes with sufficient exactness a child, impressed with the novelty of her situation, sitting in a pew, and listening with her eyes open; while the same child, fast asleep in a pew, forms the subject of 'My Second Sermon.' Who can doubt that in each of these cases the description is sufficient? There may be a few instances in which the mere registration of the name of the picture is not sufficient; for instance, Sir E. Landseer's picture of a Newfoundland dog might possibly be insufficiently registered under the description of 'A distinguished Member of the Humane Society.' Similarly, the well-known picture called 'A Piper and a Pair of Nutcrackers,' representing a bullfinch and a pair of squirrels, might not be accurately pointed out by its name. In either of those cases the names would scarcely be sufficient, and it would be advisable for a person proposing to register them to add a sketch or outline of the work. But when the subject is indicated, as it is here, it seems to be merely a question of fact whether the description affords enough information, and I cannot doubt that it does" (a).

A memorandum of every copyright and of subsequent assignments is to be entered in the register, but it is not necessary that any agreement in writing should be made or entered on the register where registration is in the name of the person for or on behalf of whom a drawing is made or executed for a good or valuable consideration (b).

What to be entered on register.

(a) *Ex parte Beul* (1868), Law Rep. 3 Q. B. 387; 37 L. J. (Q.B.) 161; S. C. 18 L. T. 285.

(b) *Petty v. Taylor* (1897), 1 Ch. 465.

CAP. III.

It must be remembered that if pictures are used to illustrate books, registration of the books under the Literary Copyright Act, 1842, will be sufficient to protect the illustrations (a), unless the copyright in the letter-press and in the illustrations is in different persons, when registration must be effected under both that Act and the Copyright (Fine Arts) Act (b).

Benefit of Act cannot be claimed until after registration.

It is further enacted by the 4th section that no proprietor of any copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration.

In a recent case, Lopes, L.J., expressed an opinion that by this section the proprietor of the copyright was with regard to the right to recover damages and penalties placed until registration in the same position as if he had no copyright; and that the making of the copies before registration and the sale of these copies after registration were so connected together that the proprietor of the copyright could not recover either damages or penalties in respect of the sale. Lord Esher, M.R., and Lindley, L.J., however, were of opinion that though by reason of the section the proprietor of the copyright could not recover damages for the making of the unauthorized copies before the registration, they were entitled to damages for the sale of these copies after the registration, but that the proprietor of the copyright could not recover *penalties* in respect of the sale of such copies after registration (c).

In the case referred to the plaintiffs were art publishers, and were assignees of the copyright in a water-colour drawing entitled 'Sounding the Charge.' In January 1884, the plaintiffs employed the defendant, who was a printer carrying on business in Berlin, to produce 2000 copies of the drawing. The defendant executed the order, but also produced a number of copies on his own account without the knowledge of the plaintiffs, and some of the copies so produced were imported into England afterwards. On January 21, 1886, the plaintiffs registered their copyright in the drawing. After such registration the defendant sold copies in England, and the plaintiffs then commenced an action claiming penalties under sect. 6 and damages under sect. 11 of the Copyright Act, 1862. It

(a) *Maple v. Junior Army and Navy Stores* (1882), 21 Ch. D. 369; *Comyns v. Hyde* (1895), W. N. 9; 43 W. R. 266; *Marshall v. Bull* (1901), 85 L. T. 77.

(b) *Petty v. Taylor*, *ubi sup.*

(c) *Tuck & Sons v. Priester* (1887), 19 Q. B. D. 48, 629; 57 L. T. 110; 19 Q. B. D. 629; 56 L. J. Q. B. 553; 36 W. R. 93 (C.A.); *S. C. Tuck & Sons v. The Continental Printing Co.* (1887), 3 T. L. R. 150, 661, 826; *Troitzsch v. Rees*, W. N. (1887), 150; 3 T. L. R. 773.

was held that the statute gave no remedy for infringement of common law right, and by sect. 4 the plaintiffs were not entitled to recover in respect of anything done before registration, and that the sale after registration of copies made and imported before registration was not unlawful so as to give a right of action. In the court of first instance, Mr. Justice Day held that the case did not come within the words "knowing that any such repetition, copy, or other imitation has been unlawfully made" in sect. 6, and from this there was an appeal to the Divisional Court.

On this appeal the view of Mr. Justice Day was confirmed by Mr. Justice Grove and Mr. Justice Denman, but upon appeal to the Court of Appeal that court reversed the decision of the Divisional Court, the Master of the Rolls in delivering judgment, saying: "The question was whether a person might sell after registration copies made before registration. The proprietor of the copyright could not sue in respect of the making of copies before registration. But he could sue for the sale of the copies so made, as copyright existed at the time when the copies were made (*sic*). The word 'unlawful' meant without the consent of the proprietor. Therefore every proprietor of a work which was pirated before registration could bring an action for a sale or other wrong committed after registration. Accordingly both under the general law and under the statute the plaintiffs were entitled to an injunction and the damages. As to whether the plaintiffs were entitled to penalties different considerations arose."

In this case the Court of Appeal also held that there was an implied contract that the defendant should not make any copies of the drawing other than those ordered by the plaintiffs, and that, independently of the statute, the plaintiffs were entitled to an injunction and damages by reason of the defendant's breach of contract.

Proprietor can sue for breach of faith without registration.

Similarly, a person who has his photograph taken, and pays for the sitting, can sue the photographer for improperly multiplying copies of the photograph as an infringement of his copyright if he has registered, but, even without registration, he can sue for breach of the implied contract that the photographer will not sell or exhibit copies without the sitter's consent (*a*).

The 4th section, though it prevents an assignee from suing for penalties, before the assignment to him has been regis-

All assignments need not be registered.

(*a*) *Pollard v. Photographic Co.* (1888), 40 Ch. D. 345 ; 58 L. J. Ch. 251.

CAP. III. tered (*a*), does not render it necessary that all or any previous assignment should also be registered, or that the copyright of the original author should be registered (*b*). Registration of the proprietorship of the copyright is only *prima facie* evidence of title, and may be rebutted by the terms of the assignment of the copyright to the person who has made the registration (*c*).

The enactments of the 5 & 6 Vict. c. 45, in relation to the registry thereby prescribed, are applicable to the registry under the 25 & 26 Vict. c. 68, except that the forms of entry prescribed by the earlier Act may be varied under the latter to meet the circumstances of any case (*d*). Consequently, the making of false and fraudulent entries of proprietorship of copyright for any purpose, either to acquire property in such copyright or to improperly restrain the publication or copying of works in which no copyright lawfully exists, is a misdemeanor. And the person aggrieved may apply to the court or a judge to obtain an order for the cancellation or substitution of names so inserted (*e*).

Rectification
of register.

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

"A person," said Hannen, J. (*f*), "to be 'aggrieved' within the meaning of the statute must show that the entry is inconsistent with some right that he sets up in himself or in some other person, or that the entry would really interfere with

(*a*) *Dupuy v. Dilkes*, W. N. (1879), 145; 18 L. J. Ch. 682. 'The Young Cricketer'; *Liverpool General Brokers v. Commercial Press* (1897), 2 Q. B. 1.

(*b*) *Re Walker & Graves* (1869), 20 L. T. Q. B. 877; L. R. 4 Q. B. 715; *Troitzsch v. Rees*, W. N. (1887), 150; 3 T. L. R. 773.

(*c*) *Lucas v. Cooke* (1880), 13 Ch. Div. 872. 'Going to Work.'

(*d*) The Royal Commissioners in their report on Copyright, in 1878, recommended that registration of paintings and drawings should not be insisted on as long as the property in the picture and the copyright were vested in the same person, but that if the copyright were separated by agreement from the property in the picture, there should be compulsory registration, and that the register should show—

(*a*) The date of the agreement.

(*b*) The names of the parties thereto.

(*c*) The names and places of abode of the artist, and of the person in whom the copyright is vested.

(*d*) A short description of the nature and subject of the work, and, if the person registering so desires, a sketch, outline, or photograph of the work in addition thereto.

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

(*e*) *Chappell v. Purday* (1845), 12 M. & W. 303.

(*f*) *Graves's Case* (1869), L. R. 4 Q. B. 721; 20 L. T. 877.

some intended action on the part of the person making the application." CAP. III.

"It seems," said Blackburn, J., in the same case, "that to make a person aggrieved within the meaning of the statute, the applicant must have some substantial objection, and one going to the merits of the registered proprietor's title; then the court may direct an issue, or have the question otherwise disposed of, or, if they think this the proper course, may set aside or expunge the entry. But I do not think it is enough to entitle a person to say that he is aggrieved, and that the entry ought to be expunged, that, although the registered proprietor has a complete title in equity and in good sense, yet there is some slip either in the signing of the memorandum or in the spelling of a name; this would be my view if it were necessary to decide this question."

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

There is no appeal to a Divisional Court from an order expunging an entry made by a Vacation Judge sitting as a Divisional Court (*a*), and probably no appeal at all.

Invasion of the property is guarded against by the 6th section, which provides that if the author, after having sold or disposed of the copyright, or if any other person not being the proprietor for the time being of the copyright, shall (1) repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or (2) cause or procure to be repeated, copied, imitated, or otherwise multiplied for sale, hire, Infringement of the right.

(a) *In the matter of 'The Young Duchess'* (1892), 8 T. L. R. 41.

CAP. III.

exhibition, or distribution, any such work or the design thereof, or (3) knowing that any such repetition (*a*), copy or other imitation has been unlawfully made, shall import into the United Kingdom, or (4) sell, publish, let to hire, exhibit or distribute, or offer for sale, hire, exhibition, or distribution, or (5) cause or procure to be imported, sold, published, let to hire, distributed or offered for sale, hire, exhibition, or distribution any repetition, copy, or imitation of the said work, or of the design thereof, such person, for every such offence, shall forfeit to the proprietor of the copyright for the time being a sum not exceeding £10: and all such repetitions, copies, and imitations, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright.

Under this clause, where the subject of a picture is copied, it is of no consequence whether that is done directly from the picture itself or through intervening copies; if, in result, that which is produced be an imitation of the picture, then it is immaterial whether that be arrived at directly or by intermediate steps. A copy, therefore, from an intervening copy is a copy from the original work, and within the prohibitory clauses of the statute (*b*). Nor does the copying refer merely to the imitation of a painting by a painting, or drawing by a drawing, or a photograph by a photograph, so that a photograph of a drawing, or a drawing of a painting, protected by the Act, would be a piracy. For, on inspecting the 1st section, which is the key to the whole Act, it gives to the author of every original painting, drawing, or photograph the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing and the design thereof, or such photograph and the negative thereof, by any means and of any size; and the terms used are so extensive that it is plain that a photograph of a painting, of a drawing, or of another photograph made without the consent of the owner, though of a different size, provided it be a reproduction of the design, is an infringement such as would subject the maker to the penalty.

Copy of part.

Thus where a man had a drawing of his wife made, having attached to her arm and dress a dress-holder, a patented invention of his own, and substituted for his wife's head that of the Princess of Wales, taken from a photograph, the copyright in which belonged to the plaintiff, and from the

(*a*) *Actus non facit reum, nisi mens sit rea* (*Reg. v. Sleaf*, 8 Cox, C. C. 472; *Reg. v. Cohen*, *ibid.* 41; *Hearne v. Garton* (1859), 28 L. J. (M.C.) 216); as to the licence required to copy photographs, see *Strahan v. Graham* (1867), 16 L. T. 87; 17 L. T. 457.

(*b*) *Ex parte Beal* (1868), L. R. 3 Q. B. 387.

combination so obtained made and printed cabinet-size photographs for the purpose of advertising his invention, that was held to be an infringement (a).

In another case, the plaintiff was the owner of the copyright in a picture and engraving known as 'Can't you talk?' which represented a collie dog seated on his haunches on a stone floor looking down at the upturned face of a child; there was a wall in the background with a door on one side through which a cat was looking; above the dog was a table on which was a tub with a spoon in it. The defendants were the owners of a periodical in which was a wood-cut that almost exactly reproduced the whole of the plaintiff's engraving, with the exception of the child, whose position was replaced by a tortoise and two cats. The wood-cut was given as an illustration of a story entitled 'A Strange Visitor.' It was held that, as the defendants had taken a substantial portion of the plaintiff's engraving and reproduced it in the wood-cut with slightly different surroundings, this constituted an infringement of the plaintiff's copyright, and that the latter was accordingly entitled to an injunction (b).

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

The Lord Justice of Appeal said: "The stereoscopic slides are not photographs taken directly from the picture, in the ordinary mode of copying; but they are photographic pictures of a model itself copied from, and accurately imitating in its design and outline, the petitioner's painting. It is through this medium that the photograph has been made a perfect

(a) *The London Stereoscopic and Photographic Co., Limited v. Kelly and others* (1888), 5 T. L. R. 169.

(b) *Brooks v. Religious Tract Society*, W. N. (1895) 25; 45 W. R. 476; *Hanfstaengl v. Empire Palace* (1895), 11 T. L. R. 314, 368.

(c) (1860). 10 Ir. Ch. 121, 510.

CAP. III.

representation of the painting. Thus the object contrived and achieved, and the consequent injury, are the very same as if the copy had, in breach of confidence, been made on the view, and by the eye; and no court of justice can admit that an act illegal in itself can be justified by a novel or circuitous mode of effecting it. If it is illegal, so must the contrivance be by means of which it was effected."

Photograph
is an original
production.

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

Absence of
artistic merit.

The question of artistic merit is sometimes taken into consideration where at least there is not an exact reproduction. Thus where a plaintiff conceived the idea of printing and publishing cards bearing a representation of a hand holding a pencil in the act of completing a cross within a square, with a view to such cards being used at elections by illiterate voters, and procured an artist to make, under his directions, a drawing of the representation above described, and subsequently to the registration (which on other grounds was held to be bad) the defendants published similar cards with a hand, holding a pencil, in the act of completing a cross in a particular square of a voting paper, but the hand in the defendant's cards was in a slightly different position, though the idea was clearly taken from plaintiff's cards; and it appeared that neither the plaintiff's nor the defendants' drawings were of any artistic merit, it was held that an action for infringement of copyright could not be maintained, on the ground that the plaintiff's drawing was so far not the subject of copyright that it was not entitled to protection against an imitation which was not an exact reproduction (*b*). It is clear that, in the opinion of Lord Justice Bowen, in *Nottage v. Jackson* (*c*), the statute relates

(*a*) *Graves's case* (1869), L. R. 4 Q. B. 723.

(*b*) *Kenrick & Co. v. Lawrence & Co.* (1890), 25 Q. B. D. 99; 38 W. R. 779.

(*c*) (1883), 11 Q. B. D. 627.

only to works of art of some sort or other. He considered, to put his opinion in the language of Mr. Justice Wills in the subsequent case of *Kenrick and Co. v. Lawrence and Co.* (a), that it was the product of the artistic faculty that was intended to be primarily, at all events, the subject of copyright—the thing to be protected by the Act.

This point, which is of considerable importance, was fully treated by Mr. Justice Wills. He says (b): “The mere choice of subject can rarely, if ever, confer upon the author of the drawing an exclusive right to represent the subject; and certainly, where the subject chosen is merely the representation to the eye of a simple operation which must be performed by every person who records a vote, there cannot possibly be an exclusive right to represent in a picture that operation. It may well be that something special in the way of artistic treatment even of this simple operation, if it existed, might be the subject of copyright; but nothing of the kind has been suggested or exists in the present case, and if it does exist without being discovered it has not been imitated, for there is nothing which by any flight of imagination can be called artistic about either the plaintiffs’ or the defendants’ representation of a hand making the mark of a cross. It may be also that even the coarsest, or the most commonplace, or the most mechanical representation of the commonest object is so far protected in registration that an exact reproduction of it, such as photography, for instance, would produce, would be an infringement of copyright. But in such a case it must surely be nothing short of an exact literal reproduction of the drawing registered that can constitute the infringement, for there seems to be in such a case nothing else that is not the common property of all the world. It is possible that in this case the proprietors of the drawing may have a right to be protected from a reproduction of their picture of a hand drawing a cross, in which every line, dot, measurement, and blank space shall be rendered exactly as in the original, or in which the variations from such minute agreement shall be microscopic. But I cannot possibly see how they can make a higher claim, or say that because they have registered a drawing of a hand pencilling a cross within a square, that no other person in the United Kingdom is at liberty to draw a hand pencilling a cross within a square for perhaps the next half century. The plaintiff, Mr. Jefferson, put his case as high as that proposition, for he said he might wish to claim applications of the picture to subjects

(a) 25 Q. B. D. 99, 104.

(b) 25 Q. B. D. 99, 102.

.CAP. III.

other than voting cards. It is obvious that, unless there be a copyright in the *subject*, any other person who wishes to draw a hand pencilling a cross within a square, cannot help producing something so like the plaintiffs' design as to look very like a colourable imitation of it. Now, it may or may not be very shabby conduct on the part of the defendant to wish to represent a hand pencilling a cross within a square, notwithstanding that the plaintiffs were first in the field, and notwithstanding that but for the picture used by the plaintiffs they might never have thought of making theirs; but I cannot see why they should be precluded, for the next fifty years perhaps, from representing in a picture the act which every voter performs when he records his vote, simply because one of the plaintiffs first thought of doing so, any more than if a new article of commerce were introduced of extensive distribution, and very simple and definite shape and proportions, and a drawing of it were made for one firm, all other persons should be precluded from making a drawing which, if it truthfully represented the same thing, must be exceedingly like the first drawing; nor, even though the draughtsman of the second drawing might never have seen the original article, or might have derived his knowledge of its existence and aspect solely from the first drawing. If a new and very simple tea-caddy were represented first by A. in a drawing which he registered, I cannot conceive that he could during his whole life prevent B. from drawing the same tea-caddy, and even from drawing it from his recollection of A.'s picture, nor that A. could claim copyright except in the extremely limited and useless sense in which I have suggested that a copyright might exist for a registered drawing of even such a subject. In the present instance, what the plaintiffs claim is really a right to prevent any one else from drawing the same subject as that of his drawing. If he has a copyright in the *subject* there is a colourable imitation, because the subject is not altered by changing the position of the hand and adding the indications of a shirt-sleeve. But it is clear that there is no copyright in the subject. As for the manner of treating the subject, there can be no copyright in that, for if the thing to be represented be represented at all it is impossible to treat it in any other way. It seems to me, therefore, that although every drawing of whatever kind may be entitled to registration, the degree and kind of protection given must vary greatly with the character of the drawing, and that with such a drawing as we are dealing with, the copyright must be confined to that which is special

to the individual drawing over and above the idea—in other words, the copyright is of the extremely limited character which I have endeavoured to describe. A square *can* only be drawn as a square, a cross *can* only be drawn as a cross, and for such purposes as the plaintiffs' drawing was intended to fulfil there are scarcely more ways than one of drawing a pencil or the hand that holds it. If the particular arrangement of square, cross, hand, or pencil be relied upon, it is nothing more than a claim of copyright for the *subject*, which, in my opinion, cannot possibly be supported.”

The question of what amounts to an infringement of the copyright in a picture was fully dealt with in what have been called the “Living Picture” cases (a). “Living Pictures.”

The defendants, the Empire Palace, in the year 1894, produced on their stage certain tableaux vivants, which were intended to be representations of pictures the copyright in which belonged to the plaintiff. The representations were exact reproductions, as tableaux vivants, of the pictures, and the backgrounds, taken from photographs of the original pictures, were painted on canvas, the whole being enclosed in a large gilt frame. The plaintiff gave notice of motion for an interlocutory injunction to restrain this exhibition, contending that the groups of living persons were a reproduction of the design of his pictures within the meaning of the Act of 1862. The motion coming on for hearing before Mr. Justice Stirling, that learned Judge was of opinion that the representation of the designs of the pictures by means of groups of living persons was no infringement of the plaintiff's rights, and upon the defendants undertaking to keep until the trial the backgrounds to the “Living Pictures,” or to take and keep photographs of the backgrounds used in respect thereof, and to keep an account of the moneys received at all exhibitions at which any such backgrounds were exhibited, and the number of times each such background was exhibited, no order was made on the motion. The plaintiff thereupon appealed to the Court of Appeal, who confirmed the opinion of Mr. Justice Stirling, and dismissed the appeal (b).

In giving judgment, Lord Justice Lindley, after referring to the terms of section 1 of the Act, said: “We are asked to say that the words ‘copying and reproducing by any means’ include reproducing in the sense of imitating or representing

(a) *Hanfstaengl v. Empire Palace* (1894), 2 Ch. 1; *Hanfstaengl v. Newnes* (1894), 3 Ch. 109; *Hanfstaengl v. Baines & Co.* (1895), A. C. 20.

(b) *Hanfstaengl v. Empire Palace* (1894), 2 Ch. 1.