

THE
LAW OF COPYRIGHT,

IN WORKS OF LITERATURE, ART, ARCHITECTURE,
PHOTOGRAPHY, MUSIC AND THE DRAMA:
INCLUDING CHAPTERS ON MECHANICAL CONTRIVANCES AND
CINEMATOGRAPHS:

c
#

TOGETHER WITH
INTERNATIONAL AND FOREIGN COPYRIGHT,
WITH THE STATUTES RELATING THERETO.

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

FIFTH EDITION.

BY

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PREFACE.



OWING to the lamented death of the Author in the year 1910, the publishers again entrusted the work of preparing a new edition of "Copinger on Copyright" to the Editor. His task has proved of a severe—perhaps of an unique—character. Nearly a century and a half ago the House of Lords declared copyright in a published work to be entirely a statutory right. Since the publication of the last edition of this work all of the score or so of Statutes upon which the law of copyright depended have, with a few minor exceptions, been repealed and replaced by the Copyright Act, 1911. It is, indeed, no unusual experience for the editor of a legal treatise to find the statute law upon his particular subject repealed and re-enacted, with or without amendment, in a codifying Statute. The Copyright Act, 1911, is not, however, a codifying Statute, but is expressed to be one "to amend and consolidate the law relating to copyright." By section 31 of the Act it is declared that no person is to be "entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force,"

thus making copyright in unpublished, as well as published, works entirely a statutory right. Yet there is hardly a single section of the new Act which preserves the language of any section of the repealed Acts, and therefore the Editor has found himself in the position of having to edit a treatise upon a statutory right based upon different Statutes to those in force at the date of the publication of the last edition of the same treatise, and to determine how far the cases decided upon the repealed Statutes are applicable to the new Statutes or must be "scrapped." Under these circumstances there appeared to be but one course open to him—and that was to re-write practically the whole of the work, and in doing so he can only hope that he has not lowered the standard of the work.

With regard to the old cases, decided under the repealed Acts, the Editor believes that many of them—particularly those relating to infringement of copyright—will be found useful in elucidating the new Act, and he has only omitted—at least intentionally—to refer to such of the old cases as turned upon the peculiar wording of a repealed Statute or related to matters—such as registration of copyright—which find no place in the new Act. A certain number of cases have already been decided under the Act of 1911, and these will all be found to have been duly noted; but, in the absence of any considerable body of case law since that Act came into force, there are many points as to its construction upon which the Editor can only offer a tentative opinion, and he would be unduly optimistic if he thought that his opinion in every case will ultimately prove to be correct. He can only say that, to the best of his ability, he has endeavoured to suggest solutions of such difficulties as have occurred to him.

A revision of the copyright law was long overdue when the Act of 1911 was passed. The revision of the Berne Convention in the year 1908 rendered it imperative for this country to amend her domestic legislation if she was to be in a position to adhere to the Revised Convention, and this was the effective cause of the passing of the new Act. The same cause has affected many foreign countries and led them to modify their domestic legislation. The Editor's task of bringing the foreign law of copyright up to date would have been well-nigh impossible if he had not had the assistance of that invaluable organ of the Copyright Union—"Le Droit d'Auteur"—to which he acknowledges his deep indebtedness.

The previous editions of this work have included the law as to copyright in designs. The law as to designs has, for many years past, parted company with the law as to copyright in literary and artistic works, and—after consultation with the publishers—the Editor decided to omit the portion of the work relating to copyright in designs from the present edition.

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ADDENDA.

- Pp. 24, 125, 206, 209, 210, 287, 289,—*Savory v. World of Golf* is now reported (1914) 2 Ch. 566; 83 L. J. Ch. 824; 111 L. T. 269.
- P. 38,—At end of first paragraph, add “As to place of publication, see *McFarlane v. Hulton*, (1899) 1 Ch. 884. If part of a work only be published in Great Britain, copyright may be claimed for that part (*Low v. Ward*, 1868, L. R. 6 Eq. 415).”
- Pp. 41, 132,—The case of *Francis, Day & Co. v. Feldman & Co.*, has been reversed by the Court of Appeal upon the question of infringement of copyright, but affirmed upon the question of publication (1914, 2 Ch. 728).
- P. 126,—At the end of note (*b*), add “As to the meaning of ‘London right’ in the case of a partial assignment of dramatic rights, see *Taylor v. Neville* (1877, 47 L. J. Q. B. 254).”
- P. 131,—On line 12, add “It is submitted that the case of *Eaton v. Lake* (1888, 20 Q. B. D. 378) is not a decision to the contrary, for the statute which had to be construed in that case expressly provided that the consent should be given ‘in writing.’”
- Pp. 136, 250,—The case of *Fenning Film Service v. Wolverhampton Cinemas* is now reported (1914) 3 K. B. 1171; 83 L. J. K. B. 1860.
- P. 173,—At the end of note (*b*), add “The making of a single copy of a piano-forte arrangement may be an infringement of copyright (*Chappell & Co. v. Columbia Gramophone Co.*, (1914) 2 Ch. 745).”
- P. 200,—To note (*g*), add “See also *Fenning Film Service v. Wolverhampton Cinemas*, (1914) 3 K. B. 1171.”
- P. 207,—On line 9, add “In an action for infringement of copyright in a picture, it is not necessary to produce the original from which the alleged copy has been made: *Lucas v. Williams*, (1892) 2 Q. B. 113.”
- P. 210,—Note (*g*). *Smith v. Service, Reeve & Co.*, is now reported (1914) 2 Ch. 576; 83 L. J. Ch. 876.
- P. 248,—To note (*c*), add “The case of *London Theatre of Varieties v. Evans* was reversed on the facts, but not upon the question of law, by the Court of Appeal (31 T. L. R. 258).”
- Pp. 269, 271, 277,—*Chappell & Co. v. Columbia Gramophone Co.* has been affirmed by the Court of Appeal, (1914) 2 Ch. 745.
- Pp. 325, 450,—On the 23rd September, 1914, Italy gave her adherence to the Revised Berne Convention, 1908, subject to two reservations, viz., (1) as regards translations, she is to remain bound by Article V. of the 1886 Convention, as amended by the Additional Act of Paris; and (2) as regards public performances of translations of dramatic or dramatico-musical works, she is to remain bound by Article IX. of the 1886 Convention. A law of the 4th October, 1914, has given legislative sanction to this adhesion.

- P. 380,—To note (*t*), add “The foreshadowed amendment of the law has now been made, and by a law of the 16th October, 1914, the period during which works manufactured before the 1st November, 1912, *or afterwards*, may be sold, &c., has been extended to three years from such date.”
- Pp. 458, 611,—The Additional Protocol of 1914 was, on the 5th November, 1914, ratified by the Principality of Monaco.
- P. 484,—Great Britain has now declared a Protectorate over Egypt, but the question of the abolition of the Capitulations has been expressly held over for the moment. The law as to copyright in Egypt would, therefore, appear at present to be as stated in the text, though possibly the Crown is now in a position to make an Order in Council under sect. 28 of the Copyright Act, 1911, extending the provisions of that Act to Egypt.

NOTE AS TO THE EFFECT OF WAR UPON THE LAW AS TO COPYRIGHT.



At the time when these pages go to press Great Britain is at war with Germany, Austria-Hungary, and Turkey. With Turkey Great Britain has no treaty or convention relating to copyright, but prior to the outbreak of war German works were entitled to copyright protection in England by virtue of the Revised Berne Convention, 1908, and Austrian works were entitled to similar protection by virtue of a special copyright treaty of the 24th April, 1893 (*a*). There seems to be an impression in some quarters that after the outbreak of war German and Austrian works may be lawfully copied or translated in Great Britain. The Editor believes such impression to be entirely erroneous.

The precise effect of the outbreak of war upon treaties previously subsisting between belligerents seems to be in no case very clear (*b*), but the Berne Convention is not a treaty between belligerents alone. By Article I., the contracting States are constituted into a Union for the protection of the rights of authors over their literary and artistic works, and mutual protection is to be granted to works published in any country of the Union in all other countries of the Union. The Convention, therefore, affects the rights of neutrals as well as of belligerents, and it would seem impossible for any country remaining a party to the Union to take up the position that it will accord protection to works published in some, and not in others, of the countries of the Union. It is, moreover, upon the place of publication, and not the nationality of the author, that the question of protection or non-protection of a particular work depends. The subject of a neutral country first publishing his work in Germany can, under the Convention, claim protection for his work; and, likewise, a German subject first publishing his work in a neutral country can, under the Convention, claim like protection. Whether, therefore, the proposition be that the copyrights of German subjects, or that the copyrights in works first published in Germany, fell into the

(*a*) See p. 622, *post*.

(*b*) See Hall's *International Law*, pp. 378 *et seq.* (6th ed.).

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public domain in Great Britain upon the outbreak of war, either proposition might infringe the rights of neutrals.

The above arguments, it may be admitted, do not apply to the case of Austria-Hungary, but there is another point of view from which the question may be considered. Copyright is a right of property. Whilst it may be conceded that there is a technical right in the Crown to confiscate enemy property situate within its jurisdiction, it has never been suggested that any private citizen is at liberty to do so. By virtue of the Patents, Designs, and Trade Marks (Temporary Rules) Act, 1914 (c), power is given to the Comptroller of Patents to avoid or suspend any patent or registration of any trade mark belonging to a belligerent subject. Doubtless, good reasons may be advanced to justify the confiscation of patents and trade marks of enemy subjects, but it is very difficult to suggest any beneficial object, either of a political or military character, that would be secured by confiscating the copyright of an enemy subject in his literary or artistic works.

Again, under sect. 29 of the Copyright Act, 1911, the Crown is authorised by Order in Council to direct that that Act shall apply (a) to works first published in a foreign country to which the Order relates as if they were first published in British territory, (b) to works the authors whereof were at the time of the making of the work subjects or citizens of a foreign country to which the Order relates, in like manner as if the authors were British subjects. Orders in Council have been made under this section extending the benefit of the Act to works first published in both Germany and Austria, and to citizens of those countries in respect of their unpublished works. Under sect. 32 of the Act the Crown has power to alter, revoke, or vary these Orders in Council by other Orders in Council, but no such Order under this section has been made, or, it is believed, is even contemplated, and, unless and until such Orders have been made, both German and Austrian works have a statutory right to protection. Moreover, there is an important limitation to the power of the Crown contained in the section just referred to, because it is thereby expressly provided that "any Order made under this section shall not affect prejudicially any rights or interests acquired or accrued at the date when the Order comes into operation, and shall provide for the protection of such rights and interests." It would, therefore, appear that an amending Act of Parliament would be necessary before the works of German or Austrian subjects which are already in existence could be legally deprived of copyright protection.

It is, therefore, confidently submitted that the copyright in German and Austrian works is neither abrogated by, nor even suspended

during the continuance of, the war, but it does not follow from this that the remedy for an infringement of copyright is not suspended for the period of the war. As a general proposition, it would seem to be correct to say that an alien enemy is, during the continuance of war, incapable of seeking the protection of the Courts of this country as plaintiff (*d*). But the question as to whether a particular person is, or is not, an "alien enemy" depends not so much upon his nationality as upon the place of his residence or his business at the time of action. Thus, a British subject resident in the enemy country, is, for the time being, an alien enemy for the purposes of the rule (*e*); on the other hand, an enemy subject resident in England, and having fulfilled all the formalities required by law in the case of such residents, is not an alien enemy within the meaning of the rule (*f*). It would, therefore, appear that if the owner of the copyright were a German or Austrian subject lawfully residing in England, he could bring an action for infringement, but that if he were resident or carrying on business elsewhere, his right of action would be suspended until the conclusion of peace. Any contract made after the outbreak of war by a British subject with an alien enemy for the publication of his works would, of course, be illegal, and so would the payment of royalties upon agreements made prior to the outbreak of war, under the Trading with the Enemy Act, 1914 (*g*).

(*d*) As to whether he may be sued as defendant, see *Robinson v. Continental Insurance Co.*, (1915) 1 K. B. 155.

(*e*) *Janson v. Driefontein Consolidated Mines*, (1902) A. C. 484, at p. 505.

(*f*) *Princess Thurn and Tarix v. Moffitt*, (1915) 1 Ch. 58.

(*g*) 4 & 5 Geo. V. c. 87.

THE LAW OF COPYRIGHT.

PART I.

INTRODUCTORY AND HISTORICAL.

CHAPTER I.

NATURE OF COPYRIGHT.

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

In process of time, however, the expression has come to include another and analogous right, namely, the sole and exclusive right of performing a work in public.

The definition of copyright contained in the Copyright Act, 1911, combines these two ideas, and is as follows: "for the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work in any material form whatsoever, to perform, or, in the case of a lecture, to deliver, the work or any substantial part thereof in public: if the work is unpublished, to publish the work or any substantial part thereof, and shall include," &c. (b).

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

(b) Sect. 1 (2).

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

No copyright
in ideas.

Historically, "books" were the first works to which copyright applied, and extensions of the law of copyright have all consisted in bringing works other than "books" within the principle of the same law. The copyright laws, therefore, accord protection not to ideas, but to the particular expression of ideas (d): the protection of ideas falls not within the laws as to copyright, but within the patent laws. It is not infrequently urged as an objection to granting copyright protection for a long term that the effect is to create a monopoly, but, at least, it is not a monopoly of knowledge. The grant of a patent does prevent full use being made of knowledge, but the reader of a book is not by the copyright laws prevented from making full use of any information he may acquire from his reading. He is only prohibited from disseminating that information or knowledge by multiplying copies of the book or of material portions of it: or, possibly, by reading the book aloud in public. As Lord Justice Buckley remarked in a recent case (e): "there never has existed, and does not exist at common law, a right in a person who has composed a poem, a story, a speech, or a tune, and who has, let me say, by word of mouth, uttered or published it to the public, to restrain the hearer or persons who hear it derivatively from the hearer, from carrying it away in their memory and orally repeating or reproducing it."

Copyright is, in fact, only a negative right to prevent the appropriation of the labours of an author by another. If it could be shown that two precisely similar works were in fact produced wholly independently of one another, the author of the work that was published first would have no right to restrain the publication by the other author of that author's independent and original work (f). A patentee, on the other hand, has the right to prevent another from using his invention if it in fact infringes the former's patent, notwithstanding that the latter's invention was the subject of independent investigation on his part.

A literary composition, so long as it lies dormant in the author's

(c) Hoffman's Legal Outlines, sect. iii.

(d) *Hollinrake v. Truswell*, (1894) 3 Ch. 420; *Libraeo, Ltd. v. Shaw Walker* (1913), 30 T. L. R. 22.

(e) *Monckton v. Gramophone Co.* (1912), 106 L. T. 84. He cannot even obtain copyright in the "plot" of a play: *Rees v. Robbins*, Times, 4th July, 1914.

(f) *Per Sargant, J., Corelli v. Gray* (1913), 29 T. L. R. 570; *per Warrington, J., Rees v. Robbins*, Times, 6th Feb., 1914.

mind, is absolutely in his own possession. Ideas drawn from external objects may be communicated by external signs, but words demonstrate the genuine operations of the intellect. The former are so identical with himself, that when by the author resolved into the latter, they lose not their original characteristic; and whether or not they be regarded as of pecuniary value in the way of recital or sale, he ought to be the sole arbiter to authorise or to prohibit their publication, and have full control over them, before they are actually submitted to public inspection.

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

Copyright however in the material that has embodied the ideas.

Nothing can with greater propriety be called a man's property than the fruit of his brains. The property in any article or substance accruing to him by reason of his own mechanical labour is never denied him: the labour of his mind is no less arduous and consequently no less worthy of the protection of the law. It has, nevertheless, been a matter of frequent controversy whether copyright is a natural right or one entirely dependent upon statute. If it was a natural right, then the period of protection ought logically to have been unlimited.

Copyright rightfully called property.

This question came before the House of Lords in the famous case of *Donaldson v. Becket* (g). The judges were directed to

(g) (1774), 4 Burr. 2408.

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attend, and the following questions, amongst others, were put to them by the House of Lords:—

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

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

3rd. Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity by the common law?

Copyright
at common
law merged
in statutory
copyright.

The first question was decided in the affirmative by ten judges, against one in favour of the negative: the second was decided in the negative by eight to three: and the third in the affirmative by seven to four. It was, however, held by the majority of the judges that the common law right which an author had to copyright in his works became merged in the statutory right conferred by the Copyright Act then in force (8 Anne, c. 19), upon publication.

Although, from time to time, there have been cases in which the contrary has been strenuously argued (*h*), this case must be taken to have finally decided that publication put an end to the common law perpetual right, and that after publication an author had to base his claim for protection upon his statutory right, if any. But, prior to the Copyright Act, 1911, a common law copyright in unpublished works was constantly admitted (*i*). It is now, however, expressly enacted by the Act of 1911 that no person shall be entitled to copyright, or any similar right, in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of that Act, or of any other statutory enactment for the time being in force (*k*). Copyright, therefore, at the present day is, in England, purely a statutory right.

(*h*) *Jefferys v. Boosey* (1854), 4 H. L. C. 815; *Reade v. Conquest* (1861), 9 C. B. N. S. 768.

(*i*) *Prince Albert v. Strange* (1849), 1 Macn. & G. 25; *Caird v. Sime* (1887), 12 A. C. 326; *Exchange Telegraph v. Gregory*, (1896) 1 Q. B. 147; *Exchange Telegraph v. Central News*, (1897) 2 Ch. 48; *Philip v. Pennel*, (1907) 2 Ch. 577; *Mansell v. Valley Printing Co.*, (1908) 2 Ch. 441.

(*k*) Sect. 31.

CHAPTER II.

HISTORICAL VIEW OF THE COPYRIGHT LAWS IN ENGLAND.

It was only after the introduction of printing that any serious question as to the copyright in literary works could be expected to arise. An early statute of Richard III. (*a*) encouraged the printing of books, and permitted their importation, but this statute was repealed fifty years later on protectionist grounds, it being alleged in the preamble of the repealing statute (*b*) that such a "marvellous number of printed books" were imported into the realm to the prejudice of the "King's natural subjects," who "have given themselves so diligently to learn and exercise the said craft of printing, that at this day there be within this realm a great number cunning and expert in the said science or craft of printing, as able to exercise the said craft in all points as any stranger in any other realm or country." A similar plea is urged on behalf of the bookbinders, who, "having no other faculty wherewith to get their living; be destitute of work and like to be undone, except some reformation herein be had" (*c*).

As the number of printers increased in England, the King assumed a prerogative of granting printing privileges, and the earliest copyright protection took the form of printers' licences, and became a source of considerable profit to the King and his favourites.

In the year 1556 the original charter of the Stationers' Company was granted by Philip and Mary. It was the declared object of the Crown at that time to prevent the propagation of the reformed religion, and it seems to have been thought that this could most effectually be brought about by imposing the severest restrictions on the press. About this period there are several decrees and ordinances of the Star Chamber regulating the manner of printing, the number of presses throughout the kingdom, and

Original
charter
of the
Stationers'
Company.

(*a*) 1 Ric. III. c. 9 (1483).

(*b*) 25 Hen. VIII. c. 15.

(*c*) We recognise in this statute the prototype of the American "manufacturing clause."

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prohibiting all printing against the force and meaning of any of the statutes or laws of the realm. Until the year 1640 the Crown, through the instrumentality of the Star Chamber, exercised this restrictive jurisdiction without limit, enforcing by the summary powers of search, confiscation and imprisonment, its decrees, without the least obstruction from Westminster Hall or the Parliament in any instance.

Decrees
of Star
Chamber.

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

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

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

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

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

In 1640, however, the Star Chamber was abolished; the King's authority was set at nought; all the regulations of the press, and restraints previously imposed upon unlicensed printers by proclamations, decrees of the Star Chamber, and charter powers given to the Stationers' Company, were deemed and certainly were illegal. The licentiousness of libels induced Parliament to make an ordinance which prohibited printing, unless the book was first licensed. The ordinance prohibited printing without the consent

of the owner, or importing (if printed abroad), upon pain of forfeiting the same to the *owner or owners of the copies* of the said books, &c. The provision necessarily presupposed the property to exist; it would have been nugatory if there had been no admitted owner. An owner could not at that time have existed otherwise than by common law. In 1649 the Long Parliament made another ordinance; and in 1662 was passed the Licensing Act (13 & 14 Car. II. c. 33), which interdicted the printing of any book unless first licensed and entered in the registry of the Stationers' Company. It ordered that no person should presume to print "any heretical, seditious, schismatical, or offensive books or pamphlets, wherein any doctrine or opinion shall be asserted or maintained which is contrary to the Christian faith, or the doctrine or discipline of the Church of England, or which shall, or may, tend to be to the scandal of religion or the church, or the government or governors of the church, state, or commonwealth, or of any corporation or particular person or persons whatever." It further prohibited the publication of unlicensed books, prescribed regulations as to printing, and empowered the King's messengers, and the master and wardens of the Stationers' Company, to seize books suspected of containing matters hostile to the Church or Government. It was necessary to print in the beginning of every licensed book the certificate of the licenser to the effect that the books contained nothing "contrary to the Christian faith, or the doctrine or discipline of the Church of England, or against the state and government of this realm, or contrary to good life or good manners, or otherwise, as the nature and subject of the work shall require." To prevent fraudulent changes in a book after it had been licensed, a copy was required to be deposited with the licenser when application was made for a licence.

The Licen-
sing Act of
Car. II.

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

The sole property of the owner is here acknowledged in express terms as a common law right; and the legislature which passed that Act could never have entertained the most distant idea "that

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the productions of the brain were not a subject-matter of property." To support an action on this statute, ownership had to be proved or the plaintiff could not have recovered, because the action was to be brought by the owner, who was to have a moiety of the penalty. The various provisions of this Act effectually prevented piracies, without actions at law or bills in equity. But cases arose of disputed property. Some of them were between different patentees of the Crown; in some the point was whether the property "belonged to the author, from his invention and labour, or the King, from the subject matter."

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

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

The Licensing Act of Car. II. was continued by several Acts of Parliament, but expired May, 1679; soon after which there is a case in Lilly's 'Entries of Hilary Term,' 31 Car. II. B. R. (e). In this case an action was brought for printing 4,000 copies of the "Pilgrim's Progress," of which the plaintiff was the true proprietor, whereby he lost the profit and benefit of his copy. There is no account, however, of the case having been proceeded with.

Ordinance
of the
Stationers'
Company in
1681.

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

(e) *Ponder v. Bradyl*, Lilly's 'Entries,' 67; see Carter, 89; 4 Burr. 2817; Skinner, 284; 1 Mod. 257.

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

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

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

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

In one of the petitions presented to the House in support of applications to Parliament in 1709, for a Bill to protect copyright, the last clause or paragraph was as follows: "The liberty now set on foot of breaking through this ancient and reasonable usage is no way to be effectually restrained but by an Act of Parliament. For by common law, a bookseller can recover no more costs than he can prove damage; but it is impossible for him to prove the

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

(*f*) Curtis on Copyright, p. 38.

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

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tenth, nay, perhaps, the hundredth part of the damage he suffers; because a thousand counterfeit copies may be dispersed into as many hands all over the kingdom, and he not be able to prove the sale of them. Besides, the defendant is always a pauper, and so the plaintiff must lose his costs of suit. (No man of substance has been known to offend in this particular, nor will any ever appear in it.) Therefore, the only remedy by the common law is to confine a beggar to the rules of the King's Bench or Fleet, and there he will continue the evil practice with impunity. We therefore pray that confiscation of counterfeit copies be one of the penalties to be inflicted on offenders" (*h*).

First Copy-
right Act,
8 Anne, c. 19.

In response to these applications, in the year 1709 the first Copyright Act, the 8 Anne, c. 19, was passed. This Act gave authors of books then printed, the sole right and liberty of printing them for a term of twenty-one years from the 10th of April, 1710, and of books not then printed the sole right of printing for fourteen years, with a proviso that after the expiration of the said term of fourteen years the sole right of printing or disposing of copies should return to the authors thereof, if they were then living, for another term of fourteen years. The titles to books had to be registered in the register book of the Stationers' Company, and nine copies had to be delivered to certain libraries.

Effect of the
Act.

This statute, passed with a view to giving a greater protection to copyright, had the unexpected result of curtailing it; for in the case of *Donaldson v. Becket* (*i*) the House of Lords finally decided that the effect of the statute was to extinguish the common law copyright in published works, though leaving the common law copyright in unpublished works unaffected.

Universities'
copyright.

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

54 Geo. III.
c. 156.

The period for which copyright was capable of existing was somewhat varied by the 54 Geo. III. c. 156, s. 4, which enacted that instead of enduring for fourteen years, and contingently for fourteen more, authors should have the sole liberty of printing and reprinting their works for the term of twenty-eight years, to commence from the day of the first publication of the same; and

(*h*) 4 Burr. 2318.

(*i*) (1774), 4 Burr. 2408; *Beckford v. Hood* (1798), 7 T. R. 620; *Jefferys v. Boosey* (1854), 4 H. L. C. 815.

(*k*) 15 Geo. III. c. 53.

further, if the author should be living at the expiration of that period, for the residue of his natural life.

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

Copyright Act, 1842.

The Act of 1842 extended the period of copyright to the life of the author and seven years after his death, or a term of forty-two years, whichever should be the longer, and in spite of its defects, both in substance and in draftsmanship, it remained the governing statute as to literary copyright, until it was repealed by the recent Copyright Act, 1911 (*m*).

In the realm of artistic copyright, engravings were the first subjects to receive legislative protection. In 1734 the Engraving Copyright Act, 8 Geo. II. c. 13, was passed, conferring copyright upon these for a term of fourteen years.

Engravings.

No provision was made in this Act for the protection of any work of which the engraver was not also the designer; and this has been accounted for by the fact that Hogarth, by whose influence

(*l*) 5 & 6 Vict. c. 45.

(*m*) 1 & 2 Geo. V. c. 46.

CAP. II. 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 extended protection to any person making an engraving from the original work of another. It also enlarged the period of protection to twenty-eight years. A further Act of 1777 (*n*) enlarged the remedies for piracy; an Act of 1836 (*o*) extended the provisions of the Engravings Acts to Ireland; and an Act of 1852 (*p*) to prints taken by lithography or other mechanical process.

Sculpture.

Works of sculpture were the next in order to be protected by the Sculpture Copyright Act, 1814 (*q*), the term of protection being fourteen years, with a further reversionary term of fourteen years to the author if then living.

Musical and dramatic performing rights.

Musical and dramatic compositions were held to be "books" within the meaning of the Copyright Acts relating to literary works (*r*); but the performing right was not statutorily protected until the year 1833, when the Act commonly known as Bulwer Lytton's Act (*s*) conferred an exclusive right of public performance for twenty-eight years, with a reversionary period to the author for the residue of his life, provided the work was printed and published; if the work was not printed or published the term of protection was uncertain.

Bulwer Lytton's Act only referred to dramatic pieces, but sect. 20 of the Literary Copyright Act, 1842 (*t*), dealt with the performing rights both in musical and dramatic pieces, and extended protection to the performing rights in both classes of works for a like period to that provided for the duration of copyright in books, namely, a period of forty-two years, or the life of the author and seven years after, whichever should be the longer.

Mischiefs arising by reason of penalties being fixed by law.

Certain abuses arose with respect to the performing rights in musical works. In particular, a man named Wall gained considerable notoriety by purchasing performing rights and enforcing payment of penalties—which penalties were fixed at 40s. a performance by Bulwer Lytton's Act—from innocent infringers. The Report of the Copyright Commission of 1878 contains the following paragraphs relating to this practice (*u*):—"This pro-

(*n*) 17 Geo. III. c. 57.

(*o*) 6 & 7 Will. IV. c. 59.

(*p*) 15 & 16 Vict. c. 12, s. 14.

(*q*) 54 Geo. III. c. 56.

(*r*) *Bach v. Longman* (1777), Cowp. 623; *Storace v. Longman* (1788), 2 Camp. 27, note (*a*).

(*s*) 3 & 4 Will. IV. c. 15.

(*t*) 5 & 6 Vict. c. 45, *ante*, p. 11. Lectures were protected by the 5 & 6 Will. IV. c. 65.

(*u*) Pars. 169, 171, 172.

vision 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."

This led to the passing of the Copyright (Musical Compositions) Acts of 1882 and 1888 (*x*), which required that notice of reservation of rights of public performance of any musical composition should be printed on every published copy thereof and left the question of payment of costs and amount of penalties to the discretion of the Court.

Owing to the injury caused to proprietors of the copyright in musical compositions by the practice of selling pirated copies of songs and music through the medium of street hawkers, and the difficulty of ascertaining any substantial person to proceed against for infringement, the Musical (Summary Proceedings) Act, 1902, and the Musical Copyright Act, 1906 (*y*), were passed providing

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The Copyright Commissioners' suggestions.

Amendments of the law as regards copyright in musical compositions.

(*x*) 45 & 46 Vict. c. 40; 51 & 52 Vict. c. 17.
 (*y*) 2 Edw. VII. c. 15; 6 Edw. VII. c. 36.

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summary methods of procedure against infringers of musical copyright. Both these last-mentioned Acts remain unrepealed by the Act of 1911, and will call for more detailed explanation later on (z).

Paintings,
drawings,
and photo-
graphs.

The last class of works to receive statutory protection were paintings, drawings, and photographs, which were for the first time protected by the Fine Arts Copyright Act, 1862 (a). This Act purported to protect paintings, drawings, and photographs for the term of the life of the author and seven years after his death, but the wording of the Act was such as to produce the somewhat remarkable result that the copyright was lost altogether—except in the case of a work executed upon commission—if the artist upon the occasion of the first sale of his work failed to make some agreement in writing reserving the copyright to himself (b).

Royal Com-
mission of
1875.

In this state of the law a consolidating statute was urgently required. In 1875 a Royal Commission was appointed to inquire into the working of the Copyright Acts, and the Commissioners presented their Report in 1878. In this Report they stated (c):—“The first observation which a study of the existing law suggests is that its form, as distinguished from its substance, seems to us bad. The law is wholly destitute of any sort of arrangement, incomplete, often obscure, and, even when it is intelligible upon long study, it is in many parts so ill-expressed that no one who does not give such study to it can expect to understand it. The common law principles, which lie at the root of the law, have never been settled. The well-known cases of *Millar v. Taylor*, *Donaldson v. Becket*, and *Jefferys v. Boosey* ended in a difference of opinion amongst many of the most eminent judges who have ever sat upon the bench. The fourteen Acts of Parliament which deal with the subject were passed at different times between 1735 and 1875 (d). They are drawn in different styles, and some are drawn so as to be hardly intelligible. Obscurity of style, however, is only one of the defects of these Acts. Their arrangement is often worse than their style. Of this the Copyright Act of 1842 is a conspicuous instance.”

The Berne
Convention.

In spite, however, of the recommendations of the Commissioners no consolidating statute was passed—difficulties with the colonies particularly standing in the way of any settlement which should include any alterations in the existing law. In the year 1885

(z) See *post*, Part II. Chapter X.

(a) 25 & 26 Vict. c. 68.

(b) Copinger, 4th ed. pp. 366, 367.

(c) Pars. 7, 8, 9.

(d) Several more were added between 1875 and 1910.

Great Britain was represented at the Conference of Powers held at Berne, which resulted in the framing of the Berne Convention, to which Great Britain adhered. Previously to doing so the International Copyright Act, 1886 (*e*), was passed, making the necessary alterations and additions to the International Copyright Act, 1844 (*f*), to enable her to give the required protection to foreign authors.

In the year 1908 the considerable modifications of the original Berne Convention, which were carried at the Conference of the Powers held at Berlin, rendered it imperative that Great Britain should amend her copyright laws, if she was to fall into line with the other Powers, and be in a position to give to foreigners the protection required by the Revised Convention (*g*). In 1909 a committee was appointed "to examine the various points in which the revised International Copyright Convention, signed at Berlin on November 13th, 1908, is not in accordance with the law of the United Kingdom, including those points which are expressly left to the internal legislation of each country, and to consider in each case whether that law should be altered so as to enable His Majesty's Government to give effect to the Revised Convention." This committee, after hearing evidence, reported to Parliament (*h*) generally approving the provisions of the Revised Convention, and recommending the passing of a consolidating and amending Act. In the year 1910 a Bill to give effect to these recommendations was drafted and introduced into the House of Commons, but was dropped for that Session. In 1911, however, another Bill was introduced which, after being modified in several particulars during its passage through Parliament, was at length passed by both Houses, and received the royal sanction on the 16th December, 1911 (*i*). This Act repeals all previous statutes on the subject of literary and artistic copyright with the exception of the Musical Copyright Acts of 1902 and 1906 (*k*), and one section of the Fine Arts Copyright Act, 1862. The Act of 1911 came into force on the 1st July, 1912, and is, therefore, the statute upon which, at the present day, practically the entire law of copyright depends.

Revised
Convention
of 1908.

(*e*) 49 & 50 Vict. c. 33.

(*f*) 7 & 8 Vict. c. 12.

(*g*) The correct title to this Convention is "The Revised Berne Convention of 1908," but it is sometimes spoken of as the "Berlin Convention." The latter title, though incorrect, receives some sanction from its employment in the Order in Council of the 24th June, 1912, adopting the Revised Convention, and being obviously convenient, will sometimes be used in this work.

(*h*) Report of the Committee on the Law of Copyright, 1909, Cd. 4376.

(*i*) 1 & 2 Geo. V. c. 46.

(*k*) *Ante*, p. 13.

CHAPTER III.

GENERAL SURVEY OF THE LAW OF COPYRIGHT IMMEDIATELY PRIOR
TO THE ACT OF 1911.

INASMUCH as no work which was in existence and unprotected on the 1st July, 1912, is entitled to protection under the Copyright Act, 1911 (*a*), some knowledge of the law prior to that Act is essential. It is, therefore, proposed in this chapter to give a general outline of that law (*b*).

Literary
copyright
under the old
law.

First, as to literary copyright. The governing statute was the Literary Copyright Act, 1842 (*c*). This related to "books," which expression included every volume, part, or division of a volume, pamphlet, letterpress sheets, music sheets, maps, charts, and plans (*d*), and the copyright extended throughout the British dominions. A work to be entitled to protection need not have been original (*e*): although a mere copy was not protected (*f*).

Term of
copyright.

The term of copyright was the life of the author and seven years, or forty-two years from publication, whichever period was the longer, and in the case of posthumous works was forty-two years from publication (*g*). Copies of books were required to be delivered at the British Museum and certain libraries, and other institutions, but the failure to make delivery did not imperil the copyright (*h*).

Registration.

The Act also made provision for registration at Stationers' Hall (*i*). This, however, was not compulsory, but had to be effected before any action could be brought against infringers (*k*). Nevertheless, once registration was effected, actions might be

(*a*) Sect. 24.

(*b*) It will, of course, be understood that it is only possible to indicate the main features of that law. Those readers who desire further information are referred to the last edition of this work.

(*c*) 5 & 6 Vict. c. 45.

(*d*) Sect. 2.

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

(*f*) *Per Lord James*, (1900) A. C. at p. 554.

(*g*) Sect. 3.

(*h*) Sects. 6, 7, 8; cf. sect. 15 of Act of 1911, *post*, Part II., Chapter XI.

(*i*) Sects. 11—14.

(*k*) Sect. 24.

brought for infringements made prior to the date of registration (*l*).

CAP. III.

The copyright—except in the case of a contribution to a collective work—vested in the author (*m*), provided he first published his work on British soil (*n*). A foreigner was clearly entitled to protection if he was resident within the dominions at the date of first publication, and probably he became so entitled even if he were resident in a foreign country at that date (*o*). With regard to collective works, the Literary Copyright Act of 1842 contained a very ill-drafted and puzzling section (*p*), under which the copyright in articles contributed to such a work vested in the proprietor of the work in certain cases. The proprietor had, however, to prove (*i*) that he employed the writer to compose the articles; (*ii*) that the articles were composed on the terms that the copyright should belong to the proprietor (*q*); and (*iii*) that the articles were paid for by him (*r*). In the case, however, of *periodicals*, the author was at liberty, after a lapse of twenty-eight years from the date of publication, to publish his articles in a “separate form,” and during the term of twenty-eight years the proprietor could not publish the articles separately or singly without the author’s consent. The general opinion (*s*) was that the section now being dealt with only applied to works of the character of encyclopædias, magazines, and periodicals.

To whom the copyright belonged.

In the case of a posthumous work, the copyright vested in the proprietor of the author’s manuscript from which the book was first published (*t*).

Posthumous works.

Every assignment of copyright was required to be in writing (*u*), and if the work had been previously registered at Stationers’ Hall it might be assigned by entry in the register (*x*).

Assignment.

(*l*) *Warne v. Laurence* (1886), 54 L. T. 371; *Goubard v. Wallace*, W. N. (1877) 130.

(*m*) There have been cases in which it has been held that an employer who has had a share in designing, or has solely designed, a work executed by another, is the “author”: *Barfield v. Nicholson* (1824), 2 Sim. & St. 1; *Hutton v. Kean* (1859), 8 W. R. 7; *Nisbet v. Golf Agency* (1907), 23 T. L. R. 370.

(*n*) *Routledge v. Low* (1865), L. R. 3 H. L. 100.

(*o*) *Routledge v. Low*, *ubi sup.*

(*p*) Sect. 18.

(*q*) There was a *prima facie* presumption that this was so: *Lawrence and Bollen v. Aflalo*, (1904) A. C. 17.

(*r*) Actual payment was necessary: *Richardson v. Gilbert* (1851), 1 Sim. (N. S.) 336.

(*s*) Kekewich, J., however, in the case of *Ward, Lock & Co. v. Long*, (1906) 2 Ch. 550, expressed the opinion that the section extended to books generally.

(*t*) Sect. 3; *Macmillan v. Dent*, (1907) 1 Ch. 107.

(*u*) *Leyland v. Stewart* (1876), 4 Ch. D. 419.

(*x*) Sect. 13.

CAP. III.
Lectures.

The only statute conferring protection upon lecturers was the Lecturers Copyright Act, 1835 (*y*). The protection was only against printing, and publishing, and no protection was given without two days' previous notice to two magistrates living within five miles of the place of delivery, or to lectures delivered in any university or public school or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment, or foundation. The period of protection was twenty-eight years (*z*).

Musical and
dramatic
works.

As regards musical and dramatic works (*a*), the musical scores and book of words were protected as literary works under the 5 & 6 Vict. c. 45 (Literary Copyright Act, 1842). The statutes relating to the performing rights were the 3 & 4 Will. IV. c. 15—commonly known as “Bulwer Lytton’s Act,” which only originally applied to dramatic works—and sects. 20 and 21 of the Literary Copyright Act, which apply to both musical and dramatic compositions. The effect of these provisions as regards the performing rights in a musical or dramatic piece were: (a) if the work had been published as a book the author was entitled to protection during his life and for seven years after his death or forty-two years from the date of the first public representation or performance of the work; (b) if the work had not been published as a book, but was in manuscript only, the term of performing right was 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 altered this. Possibly, therefore, the right was perpetual, but, more probably, the term was the same as in the case where the work was printed and published. If the dramatic work was first represented in a foreign country (such country not being one within the International Copyright Acts), it lost any right to protection in this country (*b*).

Reservation
of perform-
ing rights.

In the case of the performing rights in a musical piece, it was required by the Copyright (Musical Compositions) Act, 1882 (*c*), that these should be expressly stated to be reserved on the title page of every published copy of the work. Failure to print

(*y*) 5 & 6 Will. IV. c. 65. This statute relates to *published* lectures. Unpublished lectures were frequently protected from publication upon the ground of breach of confidence: *Caird v. Sime* (1887), 12 A. C. 326; and see *post*, “Unpublished Works,” Part II., Chapter I.

(*z*) Sect. 4.

(*a*) Performing rights were not recognised under the old law except in the case of dramatic or musical works. Probably no action would lie for reciting or singing the words of a song, unless the song was dramatic.

(*b*) *Boucicault v. Delafield* (1863), 1 H. & M. 597; *Boucicault v. Chatterton* (1876), 5 Ch. D. 267.

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

such notice involved the loss of the performing rights (*d*), but notice in a foreign language was sufficient (*e*).

CAP. III.

Registration was not necessary to protect performing rights (*f*).

Registration.

The assignment of the copyright in a dramatic or musical piece did not convey the performing rights, unless an entry to that effect was made in the register (*g*).

Assignment.

It was no infringement of the copyright in a novel to dramatise the same (*h*), provided that the dramatic version was not printed or copied (*i*). Again, mechanical instruments were not infringements of musical copyright (*k*).

Infringe-
ment.

Turning, next, to artistic copyright, the old law distinguished between three classes of artistic works, to which different statutes applied, namely: (1) engravings, prints, and lithographs; (2) works of sculpture; (3) paintings, drawings, and photographs.

Artistic
copyright.

As regards engravings and prints, the main statutes in force were the Engraving Copyright Acts of 1734 and 1766 (*l*), and the Prints Copyright Act, 1777 (*m*). Prints taken by lithograph, or any other mechanical process for multiplying prints, were brought under the earlier Acts relating to engravings by sect. 14 of the 15 & 16 Vict. c. 12. The period of protection was twenty-eight years from the date of publication. No registration was necessary, but the copyright was lost unless the name of the proprietor of the copyright and the date of the first publication were engraved on each plate, and printed on each print (*n*). It was, however, held that where engravings formed part of a book, and the copyright in the book and the engravings was vested in the same person, the pictures were protected as part of the book (*o*), but not if the copyrights were separated (*p*). Maps were protected sometimes under the Literary Copyright Act, and sometimes under the Engraving Copyright Acts (*q*), and the latter

Engravings,
prints, and
lithographs.Term and
conditions
of copyright.

(*d*) *Fuller v. Blackpool Winter Gardens*, (1895) 1 Q. B. 429.

(*e*) *Sarpy v. Holland*, (1908) 2 Ch. 198.

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

(*g*) 5 & 6 Vict. c. 45, s. 22.

(*h*) *Reade v. Conquest* (1861), 9 C. B. 755.

(*i*) *Warne & Co. v. Seeborn* (1888), 39 Ch. D. 73.

(*k*) *Boosey v. Whight*, (1900) 1 Ch. 122; *Mabe v. Connor*, (1909) 1 K. B. 515.

(*l*) 8 Geo. II. c. 13; 7 Geo. III. c. 38.

(*m*) 17 Geo. III. c. 57. The Acts were extended to Ireland by the 6 & 7 Will. IV. c. 59.

(*n*) *Newton v. Cowie* (1827), 4 Bing. 234; *Rock v. Lazarus* (1872), L. R. 15 Eq. 104.

(*o*) *Bogue v. Houlston* (1852), 5 De G. & Sm. 267; *Maple v. Junior Army and Navy Co.* (1882), 21 Ch. D. 269; *Davis v. Benjamin*, (1906) 2 Ch. 491.

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

(*q*) *Stannard v. Lee* (1871), L. R. 6 Ch. 346; *Stannard v. Harrison* (1871), 19 W. R. 811.

CAP. III. Acts extended to designs transferred to articles of manufacture (r).

The Engravings Acts made no express provisions as to assignment of the copyright, and it was generally considered advisable to assign in writing in the presence of two witnesses (s).

Sculptures.

Works of sculpture were protected under the Sculpture Copyright Act, 1814 (t). The term of copyright was fourteen years from first publication, and a further fourteen years if the first proprietor was then living and had not divested himself of the copyright. His name had to be put on the work, together with the date of publication (u), but registration was not required. All assignments had to be by deed signed by the proprietor in the presence of and attested by two witnesses (x).

Paintings,
drawings,
and photo-
graphs.

By the Fine Arts Copyright Act, 1862 (y), a British subject or any person resident in the British dominions, the author of a painting, drawing or photograph made in the British dominions or elsewhere, and his assigns, was granted copyright during his life and for seven years after his death. Copyright under this Act attached upon the creation of the work, not upon publication (z), but registration was necessary to obtain the full benefit of the Act (a). No action would lie in respect of the making of copies of a published work prior to registration, but if any of such copies were sold after the date of registration, damages could be obtained (b). If the work were unpublished, alongside the statutory copyright was a common law copyright (c), the term of which, however, would run out with the statutory copyright.

In whom
copyright
vested.

The first owner of the copyright was the author, except in a case where the work was executed upon commission, in which case the copyright vested without any agreement in the party for whom the work was executed. A curious proviso to sect. 1 of the Act, however, had the effect of causing the work to fall into the public domain, unless the author took the precaution, upon the occasion of his first selling his painting, drawing or negative, as the case might be, of reserving the copyright to himself by

(r) *Dicks v. Brooks* (1880), 15 Ch. D. 22.

(s) *Jefferys v. Boosey* (1854), 4 H. L. C. 815, 994, 995.

(t) 54 Ge. III. c. 56.

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

(x) Sect. 4.

(y) 25 & 26 Vict. c. 68.

(z) *Tuck v. Priestler* (1887), 19 Q. B. D. 629.

(a) Sect. 4.

(b) *Tuck v. Priestler, ubi sup.*; cf. *Savory v. World of Golf* (1914), 137 L. T. J. 240.

(c) *Mansell v. Valley Printing Co.*, (1908) 1 Ch. 567; *Bowden v. Amalgamated Pictorials*, (1911) 1 Ch. 386.

writing under the hand of the vendee or assignee of the work, or of granting the same in writing to such vendee or assignee (*d*). The authorship of a photograph was not always an easy matter to determine. Generally speaking, the author was the person who superintended the arrangement of the picture and placed the objects in position (*e*), but the proprietor of the photographic business was held to be the author in some cases (*f*). The sitter obtained the copyright if he gave valuable consideration (*g*).

Copyright in a painting, drawing or photograph could be assigned by any note or memorandum in writing (*h*). Assignment.

Protection under the Fine Arts Copyright Act did not extend beyond the United Kingdom, and no action for infringement could have been brought in any other part of the British dominions (*i*).

Works of architecture (except architects' plans, which were protected as artistic works), choregraphic works, pantomimes, and musical and other records were not entitled to any copyright under the old law. Architecture.

(*d*) It is perhaps strange that there never appears to have been any actual decision to this effect, but this was the generally accepted construction of the proviso: see Copinger, 4th ed. p. 366.

(*e*) *Nottage v. Jackson* (1883), 11 Q. B. D. 627.

(*f*) *Melville v. Mirror of Life Co.*, (1895) 2 Ch. 531.

(*g*) *Pollard v. Photographic Co.* (1888), 40 Ch. D. 345; *Boncas v. Cooke*, (1903) 2 K. B. 227; *Stackemann v. Paton*, (1906) 1 Ch. 774.

(*h*) Sect. 3.

(*i*) *Gravee v. Gorrie*, (1903) A. C. 496.

PART II.
THE GENERAL LAW OF COPYRIGHT.

CHAPTER I.

UNPUBLISHED WORKS, AND HEREIN OF PUBLICATION.

Author's
right to the
first publica-
tion of
his own
manuscript.

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

This elementary right of an author is protected under the new Copyright Act in a different way from that in which it was protected under the old law. Except in the cases of pictures, drawings and photographs (b), unpublished works received no statutory protection under the old law, but were protected under the common law—a form of protection fully recognized in the case of *Donaldson v. Becket* (c). The new Act has, however, abolished common law copyright (d), and confers statutory copyright upon all works as from the date when the same are made (e).

(a) *Millar v. Taylor* (1769), 4 Burr. 2378.

(b) *Tuck v. Priest* (1887), 19 Q. B. D. 629, *ante*, p. 20.

(c) (1774), 4 Burr. 2408, *ante*, p. 4; *Jefferys v. Boosey* (1854), 4 H. L. C. 815; *Mayall v. Higbey* (1862), 1 H. & C. 148; *Mansell v. Valley Printing Co.*, (1908) 1 Ch. 567; on app., (1908) 2 Ch. 441; *Bowden v. Amalgamated Pictorials, Ltd.*, (1911) 1 Ch. 386.

(d) Sect. 35.

(e) Sect. 1.

In dealing with unpublished works it is advisable to distinguish between three things, namely: (a) the right to the material thing, such as the manuscript; (b) the right to publish the manuscript by making copies of or extracts therefrom; and (c) the right to make use of the ideas or information conveyed by the manuscript, without copying the actual language employed in the original.

CAP. I.
Distinctions
to be drawn.

A manuscript is a chattel, and the proprietor of a manuscript has a right of action against any person who, without title, makes any improper use of his manuscript. As Mr. Justice Erle remarked in the case of *Jefferys v. Boosey* (f):—"The nature of the right of an author in his works (g) is analogous to the rights of ownership in other personal property, and is far more extensive than the control of copyright after publication in print, which is the limited meaning of copyright in its common acceptance, and which is the right of an author to which the statute of Anne relates. Thus, if after composition the author chooses to keep his writings private, he has the remedies for wrongful abstraction of copies analogous to those of an owner of personalty in the like case. He may prevent publication; he may require back the copies wrongfully made; he may sue for damages if any are sustained." It is submitted, therefore, that the owner of a manuscript has a right of action against a thief (h) or a borrower (i) of his manuscript who publishes copies thereof, not necessarily upon the ground of an infringement of his copyright, but upon the ground of interference with his title to a chattel, namely, the paper of his manuscript. Upon the same ground he can proceed against an innocent person deriving title under the thief or the borrower (k), and in an action of trespass or conversion, the proprietor of the manuscript is not limited in damages to the value of the paper (l).

Ownership of
manuscript
protected.

Even the ownership of the manuscript or other material article does not necessarily imply a right in the owner to publish it. Thus, in the case of the *Duke of Queensberry v. Shebbeare* (m), an injunction was granted against the representatives of a person of the name of Gwynne, restraining them from printing the second part of Lord Clarendon's history, a copy of which had been lent or given to Gwynne, the Court being of opinion that Gwynne

Ownership of
MS. does not
necessarily
imply right
of publica-
tion.

(f) (1854), 4 H. L. 815 at p. 867.

(g) I.e., his unpublished works.

(h) *Webb v. Rose* (1732), Ambl. 695.

(i) *Forrester v. Walker* (1741), Ambl. 695; *Mayall v. Higbey* (1862), 1 H. & C. 148.

(k) *Mayall v. Higbey, sup.*; *Hollins v. Fowler* (1875), L. R. 7 H. L. 757; *Mansell v. Valley Printing Co.*, (1908) 1 Ch. 567; 2 Ch. 441.

(l) *Thurston v. Charles* (1905), 21 T. L. R. 659.

(m) (1758), 2 Eden, 329; see also *Millar v. Taylor* (1769), 4 Burr. at p. 2399; *Sweetman v. Bentley* (1871), W. N. 162; but see sect. 17 (2).

CAP. I.

might make every use of it, except the profit of multiplying in print. This point is well illustrated by the case of letters, it having frequently been held that the receiver of a letter has the property in the ink and paper, but not, *primâ facie*, the right of publication (*n*); and it must be remembered that under the new Act no copyright can be assigned merely by delivery of the material thing, but must be assigned in writing (*o*).

Lawful owner of MS. cannot be sued for trespass.

It is obvious that no proceedings for trespass or conversion will lie against a person who publishes a manuscript which is his lawful property, and the person who seeks to restrain such publication must base his claim either upon an infringement of his copyright or upon a breach of confidence.

Provisions of Copyright Act, 1911, as to unpublished works.

We proceed now to consider the provisions of the Copyright Act, 1911, with regard to unpublished works. First of all, it is provided by sect. 31 that "no person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence." The old common law copyright in unpublished works is, therefore, clearly abolished, but, in return, statutory copyright is conferred upon unpublished works by sect. 1 (1) of the Act, which is as follows:—

"Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary, dramatic, musical and artistic work, if—

"(a) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid; and

"(b) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid;

but in no other works, except so far as the protection conferred by this Act is extended by Orders in Council thereunder relating to self-governing dominions to which this Act does not extend and to foreign countries."

Period of protection.

The ordinary period of copyright protection is during the life of the author and fifty years after his death (*p*), but if the author

(*n*) *Post*, p. 44.

(*o*) Sect. 5 (2).

(*p*) Sect. 3, Chapter V., *post*.

does not publish his work during his lifetime, sect. 17 will apply, which section is as follows:--

CAP. I.

“(1) In the case of a literary, dramatic, or musical work, or an engraving, in which copyright subsists at the date of the death of the author (*q*), or, in the case of a work of joint authorship, at or immediately before the date of the death of the author who dies last, but which has not been published, nor, in the case of a dramatic or musical work, been performed in public, nor, in the case of a lecture, been delivered in public, before that date, copyright shall subsist till publication, or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter, and the proviso to sect. 3 of this Act shall, in the case of such a work, apply as if the author had died at the date of such publication or performance or delivery in public as aforesaid.

“(2) The ownership of an author’s manuscript after his death, where such ownership has been acquired under a testamentary disposition made by the author and the manuscript is of a work which has not been published nor performed in public, nor delivered in public, shall be *primâ facie* proof of the copyright being with the owner of the manuscript.”

The effect of these sections is that literary, dramatic, or musical works, or engravings, are entitled to copyright so long as they remain unpublished; if they are first published during the author’s lifetime the copyright will expire fifty years after his death, but if they are first published only after the author’s death, copyright will expire fifty years after the date of first publication, the proviso to sect. 3 (which gives a right to all persons to produce a published work twenty-five years after the death of the author upon payment of royalties to the proprietor of the copyright (*r*)) in such last-mentioned case applying as though the author had died at the date of such publication. Exceptions to the general rule are, however, made in the case of photographs, the term of copyright in which, whether published or unpublished, is to be fifty years from the making of the original negative, and in the case of drawings and paintings, for which no express provisions are made, and for which accordingly the copyright ceases fifty

Effect of these sections.

(*q*) The work of a foreigner not resident, at the time of making his work, in a place to which the Act extends would not be a work in which copyright would be subsisting at the date of his death (see *post*, p. 27). If such a work were first published in England after the author’s death, would it be unprotected? It is submitted not, but would be protected under sect. 3 during the balance (if any) of fifty years from the author’s death.

(*r*) See *post*, Chapter V., “Term of Copyright.”

CAP. I. years after the author's death, whether published or unpublished (s).

Proprietor
of copyright.

In determining who is the first proprietor of the copyright in an unpublished work the statute draws no distinction between a published and an unpublished work, and for a consideration of this question the reader is referred to the later chapters in this work; but sub-sect. (2) of sect. 17 provides that where an author's unpublished manuscript is acquired "under a testamentary disposition made by the author," the ownership of the manuscript is *prima facie* proof of ownership of the copyright. That is to say, if the author bequeaths his manuscripts to A. and all the residue of his property to B., he is to be deemed, in the absence of contrary intention, to have included the copyright in his bequest to A. (t). In order, however, to raise this presumption the title to the manuscript must be derived from the "author" and under a testamentary disposition. Apparently, therefore, there would be no similar presumption in the case of a person deriving title under an assign of the author (u), and it was unnecessary to extend the provisions of the sub-section to a case where the author died intestate, for in such case the manuscript and the copyright would clearly devolve upon the deceased's administrator for the benefit of his next of kin (x). Further, the sub-section only applies to "manuscripts" and not to works of art.

Assignment
of copyright.

The copyright in unpublished works may be assigned in like manner as that in published works (y).

Cases in
which the
question of
publication
is of impor-
tance.

The question of what amounts to a "publication" of a work was one of greater importance under the old law than it is under the new Act, for under the old law the period of protection frequently expired at a fixed date, reckoned from the date of first publication. Inasmuch as, in the case of published works, under the new law copyright expires fifty years after the author's death (z), the precise date of publication will generally be immaterial; but as, in the case of works which have not been published, the period of protection may exceed the period which would have been allowed if they had been published, the question may sometimes be of importance. There is also another reason

(s) Sect. 21.

(t) *Willis v. Curtois* (1838), 1 Beav. 189.

(u) *E.g.*, in the case of the receiver of a letter. Under sect. 3 of the Literary Copyright Act, 1842, copyright in any book first published after the author's death belonged to the proprietor of the manuscript. This section received a strict construction in *Macmillan v. Dent*, (1906) 1 Ch. 101; (1907) 1 Ch. 107.

(x) *Latour v. Bland* (1818), 2 Stark. 382.

(y) Sect. 5 (2); see *post*, Chapter VII., "Assignment of Copyright."

(z) Sect. 3.

for inquiring whether a work has been published or not, because in certain cases a work which, if published, would be entitled to protection may be entitled to no copyright at all if unpublished. This arises from the terms of sect. 1 of the Act (*a*), which provides that British copyright is to subsist in published literary, dramatic, and artistic works if they are first published within such parts of His Majesty's dominions to which the Act extends, but in the case of unpublished works, only "if the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid."

It consequently follows that a foreigner may be entitled to no copyright in his unpublished works, notwithstanding that he might at any time acquire a British copyright in the same works, by first publication on British soil, and that consequently a work which at one time was in the public domain in Great Britain might subsequently become entitled to copyright there.

Unpublished
works of
foreigners.

The inconveniences of this result are no doubt largely mitigated by sect. 29 (1), which provides that His Majesty may by Order in Council direct that the Copyright Act, 1911, shall apply:— "(b) to literary, dramatic, musical, and artistic works, or any class thereof, the authors whereof were at the time of the making of the works subjects or citizens of a foreign country to which the Order relates, in like manner as if the authors were British subjects"; and "(c) in respect of residence in a foreign country to which the Order relates, in like manner as if such residence were residence in the parts of His Majesty's dominions to which this Act extends." Orders in Council have been made extending the Act to numerous foreign countries (*b*), but there is at least one foreign country of importance—namely, America—which has not obtained any such Order.

It will be noticed that one of two conditions must be present before an unpublished work can claim copyright, namely, the author must be either (a) a British subject, or (b) resident in the British dominions at the date of the making of the work. For the fulfilment of these conditions two clauses of sect. 35 must be taken into consideration. Sub-sect. (4) of that section provides that "where, in the case of an unpublished work, the making of a work has extended over a considerable period, the conditions of this Act conferring copyright shall be deemed to have been complied with if the author was, during any substantial part of that period, a British subject or a resident within the parts of His

Conditions
for obtaining
copyright in
unpublished
works.

(a) *Ante*, p. 24.

(b) See Chapter on "International Copyright," Part IV., Chapter I., *post*.

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Majesty's dominions to which this Act extends." And sub-section. (5) provides that "for the purposes of the provisions of this Act as to residence, an author of a work shall be deemed to be resident in the parts of His Majesty's dominions to which this Act extends, if he is domiciled within any such part." This last sub-section seems practically to give the benefit of British citizenship to a person domiciled in the King's dominions at the time of the making of his work. Of course, this sub-section must not be taken as cutting down the meaning of residence, but rather as enlarging it. Residence will be sufficient without domicile, but equally domicile without residence will be sufficient (c).

Meaning of
"domicile."

A person is *primâ facie* domiciled where he has his permanent home (d). Domicile may be obtained either by birth, operation of law (e.g., by marriage), or by choice. An acquired domicile differs from a domicile of origin, in that the former can be more readily changed than the latter (e). An acquired domicile has been defined as follows:—"That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something which is unexpected, or the happening of which is uncertain, shall occur to induce him to adopt some other permanent home" (f).

"Residence."

"Residence" is obviously used in the Copyright Act as meaning something less than domicile. Nevertheless, the word "residence" is an ambiguous one (g). Where, however, there is nothing to show that it is used in a more extensive sense, it denotes the place where an individual eats, drinks, and sleeps, or where his family or his servants eat, drink, and sleep (h); but perhaps the fact that sects. 19 and 21 of the Act provide that a corporation is deemed to reside in the place where it has a place of business may be used as an argument in favour of holding the word to have the more extensive meaning in this Act and to include the place where a man conducts his business.

Where is
a work
"made"?

The Act gives no assistance towards determining what is the place where a work is "made," and questions of some difficulty arise in cases where it is necessary to decide what was an author's nationality or place of residence at the date of his

(c) See sects. 19 and 21 as to Corporations.

(d) *Whicker v. Hume* (1858), 7 H. L. C. 124.

(e) *Winans v. Att.-Gen.*, (1904) A. C. 290.

(f) *Per Kindersley, V.-C., Lord v. Colvin* (1857), 4 Drew. 376.

(g) *Re Bowie* (1880), 16 Ch. D. 484.

(h) *Per Bayley, J., R. v. North Curry*, 1 O'M. & H. 158.

“making” his work. No doubt the provisions of sect. 35 (4), to the effect that where the making of a work has extended over a “considerable period,” it is sufficient if the author was, during any “substantial part” of that period, a British subject or resident within the British dominions, are of some assistance, but obviously such expressions, “considerable period” and “substantial part,” are not ones to which an exact meaning can be attached.

The “making” of a work is *primâ facie* the production of a material thing—a manuscript, a picture or negative, but it cannot be held to have that meaning with regard to an extempore speech; and in giving protection to a speech (*i*), it can hardly be supposed that protection was intended to be confined to one which has, previously to delivery, been reduced into writing.

The “making” of books and pictures probably, in the majority of cases, extends over a considerable period, and the provisions of sect. 35 (4) above referred to will consequently apply, but in the case of photographs this can hardly be so, unless the “making” of the photographs extends over the whole period of taking, developing, and fixing the negative, and printing, toning, and fixing the positive. It is submitted that a photograph is “made” at least as soon as the negative is developed, although, probably, not immediately upon exposure of the plate.

A dramatic work is “made” by the writing of the book, not by its public performance (*k*), so that the foreign author of a play, who has not published his *libretto*, cannot acquire performing rights by first performing his play in the United Kingdom, for public performance is not publication of the work (*l*). The same principles apply to a musical work.

Sects. 19 and 21 of the Act may produce somewhat strange results with regard to unpublished instruments for mechanically reproducing sounds and unpublished photographs. By the first of the above-mentioned sections it is provided that the copyright in such mechanical instruments is to run from the date of the making of the original plate from which the contrivance was directly or indirectly derived, “and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work”; and, similarly, the last-mentioned section provides that copyright in a photograph is to date from the making of the negative, “and the person who

Meaning of
“making.”

The
“making” of
photographs.

The
“making” of
a dramatic
or musical
work.

Records and
photographs.

(i) Sect. 1 (2), see *post*, p. 47.

(k) *Reichardt v. Sapte*, (1893) 2 Q. B. 308.

(l) Sect. 1, sub-sect. (3).

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was owner of such negative at the time when such negative was made shall be deemed to be the author of the work."

From these sections it would seem to follow that if a British citizen were to employ the citizen of a foreign country, who would not himself be entitled to copyright in England for his unpublished works, to make a record or photograph entirely out of the United Kingdom, but under such circumstances that the plate or negative became the property of the employer, the latter could claim protection for the unpublished work; but that, on the other hand, a foreign citizen employing a person to make a record or photograph in England upon terms that the plate or negative should belong to the employer could not claim protection for the work so long as it remained unpublished, unless the employer was a citizen of or resident in a country to which an Order in Council made under sect. 29 extends. In a case of this sort, therefore, the foreign employer might be wise to make the terms of the employment of the agent such that the plate or negative should belong to the employee, coupled with an agreement by the latter to assign his copyright to his employer.

Upon the whole, it is thought that the provisions of the Act denying, except by international arrangement, copyright in their unpublished works to foreigners not resident in British dominions at the time of the making of the work are a little unfortunate (*m*).

If an author, for any reason, should be unable to claim copyright in his unpublished works, he may sometimes derive assistance from sect. 31, which, in abolishing the old copyright at common law, provides that "nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence." This section, of course, is equally applicable to foreigners as to British subjects.

Publication
in breach of
trust or
confidence.

Cases prior to
Act of 1911.

Under the old law, prior to the Copyright Act, 1911, there are many cases in which publication has been restrained upon the ground of breach of confidence, but inasmuch as, under that law, all unpublished works were entitled to common law copyright (*n*), it is often difficult to know how far the injunctions granted were based on a breach of the common law copyright, and how far upon breach of confidence.

The breach of trust or confidence must, it is thought, originate

(*m*) The inconvenience has been chiefly felt by Americans having rights in cinematograph films. In order to protect the performing rights the plan is sometimes adopted of publishing in book form in England short descriptions of the films and the plot represented: see "Cinematographs," Part III., Chapter IV., *post*.

(*n*) *Ante*, p. 4.

from some contract for secrecy, but such a contract may be either express or implied from the circumstances of the case. A leading case upon the subject is that of *Prince Albert v. Strange* (o), where it appeared that her late Majesty Queen Victoria and the plaintiff had occasionally, for their amusement, made drawings and etchings, being principally of subjects of private and domestic interest to themselves, and that they had made impressions of those etchings for their own use, and not for publication; that, for greater privacy, such impressions had been, for the most part, made by means of a private press kept for that purpose, and the plates themselves had been ordinarily kept by her Majesty under lock, and the impressions had been placed in some of the private apartments of her Majesty at Windsor, and in such apartments only; that the defendants Strange and Judge had in some manner obtained some of such impressions, which had been surreptitiously taken from some of such plates, and had thereby been enabled to form, and had formed, a gallery or collection of such etchings, of which they intended to make a public exhibition without the permission of her Majesty and the plaintiff, or either of them, and against their will; that the defendants had compiled and prepared a work, which had been printed and published by the defendant Strange, of which the title page or cover was as follows:—
 “A Descriptive Catalogue of the Royal Victoria and Albert Gallery of Etchings.” “Every purchaser of this catalogue will be presented (by permission) with a facsimile of the autograph of either her Majesty or of the Prince Consort engraved from the original, the selection being left to the purchaser, price sixpence”; that this work had been compiled, printed, and published without the consent of her Majesty and the plaintiff, or either of them, and against their will; that, in fact, among the etchings were portraits of the plaintiff, the Prince of Wales, the Princess Royal, and other members of the Royal Family, and personal friends of her Majesty, from life, and afterwards transferred to copper and etched by her Majesty and the plaintiff, and among such etchings were portraits of their favourite dogs, taken by them from life, and etchings from old and rare engravings in the possession of her Majesty, and several from such original designs as in the catalogue mentioned; and among such etchings there were several portraits of the Princess Royal, and such scenes in the Royal nursery as in the said catalogue mentioned; and that the said descriptive catalogue comprised sixty-three several etchings;

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There must
be a contract
for secrecy.
Prince Albert
v. Strange.

(o) (1849), 1 Mac. & G. 25.

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that the catalogue could not have been made except from impressions surreptitiously obtained; that the impressions were intended for private use, and not for publication, and very few had been given away, and those only to private friends. The bill then, as amended, charged that certain of the plates were given to Brown, a printer, at Windsor, for the purpose of printing off certain impressions thereof for her Majesty and the plaintiff, and that Brown employed therein a person of the name of Middleton, who, without Brown's consent or knowledge, and in violation of the confidence reposed in him, took impressions thereof for himself; and that Judge had bought or in some manner obtained the same from Middleton. It was then prayed that the defendants might be ordered to deliver up to the plaintiff all impressions and copies of the several etchings respectively made by the plaintiff; and that they, their servants, &c., might be restrained by injunction from exhibiting the said gallery or collection of etchings, or from making engravings or copies of them, or in any manner publishing them, or from parting with or disposing of them, and also from selling, publishing, or printing the descriptive catalogue in the bill mentioned or any work being or purporting to be a catalogue of the said etchings, and that the copies of the catalogue in the possession of the defendants might be given up to the plaintiff. An injunction was immediately granted against Strange until he had answered the bill, or the court should make order to the contrary, which injunction was afterwards extended to the other defendants. Strange subsequently put in an answer denying that he had in any manner, either surreptitiously or otherwise, obtained any impressions of the etchings or copies of them. He stated that he believed that Judge purchased certain impressions of the etchings from Middleton; that Judge had proposed to him to exhibit them if her Majesty and the Prince did not object; and that he then believed that the impressions had not been improperly obtained; that Judge afterwards wrote the catalogue, which Strange printed, but struck off fifty-one copies only, and then broke up the type; that this catalogue had never been exposed for sale, and that as soon as he learnt that the exhibition was disapproved of by the Queen and the Prince, he determined to abandon the scheme, and had offered to give up all copies of the catalogue in his possession if the bill were dismissed against him and his costs paid, but that the solicitor for the plaintiff refused to pay the defendant's costs. He insisted by his answer that, as a matter of strict right, he was entitled to publish the catalogue; and so far as the injunction

related to the publication of the catalogue he moved to dissolve it before Vice-Chancellor Knight-Bruce. It was contended by the defendants that a man acquiring knowledge of another man's property without his consent, is not by any rule or principle which a Court of Justice can apply—however secretly that other man may have kept or endeavour to keep his property—forbidden, without consent, to communicate or publish that knowledge to the world, to inform the world what the property is, or to describe it publicly, whether orally or in print or writing. That there were distinct properties, independent of each other, in the owner of portraits; first, there was the right of property in the canvas; secondly, in the face that adorned the canvas; thirdly, the knowledge of the existence of what he possessed. That supposing that the owner of a collection of pictures allowed the public on certain days to view his collection, and by this means one of the visitors acquired a knowledge of the paintings, the same as the owner, that such person had in the absence of contract to the contrary a right to make use of that knowledge. It was admitted that he might be restrained from using the form, but contended that he could not be restrained from describing the attributes created by the form. That there was no greater right of property in the knowledge, in the owner of the collection, than in any stranger who might have had access to them. But both the Vice-Chancellor Knight-Bruce, in the first instance, and Lord Cottonham, on appeal, refused to give effect to this argument, and an injunction was granted both on the ground of infringement of the plaintiff's proprietary rights in the copyright and upon the ground of breach of confidence.

This case is illustrative of many others. In the case of *Webb v. Rose* (*p*) the plaintiff had his "Precedents of Conveyancing" stolen out of his chambers and printed; and in the case of *Forrester v. Walker* (*q*) he had his notes copied by a clerk of a gentleman to whom he had lent them, and printed. In *Macklin v. Richardson* (*r*) the defendant had employed a shorthand writer to take down the farce of "Love à la mode," upon its performance at the theatre, and inserted one act in a magazine, giving notice that the second act would be published in the magazine of the following month. In all these cases the Court granted injunctions (*s*). Other cases.

(*p*) (1732), cited Ambl. 695.

(*q*) (1741) *ib.*

(*r*) (1770), Ambl. 694.

(*s*) See also *Turner v. Robinson* (1860), 10 Ir. Ch. Rep. 121, 510; *Southey v. Sherwood* (1817), 2 Mer. 435; *Gee v. Pritchard* (1818), 2 Swans. 402.

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If a person lends his manuscript to another there will generally be implied a contract that the latter shall not publish it (*t*). A servant may not publish information which he has been employed to obtain for his master (*u*), nor use for his own purpose copies of documents belonging to his master (*x*), for to do so would be a breach of the confidence reposed in him. A pupil reading in a barrister's chambers may be allowed to take copies of precedents for his own use, but not for publication (*y*). In the case of *Gilbert v. Star Newspaper Co.* (*z*), Mr. W. S. Gilbert obtained an *ex parte* injunction restraining the publication of the plot of his play, "His Excellency," then being rehearsed, but not yet publicly performed, on the ground that the defendants had obtained their information with the knowledge that it was given them in breach of confidence.

Again, if a person sits for his portrait to a photographer, there will usually be implied a contract on the part of the latter that he will not sell or exhibit copies without the sitter's consent (*a*); and a contract may be implied on the part of persons attending private lectures not to take them down and publish them (*b*).

The limits of the doctrine.

In all the above cases it will be found that the defendants either themselves committed a breach of contract or confidence, or were fully aware of all the circumstances. The weakness of the remedy for such a breach lies in the fact that it probably could not be pursued against a purchaser for value without notice. If A. steals B.'s manuscript and sells it as his own work to C. who publishes it innocently (*c*), A. can hardly, it is thought, allege any breach of trust or confidence against C. (*d*), although ignorance is no defence to an action for breach of the proprietary right conferred by *copyright* (*e*).

(*t*) *Duke of Queensberry v. Shebheard* (1758), 2 Eden, 329; and see as to letters, *post*, pp. 44, 45.

(*u*) *Lamb v. Evans*, (1893) 1 Ch. 218; *Merryweather v. Moore*, (1892) 2 Ch. 518; *Robb v. Green*, (1895) 2 Q. B. 315; *Measures, Ltd. v. Measures*, (1910) 2 Ch. 248; *Amber Size Co. v. Menzel*, (1913) 2 Ch. 239.

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

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

(*z*) (1894), 11 T. L. R. 515; cf. *Exchange Telegraph Co. v. Central News*, (1897) 2 Ch. 48.

(*a*) *Pollard v. Photographic Co.* (1888), 40 Ch. D. 345. Circumstances may, of course, rebut this presumption: *Ellis v. Marshall* (1895), 64 L. J. Q. B. 757; and see "Artistic Copyright," Chapter IV., *post*.

(*b*) *Caird v. Sime* (1887), 12 A. C. 326.

(*c*) *I.e.*, without notice express or implied of the circumstances.

(*d*) *Philip v. Pennell*, (1907) 2 Ch. 577.

(*e*) *Mansell v. Valley Printing Co.*, (1908) 2 Ch. 441; but A. might sue for trespass, *ante*, p. 23.

On the other hand, the right to restrain the publication of a work upon the ground that to do so would be a breach of trust or confidence is, it is submitted, a larger right than the proprietary right of copyright. There can be no copyright in ideas or information, and it is no infringement of copyright to adopt the ideas of another or to publish information received from another, provided there is no copying of the language in which those ideas have, or that information has, been previously embodied (*f*); but if the ideas or information have been acquired under such circumstances that it would be a breach of faith to publish them, the Courts will grant an injunction against any person who does so. Thus, in *Exchange Telegraph Co. v. Gregory & Co.* (*g*) 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 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 granted an injunction restraining the defendants from infringing the plaintiffs' 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 is one of those cases in which it is difficult to say how far the decision was based upon infringement of common law copyright, and how far upon the breach of confidence, but the point of distinction between this case and the earlier case of *Chilton v. Progress Printing Co.* (*h*) seems to be that in the latter case there were no circumstances of bad faith. 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

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Information cannot be used in breach of confidence.

(*f*) *Ante*, p. 2; *Hollinrake v. Truswell*, (1894) 3 Ch. 420; *Walter v. Steinkopff*, (1892) 3 Ch. 489; *Chilton v. Progress Printing Co.*, (1895) 2 Ch. 29; *Rees v. Robbins*, Times, 4th July, 1914; but see *Corelli v. Gray* (1913), 30 T. L. R. 116.

(*g*) (1896) 1 Q. B. 147.

(*h*) (1895) 2 Ch. 29.

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aces 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.

The case of *Exchange Telegraph Co. v. Gregory & Co.* was followed in the case of *Exchange Telegraph Co. v. Central News (i)*, 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 & 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. . . . I think that it is established as against the syndicate that they published for their own benefit information acquired from or through some subscriber to the plaintiffs, with knowledge or notice on the part of their manager that it was acquired contrary to the terms imposed on the plaintiffs' subscribers." An injunction was accordingly granted.

Philip v. Pennell.

The point now contended for was recognised by Kekewich, J., in the case of *Philip v. Pennell (k)*. There the plaintiffs sought to restrain the defendants from publishing letters written by Mr. Whistler, the artist, or the information contained in them, in a biography of Mr. Whistler proposed to be published by the defendants. Inasmuch as the letters were in the lawful possession of the defendants, Kekewich, J., refused to prohibit them from making use of the information they might derive from a perusal of the letters, although he indicated that he might have arrived at a different conclusion if there had been any circumstances which

(i) (1897) 2 Ch. 48; *Exchange Telegraph Co. v. Howard* (1906), 22 T. L. R. 374.

(k) (1907) 2 Ch. 577.

would have rendered it a breach of confidence on the part of the defendants to make use of that information.

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Finally, in the recent case of *Amber Size Co. v. Menzel* (l) the Court granted an injunction against a dismissed servant of the plaintiff company, restraining him from making any use of information as to a secret process of manufacture obtained in the course of his confidential employment with the plaintiffs, although the defendant had not abstracted anything tangible, such as a list of customers, and was not proposing to publish the information he had gained, but simply to use the same for the benefit of a rival firm into whose employment he had subsequently entered. Mr. Justice Astbury granted an injunction in general terms restraining the defendant from using the whole or any material part of the plaintiffs' secret method or process of manufacture, the knowledge of which was acquired or obtained by him during his employment by the plaintiffs, and from disclosing to any other person, company, or firm any information with respect thereto (m).

*Amber Size
Co. v. Menzel.*

We now propose to consider what is meant by "publication" of a work; in other words, the circumstances under which a work ceases to fall within the class of unpublished works and becomes a published work. By sect. 1, sub-sect. 3 of the Act it is provided that, "for the purposes of this Act, 'publication' in relation to any work means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art, but (*sic*), for the purposes of this provision, the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works." It is also enacted by sect. 35, sub-sect. 2, that, "for the purposes of this Act (other than those relating to infringements of copyright) a work shall not be deemed to be published or performed in public, and a lecture shall not be deemed to be delivered in public, if published, performed in public, or delivered in public, without the consent or acquiescence of the author, his executors, administrators, or assigns." And, inasmuch as a published work is only entitled to copyright under the Act of 1911 if it is first published within the parts of His Majesty's dominions to which that Act ex-

What is
meant by
"publica-
tion."

(l) (1913) 2 Ch. 239; see also *Litholite v. Travis* (1913), 30 R. P. C. 266, 532.

(m) See also *Lord Ashburton v. Pape*, (1913) 2 Ch. 469.

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tends (*n*), it is provided by sub-sect. 2 of sect. 35, that "for the purposes of this Act a work shall be deemed to be first published within the parts of His Majesty's dominions to which this Act extends, notwithstanding that it has been published simultaneously in some other place, unless the publication in such parts of His Majesty's dominions as aforesaid is colourable only and is not intended to satisfy the reasonable requirements of the public, and a work shall be deemed to be published simultaneously in two places, if the time between the publication in one such place and the publication in the other place does not exceed fourteen days or such longer period as may, for the time being, be fixed by Order in Council."

There must be an issue of "copies."

Inasmuch as publication is to mean the issue of "copies" to the public, it follows that a work cannot be orally published (*o*), or that there can be no publication of a work of which there only exists a single example. The writer of a literary work may permit his manuscript to be viewed or read by any number of persons without thereby publishing his work; it is even doubtful whether an artist can "publish" his work by making a single *replica*, for the Act speaks of "copies." The only way, therefore, in which a painting or drawing can, in an ordinary way, be published, would seem to be by the publication of photographs or engravings of the original work, and it is to be noticed that the issue of photographs and engravings of works of sculpture and architectural works of art are not to be deemed publication of such works. The reason for distinguishing in this respect works of sculpture and architecture from other artistic works is not very apparent; and if the distinction lies between works in the round and works in the flat, it is one which is not very convincing (*p*).

Works of sculpture and architecture.

The only way, therefore, in which works of sculpture can be published will probably be by means of castings from the original work. Moreover, it would seem that sculptors and architects can never object to their unpublished works being engraved or photographed, except upon the ground of a breach of confidence, for, although one of the proprietary rights conferred upon authors of

(*n*) Sect. 1 (1); sect. 29 (1) (a).

(*o*) In this respect the law has been altered by the Act of 1911: see *Boucicault v. Chatterton* (1878), 5 Ch. D. 267; *Walter v. Lane*, (1900) A. C. 539; *Caird v. Sims* (1887), 12 A. C. 326. It is submitted, therefore, that although the section only states that performance in public of a "dramatic or musical work" is not publication, public performance of a literary work, if public performance of such a work be possible, is not publication of the work.

(*p*) It may be said that works of sculpture and architecture are generally to be found in public places, but sect. 2 (1) (iii) expressly permits photographs, &c. of such works if "permanently" situate in public places and buildings.

unpublished works is "to publish the work or any substantial part thereof" (*q*), the issue of photographs or engravings of works of sculpture and architecture is not "publication," and therefore the proprietary right referred to is not infringed.

The question may, perhaps, arise as to whether what would certainly be a "copy" of a work for the purposes of infringement of copyright is a "copy" for the purposes of publication. For instance, if A. were to translate his manuscript work and publish the translation before the original, would this be a publication of the original? Upon the whole, it is submitted that it would be so, upon the same principle that the publication of photographs of a painting would be a publication of the painting itself, but, of course, if, say, specimen pages of a literary work were distributed prior to the entire work being published, this could not be more than a publication of the specimen pages. So, the publication of a pianoforte arrangement of an opera, or that of a few of the orchestral parts, would not be a publication of the opera itself (*r*). Again, although it is now an infringement of the copyright in a work to make any record, perforated roll, or other contrivance by means of which the work may be mechanically performed or delivered (*s*), the publication of records or rolls would not be a publication of the original work, for such records or rolls are not "copies" of that work (*t*).

In order that there shall be a publication of a work, not only must the copies be made, but copies must be "issued" to the "public." Clearly, issue for the purposes of sale is not essential, although, no doubt, if copies are issued for such a purpose, this would amount to publication (*u*). A presentation of copies on the part of the author to individuals, or to a limited class, or even the sending of advance copies to the press for review would not, it is thought, be publication, but gratuitous circulation generally would seem to be so (*x*). Thus, in *Prince Albert v. Strange* (*y*) it appeared that her late Majesty Queen Victoria and the late Prince Consort had given to their intimate friends lithographic copies of drawings and etchings which they had made for their own amusement. This was held to be a private circulation of copies, and hence not a publication.

A "copy" for purposes of publication may differ from a "copy" for purposes of infringement.

When a work is "issued" to the public.

(*q*) Sect. 1 (2).

(*r*) *Boosey v. Fairlie* (1877), 7 Ch. D. 301.

(*s*) Sect. 1 (2) (d).

(*t*) *Boosey v. Whight*, (1900) 1 Ch. 122; *Monckton v. Gramophone Co.* (1912), 106 L. T. 84.

(*u*) *White v. Geroch* (1819), 2 B. & Ald. 298.

(*x*) *Novello v. Sudlow* (1852), 12 C. B. 177.

(*y*) (1849), 2 De G. & Sm. 652.

CAP. I.

Circulation among pupils of a system of book-keeping.

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

Publication not a question of number of copies sold.

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

Public performance is not publication.

The performance in public of a dramatic or musical work, and the delivery in public of a lecture, are not publication of the work or lecture (*a*). This would have been reasonably clear without any express provision to that effect, for obviously a performance is not an "issue of copies," but it was perhaps as well to emphasise the point, because in this respect the Act of 1911 effects an alteration in the law, it having been held under the old law that a dramatic work was published by being publicly performed (*b*).

(*z*) *Bartlett v. Crittenden* (1849), 4 McLean, 300; 5 *ib.* 32.

(*a*) Sect. 1 (3).

(*b*) *Boucicault v. Delafield* (1863), 1 H. & M. 597; *Boucicault v. Chatterton* (1878), 5 Ch. D. 267.

Neither is the exhibition in public of an artistic work (c), or the construction of an architectural work of art, publication of it. It was held, under the old law, that exhibition of a painting in a public gallery, the rules of which forbade the public to copy, was not a publication of the work (d).

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Nor public exhibition.

A British subject, by first publishing his work in a foreign country in the absence of international agreement, loses his British copyright, but not if it is "simultaneously" published in Great Britain and the foreign country; and in order that the publication shall be "simultaneous" the difference between the actual dates of publication must not exceed fourteen days, and the publication in Great Britain must not be "colourable only," but "intended to satisfy the reasonable requirements of the public" (e). The question as to what is a "colourable" publication arose in the case of *Francis, Day & Co. v. Feldman & Co.* (f). There the plaintiffs were the owners of the copyright in a song called "You made me love you (I didn't want to do it)," which was composed by an American author, who assigned his copyright in it to a firm in New York. This firm published the song simultaneously in New York and Canada on the 5th May, 1913. In April, 1913, they sent twelve copies of the song to the plaintiffs with instructions to copyright the song in the United Kingdom on the 5th May, 1913. On that day the plaintiffs sent one copy to the British Museum, and one copy they filed at their London office. They also sent four copies to the agent for receiving copies for the University libraries, and the remaining six copies they exposed for sale on the counter in the retail department of their business premises in London. They did not advertise the song, and there was no immediate demand for it, but subsequently it became a great success, made large sales, and the plaintiffs acquired the copyright for the United Kingdom. It was held that the publication in England on the 5th May, 1913, was not "colourable only," and that it was sufficient to show that there was an intention to satisfy the demands of the public if such demand should arise.

Simultaneous publication.

We have already pointed out (g) that an unpublished work may for the time being be unprotected in England which might at a subsequent date become entitled to protection. For instance, apart

The effect of subsequent acquisition of copyright for an unprotected work.

(c) Or, presumably, a copy of the work. It seems to follow that mere exhibition of an artistic work is not an infringement of copyright.

(d) *Turner v. Robinson* (1860), 10 Ir. Ch. 121, 510.

(e) Sect. 35 (3).

(f) (1914) W. N. 258.

(g) *Ante*, p. 27.

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from international arrangements a foreign artist does not, by exhibiting his painting in England, become entitled to copyright there. Until he has issued copies to the public, any person is at liberty (unless acting in breach of confidence) to photograph, engrave, or otherwise copy, the original work, and to sell those copies in England. This, again, being done without the consent of the artist, does not "publish" the work (*h*), and, therefore, if the artist subsequently himself issues copies to the public he thereby gains copyright in his original. What, then, is the position of the first copyist? Clearly, he cannot be sued for piracy merely because he has in his possession copies of the work, for those copies were lawfully made, and the subsequent acquisition of copyright by the author cannot, *primâ facie*, have a retrospective effect so as to render an act unlawful which was perfectly lawful at the time it was committed. It is equally clear that the copyist cannot make or print any further copies, but it is not so clear whether he can dispose of copies which he has on hand at the date when the artist acquired his copyright. It is, however, submitted that the first copyist does not infringe the copyright of the artist by selling or otherwise disposing of copies lawfully made by him. It is, no doubt, provided by sect. 2 (2) of the Act that copyright shall be deemed to be infringed by a person who (*inter alia*) sells or exposes for sale any work which to his knowledge infringes copyright, but by sect. 35 (1) an infringing copy is defined as meaning any copy "made or imported in contravention of the provisions of this Act." In the case supposed, the copies were not "made" in contravention of the provisions of this Act, and it is submitted that it follows that the copies lawfully made may be disposed of without exposing the copyist to an action for infringement of copyright. The case seems to be somewhat analogous to the case of a person who has assigned his copyright, or granted a licence to publish for a term which has expired. It was held, under the old law, that an assignor could dispose of copies manufactured before the date of his assignment (*i*), and that a licensee could do the same with regard to copies manufactured before his licence ran out (*j*). In the latter case Vice-Chancellor Wood remarked "the Copyright Acts were directed against unlawful printing; and when, as in this case, the defendant had acquired the right of lawfully printing the work, he was at liberty to sell at any time what he had so printed." No doubt, the *dicta* in the recent case of

(*h*) Sect. 35 (2).

(*i*) *Taylor v. Pillow* (1869), L. R. 7 Eq. 418.

(*j*) *Howitt v. Hall* (1862), 6 L. T. 348.

Monckton v. Pathé Frères (*k*), in which it was held that gramophone records lawfully made could not be lawfully sold without payment of royalties, are contrary to the view here expressed, but sect. 35 (1) does not appear to have been called to the attention of the Court. It is, no doubt, true, as the Lords Justices stated, that the making of an infringing copy and the selling of an infringing copy are two distinct breaches of the Act, but before a person can be held liable for the second breach it must be shown that the copy he sells is an "infringing copy" within the meaning of the Act (*l*).

Two classes of works which will frequently remain unpublished call for some special observations, namely, letters and lectures.

It is clear that a letter is an "original literary work," and therefore entitled to copyright. It is also clear that the writer of an ordinary private letter does not by sending the same to his correspondent thereby publish the letter, although it would be different if he wrote his letter to a newspaper. Under the old law, it was constantly affirmed that the copyright in a letter under normal circumstances remained in the writer, but that the ownership of the paper upon which the letter was written passed to the receiver (*m*). The fact that the letters are of no literary value is quite immaterial (*n*). From the general statement above made, exceptions might arise in special instances, such as in the case of letters written by an agent to or for his principal, and other cases where the conditions indicated that the property in the form or expression was intended to be in another than the writer. Thus, it was held that the letters which an officer of an insurance company had written in the discharge of his official duties became the property of the company (*o*). "If the solicitor of an assurance company, established in London," said the Master of the Rolls in the case cited, "by the direction of the directors, wrote a letter to one of the shareholders in the country, it is clear that such letter is not the property of the solicitor, and that he cannot

Copyright
in letters.

(*k*) (1914) 1 K. B. 395.

(*l*) It is not suggested that the actual decision in this case was wrong, having regard to the special provisions of the Act relating to mechanical contrivances. The case will be more fully considered in the Chapter upon "Mechanical Contrivances," *post*.

(*m*) *Pope v. Curl* (1741), 2 Atk. 342; *Oliver v. Oliver* (1861), 11 C. B. N. S. 139; *Howard v. Gunn* (1863), 32 Beav. 462; *Lytton v. Devoy* (1884), 54 L. J. Ch. 293; *Labouchere v. Hess* (1898), 77 L. T. 559; *Macmillan v. Dent*, (1907) 1 Ch. 107; *Philip v. Pennell*, (1907) 2 Ch. 577. In *Labouchere v. Hess*, Mr. Justice North did not consider it clearly established by the cases that the property in the paper is in the receiver, but it is thought that there really is no doubt upon the point.

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

(*o*) *Howard v. Gunn* (1863), 32 Beav. 462.

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say that the company have not a right to publish it. Take it a step further, and assume that the solicitor wrote a letter, but not by the direction or on behalf of the directors, though it had all the appearance of being written on their behalf and by their direction. Thus, if it were written to a person who proposed to take shares in the company, and it related to the affairs of the company, and contained authoritative information on behalf of the company in answer to an application for shares, and the person who receives it treats it as such, and sends back to the company, objecting to its contents, shall the solicitor be allowed to complain of its publication, and to insist that it is a private letter, though it appears to be written on behalf of the directors? The answer is, if that be so, it ought not to have been written. It has all the appearance of having been written by the plaintiff on their behalf, and Jamieson [the person to whom it was written] so treats it, for he writes to the manager in answer to it. Can the plaintiff be allowed to say that the company have no right to publish it? and if they have, is not the defendant entitled, as regards the plaintiff, to bring it forward? It is obvious that this was not a private letter, and was not intended to be a private letter."

Under the
Act of 1911.

The Copyright Act, 1911, has made no alteration in the law as to the proprietorship of the copyright in a letter (*p*), and in the paper upon which the letter is written, except that if a letter is composed by A. on behalf of B., the copyright will only belong to B. if A. is under a contract of service or apprenticeship (*q*). Although a solicitor is not generally under any contract of service with his employer, the actual decision in *Howard v. Gunn* would be the same under the new law, for the solicitor could not, under the circumstances, object to the publication by the company—his consent would be implied (*r*).

Relative
rights of
writer and
receiver of
a letter.

The relative rights of the writer and the receiver of a letter must, however, vary under different circumstances. If the letter was sent with a request for return of the manuscript, the property in the paper would not pass to the recipient: if the letter were marked "private and confidential," this also would be a matter

(*p*) The composer of the letter is clearly its author (sect. 5 (1)).

(*q*) Sect. 5 (1) (b).

(*r*) Sect. 2 (1). See Chapter "Assignment of Copyright," *post*. The Act of 1911 has also incidentally overruled the case of *Maomillan v. Dent* ((1907) 1 Ch. 107), where it was held, upon the peculiar wording of sect. 3 of the Literary Copyright Act, 1842, that the copyright in letters first published after the writer's death vested in the owners of the manuscript, *i.e.*, the paper upon which the letters were written. The case did not decide that the executors of the deceased writer might not, under some circumstances, have restrained the publication on the ground of breach of confidence.

which would have to be regarded. In fact, ordinary correspondence will generally be conducted upon the understanding that it shall not be published, and, if it were published, the writer of the letters would not require to rely upon his copyright at all, but could restrain the publication as a breach of confidence (s). There have been many cases in which injunctions have been granted upon this ground (t). On the other hand, circumstances may imply a licence to publish. The case of a letter to a newspaper is an extreme example, in which case not only does the newspaper obtain the right to publish the letter, but also the right to alter it, so long as the alterations are not of a nature to affect the credit or literary reputation of the writer (u). Again, a licence to publish commercial letters will be more readily implied than in the case of private correspondence (v). It would seem that letters may be published if the object of doing so is to vindicate the character of the receiver (x); but not for the purpose of representing to the public as true that which the receiver has, in legal proceedings upon that very question, admitted to be false (y). Further, the person lawfully in the possession of a letter is entitled to make use of the information obtained from a perusal of it without copying its actual language, unless there are any circumstances which may render it a breach of trust or confidence for him to do so (z).

The position of the receiver of a letter is that, in the absence of some limitations, imposed either by the subject-matter of the letter or the circumstances under which it is sent, he has an unqualified title to the material upon which it is written, and he can deal with it as absolute owner, subject only to the proprietary right retained by the author and his representatives to the publication or non-publication of the ideas in their particular verbal expressions. The receiver is under no obligation to preserve the letter for the benefit of the writer: he is at liberty to destroy it,

The right of the receiver of a letter to the material upon which it is written.

(s) Sect. 31.

(t) *Pope v. Curl* (1741), 2 Atk. 342; *Thompson v. Stanhope* (1774), Amb. 737; *Granard v. Dunkin* (1809), 1 Ball & B. 207; *Gee v. Pritchard* (1818), 2 Swans. 418; *Palin v. Gathercole* (1844), 1 Coll. C. C. 565; but see *Perceval v. Phipps* (1813), 2 V. & B. 19.

(u) *Springfield v. Thame* (1903), 89 L. T. 242, in which case it was held that the alterations were such as to make the editor the "author" of the communication. Cf. *Lee v. Gibbings* (1892), 9 T. L. R. 773; *Hogg v. Kirby* (1803), 8 Ves. 215.

(v) *Perceval v. Phipps* (1813), 2 V. & B. 19.

(x) *E. of Lytton v. Drey* (1884), 52 L. T. 121; *Labouchere v. Hess* (1898), 77 L. T. 559; *Tolsom v. Marsh*, 2 Story (Amer.), 100; *Howard v. Gunn* (1863), 32 Beav. 462.

(y) *Palin v. Gathercole* (1844), 1 Coll. C. C. 565.

(z) *Philip v. Pennell*, (1907) 2 Ch. 577; *Labouchere v. Hess*, *supra*.

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Power of
government
to publish or
withhold
letters.

or to sell it for waste paper, or for the value of the autograph signature, or for any other purpose, if he pleases (a).

The government has a right, upon grounds of public policy, to publish or to withhold all letters addressed to the public offices (b). This exception in favour of the government is not supposed to make such communications common property, to be published by any person who may see fit, without the sanction of the government, nor to take away the property of the writers or their representatives. "In respect to official letters addressed to government," observed Mr. Justice Story in *Folsom v. Marsh* (c), "or any of its departments, by public officers, so far as the right of the government extends from principles of public policy to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful whether any public officer is at liberty to publish them, at least in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be right, and even the duty, of the government, to give them publicity, even against the will of the writers. But this is an exception in favour of the government, and stands upon principles allied to, or nearly similar to the right of private individuals, to whom letters are addressed by their agents, to use them, and publish them, upon fit and justifiable occasions. But assuming the right of the government to publish such official letters and papers, under its own sanction, and for public purposes, I am not prepared to admit that any private persons have a right to publish the same letters and papers without the sanction of the government for their own private profit and advantage. Recently the Duke of Wellington's despatches have, I believe, been published by an able editor, with the consent of the noble duke and under the sanction of the government. It would be a strange thing to say, that a compilation involving so much expense and so much labour to the editor in collecting and arranging the materials, might be pirated and republished by another bookseller, perhaps to the ruin of the original publisher and editor. Before my mind arrives at such a conclusion, I must have clear and positive lights to guide my judgment, or to bind me in point of authority."

(a) *Baker v. Libbie* (1912), an American case reported in the Annual Report of the Register of Copyrights for the years 1912, 1913 (Letters of the late Mrs. Eddy, founder of Christian Science).

(b) Curtis on Copyright (Amer.), 98.

(c) 2 Story (Amer.), 100.

The protection accorded to lecturers was under the law prior to the Copyright Act, 1911, of a very unsatisfactory character (*d*), and that Act is not so clear upon the rights of lecturers as might be desired. Lectures are certainly intended to be protected, for sect. 1, sub-sect. (2), of the Act states it to be an infringement of copyright "in the case of a lecture to deliver the work or any substantial part thereof in public," and a "lecture" includes an address, speech, or sermon (*e*). A lecture, therefore, is doubtless intended to fall within the class of "original literary works" upon which copyright is conferred by sect. 1, sub-sect. (1), and it is submitted that there is no difficulty in so classifying the work, even although it be an entirely extempore speech of which no manuscript copy or note exists. For the purposes of acquisition of British copyright a speech is presumably "made" at the place where it is first delivered, for, even although it may have previously been written out in manuscript, it does not exist, *quâ* speech, until it has been delivered (*f*). The copyright in a speech will be infringed by being publicly repeated or by a report being taken of it, for "copyright" means the "sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever" (*g*). The only doubt seems to be as to whether there is any possible way of "publishing" a lecture. As we have seen, "publication" for the purposes of the Act "means the issue of copies of the work to the public, and does not include . . . the delivery in public of a lecture" (*h*). Does, then, a speaker "publish" his lectures by printing them and issuing them in book form?—in other words, is his book a "copy" of his speeches? In the case of *Hanfstaengl v. Empire Palace* (*i*), Mr. Justice Stirling expressed an opinion to the effect that if at a public meeting some portion of a copyright work was recited or read from an authorised copy of a work, that would be no infringement of the rights of the owner of the copyright, presumably upon the ground that the recitation would not be a "copying" of the written work. This was a mere dictum, but, if correct, the converse would appear to be equally true, that a written report of a

(*d*) *Ante*, p. 18.

(*e*) Sect. 35 (1).

(*f*) Cf. the converse case of a speech reduced to writing, *Walter v. Lane*, (1900) A. C. 539. Upon a question of infringement, therefore, it may be important to consider whether the infringement owes its origin to the manuscript or the oral delivery in public.

(*g*) Sect. 1 (2). In the case of *Walter v. Lane*, *supra*, where a *Times* reporter was held to have the copyright in certain speeches of Lord Rosebery, the latter did not, and probably could not, claim any copyright in his speech.

(*h*) Sect. 1 (3).

(*i*) (1894) 3 Ch. 109, 116.

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speech is not a "copy" of the speech itself (*k*). It is therefore possible that, apart from international arrangement, a foreigner cannot obtain copyright in an extempore speech delivered in public unless he was resident or domiciled (*l*) in Great Britain at the time when he delivered his speech (*m*). The point, however, will not generally be of any great importance, because the delivery of the speech is not publication of it, and therefore if it be subsequently printed and published in England it will at least acquire copyright as an original literary work (*n*).

Newspaper reports of public lectures.

In favour of newspapers, it is provided (*o*) that the publication in a newspaper of a report of a lecture delivered in public is not to be an infringement of copyright, unless the report is prohibited by a conspicuous written or printed notice, affixed before, and maintained during, the lecture at or about the main entrance of the building in which the lecture is given, and, except whilst the building is being used for public worship, in a position near the lecturer. Even if such notice is affixed a newspaper summary may be given (*p*).

Of course, if a speech or lecture is not delivered in public there may be an express or implied obligation on the part of those who hear the speech or lecture not to publish it, in which case publication would—apart altogether from copyright—be restrained by injunction (*q*). If, however, pupils are admitted to a lecture given for their instruction, they may go to the extent, if desirous and capable, of taking down the whole by means of shorthand, for the purposes of their own information; but they may not publish (*r*).

(*k*) And cf. *Reade v. Conquest* (1861), 9 C. B. 755 (dramatization of a novel).

(*l*) As to the meaning of these expressions, see *ante*, p. 28.

(*m*) Sect. 1 (1) (b).

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

(*o*) Sect. 2 (1) (v). See Chapter "Newspapers," *post*.

(*p*) Sect. 2 (1) (i), (v).

(*q*) *Nicols v. Pitman* (1884), 26 Ch. D. 374; *Caird v. Sime* (1887), 12 A. C. 326.

(*r*) Sect. 2 (1) (i). In an American case, *Keene v. Kimball*, 16 Gray (82 Mass.) 551, Hoar, J., said: "The student who attends a medical lecture may have a perfect right to remember as much as he can, and afterwards to use the information thus acquired in his own medical practice, or to communicate it to students or classes of his own, without involving the right to commit the lecture to writing, for the purpose of subsequent publication in print or by oral delivery. So any one of the audience at a concert or opera, may play a tune which his ear has enabled him to catch, or sing a song which he may carry away in his memory, for his own entertainment or that of others, for compensation or gratuitously, while he would have no right to copy or publish the musical composition."

CHAPTER II.

THE SUBJECTS OF LITERARY COPYRIGHT.

By sect. 1 of the Copyright Act, 1911, copyright extending throughout the parts of His Majesty's dominions to which the Act extends (a) is granted to (*inter alia*) all "original literary works" first published within such parts of His Majesty's dominions as aforesaid (b). By sect. 35 literary works are defined as including "maps, charts, plans, tables and compilations."

Copyright Act, 1911, s. 1.

It will be noticed that the Act requires that the work shall be "original." The Literary Copyright Act, 1842 (c), did not expressly require any originality, but at the same time it was a debateable point whether, under that Act, any and, if so, what, degree of originality was necessary.

Originality.

In the case of *Walter v. Lane* (d), the point arose whether a reporter is entitled to copyright in his verbatim report of a public speech. The plaintiffs were the proprietors of the *Times*, and the defendant published a book called "Appreciations and Addresses delivered by Lord Rosebery," which contained practically verbatim copies of the reports in the *Times* of five speeches delivered by Lord Rosebery during the years 1896 to 1898. The reports of these speeches had been obtained in the usual way by the *Times* sending their reporters to the meetings, the speeches being taken down verbatim in shorthand and transcribed. The defendant admitted that he had used in preparing his work cuttings from the *Times*, and in four cases the speeches appeared in his book

Reports of Lord Rosebery's speeches.

(a) The Act extends throughout the King's Dominions with the exception of "self-governing dominions" (sect. 25 (1)). The self-governing dominions include the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa and Newfoundland (sect. 35 (2)). As regards the self-governing dominions the Act extends to them if by their legislature they declare the Act to be in force therein (sect. 25 (1)). At the time of writing the Act does not extend to Canada or the Union of South Africa. The Act has also been extended to other possessions of the Crown, including Cyprus, by Order in Council: see *post*, "Colonial Copyright," Part IV., Chapter II.

(b) As to what is "publication," see *ante*, p. 37.

(c) 5 & 6 Vict. c. 45.

(d) (1900) A. C. 539.

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without any alteration whatever. Lord Rosebery made no claim to copyright in any of the speeches, and the *Times* brought their action claiming a declaration that they were entitled to the copyright of the reports in question and an injunction to restrain the defendant from further publishing any book containing copies of them. North, J., granted an injunction, but, upon appeal, the Court of Appeal reversed his decision, holding that the Copyright Act was passed to protect authors, not reporters, and that shorthand reporters are not authors. "If," said Lindley, J., "the reporter of a speech gives the substance of it in his own language: if, although the ideas are not his, his expression of them is his own and not the speaker's, with immaterial differences, the reported speech would be an original composition, of which the reporter would be the author, and he would be entitled to copyright in his own production. . . . But we have not to deal with speeches re-cast by the reporter. He has reproduced to the best of his ability, not only the ideas expressed by the speaker, but the language in which the speaker expressed those ideas. In other words, we are dealing with the most accurate report of the speaker's words which the reporter could make. No doubt it requires considerable education and ability to make a good report of any speech. But an accurate report *is not an original composition*, nor is the reporter of a speech the author of what he reports" (e).

The plaintiffs thereupon appealed to the House of Lords, and were successful in obtaining a reversal of the decision of the Court of Appeal. In the course of his judgment in the House of Lords, Lord Halsbury, L. C., made the following remarks: "I observe that the Court of Appeal introduces the words 'original composition' as if those were the words of the statute; and at another part of the judgment it is said that 'the report and the speech reported are, no doubt, different things, but the author or publisher of the report is not the author of the speech reported, which is the only thing which gives any value or interest to the report.' The sentence is a little difficult to construe, but, as I understand it, it means to convey that the thing to which the statute gives protection must be of some value or interest. Again, I am compelled to point out that such words are not to be found in the statute. The producer of this written composition is, to my mind, the person who is the author of the book within the meaning of the statute, and, as I have pointed out, the words 'original composer' are not to be found in the statute at all; and, as I understand, the

(e) (1899) 2 Ch. 749, 772.

judgment of the Court of Appeal is entirely based on the thing protected being an original composition in the sense that the person who claims the protection of the statute must not have obtained his words or his ideas from somebody else, but must be himself an original author in the sense in which that word is generally used in respect of literary composition" (f). Later on he says: "Though I think in these compositions there is literary merit and intellectual labour, yet the statute seems to me to require neither, nor originality either in thought or in language . . . I do not find the word 'original' in the statute, or any word which imports it, as a condition precedent, or makes originality of thought or idea necessary to the right." In the Lord Chancellor's view copyright "is given by the statute to the first producer of a book, whether that book be wise or foolish, accurate or inaccurate, of literary merit or of no merit whatever" (g). Likewise Davey, L. J., did not think "the fact that the subject-matter of the report had been made public property, or that no originality or literary skill was demanded for the composition of the report, have anything to do with the matter, . . . but it is a sound principle that a man shall not avail himself of another's skill, labour, and expense by copying the written product of it" (h).

It must be clearly understood that the House of Lords did not decide that the reporter obtained the copyright in Lord Rosebery's speeches, but only in the reports of those speeches. Lord Rosebery did not—and, indeed, could not—claim to prevent the publication of his speeches either in newspaper or pamphlet form (i). Any other persons present at Lord Rosebery's meetings were at liberty to take his speeches down in shorthand and each of them to obtain copyright in his original report, but no person was entitled to annex the result of the *Times* reporter's labour. The reporter had added something "original," in that he reduced to writing what previously had only been oral, and that added "something" was considered to be worthy of protection.

The question arises as to whether the Copyright Act, 1911, has altered this decision. It is submitted that it has not. It is true that some of the Lords Justices, in giving their opinions in the case of *Walter v. Lane* (k), laid stress upon the fact that the

Effect of this decision.

Has the Act of 1911 altered the law?

(f) (1900) A. C. 546. 547.

(g) *Ib.* p. 549.

(h) *Ib.* p. 552. *Collis v. Cater* (1898), 78 L. T. 613; see also *Jarrold v. Houlston* (1857), 3 K. & J. 708.

(i) Under the old law it was very difficult to retain any copyright in a speech publicly delivered, see *ante*, p. 18.

(k) *Ubi sup.*

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word "original" did not appear in the Literary Copyright Act, 1842, whereas sect. 1 of the Act of 1911 does expressly state that only "original" works are to be entitled to copyright. The Fine Arts Copyright Act, 1842 (*l*), did, however, contain the word, for copyright was thereby conferred upon "original" paintings, drawings and photographs. It was, nevertheless, decided in *Graves' Case* (*m*) that a photograph of an engraving was an "original" photograph. The insertion of the word in the Act of 1911 (*n*) was simply with a view to preventing any claim being made to copyright in a work which was a mere slavish copy of another, and not so as to require that a work shall manifest literary merit or novelty as a condition of becoming entitled to protection. A photograph is not identical with an engraving, and a written report is not identical with a spoken speech. The reports of Lord Rosebery's speeches were not original in the sense that the words and sentiments were new, but they were original in the sense that, without the aid of the reporter, the report would have had no existence. It is only in this sense, it is submitted, that the Act of 1911 requires a work to be original.

No copyright
in a copy.

The mere copyist of a written document in which no copyright existed had no right to protection under the old law (*o*); and does not acquire it under the new law.

Copyright
in a work
which itself
infringes
copyright.

It is submitted that copyright can be claimed in a work which is a piracy of another copyright work, provided that the piracy is not a mere slavish copy or, possibly, obtained by fraud (*p*). In the case of *Cary v. Faden* (*q*), Lord Eldon, in refusing an injunction to restrain an infringement of the copyright in a road book, appears to have been influenced by the fact that the plaintiff's work was an infringement of the copyright in an earlier work, but it is difficult to see why, in principle, this should affect the right to copyright, so long as the infringer has done independent work. Take, for example, the case of a person who translates a copyright work into another language. Why, on principle, should anyone be at liberty to appropriate the translator's independent labour because his translation was not authorised by the author of the original work, who does not see fit to prevent the publication of the translation? Moreover, the un-

(*l*) 5 & 6 Vict. c. 45.

(*m*) (1869), L. R. 4 Q. B. 715.

(*n*) An effort to strike the word out, made in Committee of the House of Commons, was unsuccessful.

(*o*) See *per James, I. J.*, *Walter v. Lane*, (1900) A. C. at p. 554; *Barfield v. Nicholson* (1824), 2 Sim. & St. 1; *Leslie v. Young*, (1894) A. C. 335.

(*p*) *Slingsby v. Braulford*, (1905) W. N. 122.

(*q*) (1799), 5 Ves. 24.

authorised translation of to-day may become an authorised translation to-morrow. The same argument applies to any unlawful abridgment, collection or compilation, or to an unauthorised photograph of an artistic work.

The argument that a piracy may be entitled to protection as copyright receives support from Art. 2 of the Revised Convention of Berne (*r*), which provides that "translations" are to be entitled to protection as original works, whereas Art. 6 of the original Berne Convention only accorded such protection to "lawful" translations. By deliberately suppressing the word "lawful" in the Revised Convention, the signatories to the Convention—including Great Britain—have signified their intention to protect unauthorised translations—of course, without prejudice to the rights of the original author.

An argument from the Revised Berne Convention.

Although, as we have seen, there can be no copyright in a work which is simply a copy of another, it would appear that very slight independent labour will be sufficient to gain protection for a work. Thus, in a case of *Parry v. Moring* (*s*) the plaintiff published a book entitled "Letters from Dorothy Osborne to Sir William Temple, 1652-54." These letters were, at the time when the plaintiff issued his book, in a private collection, whilst most of them were undated and in old English spelling. The plaintiff had had these letters copied, translated them into modern English spelling, arranged them in the order of date in which he considered they had been written, and published them with notes. Subsequently, the original MSS. were bought by the British Museum authorities, and it was in evidence that they claimed no copyright in these originals. The defendants then published an edition of these same letters, and in their edition the letters were placed in practically the same order as in the plaintiff's. The plaintiff moved for an interlocutory injunction restraining the infringement of his copyright (*t*), and, on the defendants admitting that they had sent the plaintiff's book to their printers, and had the text of the letters printed direct from this, without having taken the trouble to get the letters copied from the originals in the British Museum, the judge expressed such a strong opinion that this method could not be defended, that the defendants sub-

Slight independent labour will be protected.

(*r*) Appendix B., *post*.

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

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

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

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

It has been pointed out that the Act of 1911 expressly includes "compilations" amongst literary works.

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

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

"Gray's Poems."

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

Accounts of natural curiosities, &c.

If a person compiles an account of natural curiosities or of works of art, or of mere matters of statistical or geographical information, his own description may be the subject of copyright. It is equally competent, however, for any person to compile and publish a similar work; but it must be made substantially new and original, like the first work, by resort to the original sources, and must not be simply a copy or adaptation from the other, under the impression that the subject is common (*z*).

Receipt books.

The composing receipts or arranging them in a book will give copyright to the compiler; but the mere collecting them and

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

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

(*y*) *Mason v. Murray*, cited 1 East, 360; *Moffatt & Paige v. Gill* (1902), 84 L. T. 452; 86 L. T. 465.

(*z*) *Hogg v. Kirby* (1803), 8 Ves. 213; *Hotten v. Arthur* (1863), 1 H. & M. 603.

handing them over to a publisher will not (a). And although the mere copying of the work of another will not confer copyright, if there be some new arrangement or classification of the subject, or the copy be at all varied, then a copyright may exist in it, provided the variation be not merely colourable (b).

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

Similitude
between
maps.

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

Component
parts of a
compilation
not pro-
tected apart
from the
arrangement.

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

Mathemati-
cal tables.

Selections of poems or prose compositions, and collections of

Selections of
poems, &c.

(a) *Rundal v. Murray* (1821), Jac. 314, per Lord Eldon; *Matthewson v. Stockdale* (1806), 12 Ves. 270.

(b) *Matthewson v. Stockdale*, *supra*; *Barfield v. Nicholson* (1824), 2 Sim. & St. 1.

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

(d) (1806), 12 Ves. 275; *Wilkins v. Aikin* (1810), 17 Ves. 422.

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

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

(g) *Jamb v. Evans*, (1892) 3 Ch. 462; (1893) 1 Ch. 218; *Moffatt & Paige v. Gill* (1902), 86 L. T. 465.

(h) *Bailey v. Taylor* (1829), 1 Russ. & My. 73.

CAP. II. proverbs, maxims, quotations, hymns, &c., may be the subjects of copyright (*i*).

There can be no copyright in specifications of patents copied at the Patent Office (*k*), but various other compilations have been held entitled to protection—such as a mining report (*l*); a list of registered bills of sale and deeds of arrangement extracted from official sources (*m*); a list of foxhounds and hunting days (*n*); biographical notes of prominent golfers published in a golf annual (*o*); and a list of brood mares with their sires, and a list of stallions with daughters at the stud (*p*). In *Leslie v. Young* (*q*) the appellant had compiled a railway guide affecting the Perth district, and he sought an injunction against the respondents, the publishers of a new Perth railway time-table, to restrain the sale of their time-tables for July, 1891, on the ground of infringement. It appeared that the appellant's time-table consisted of a train service from Perth, selections for this purpose having been made from official time-tables, and also of information as to circular tours convenient to be taken from Perth, which had not merely been selected from official tables, but condensed and arranged. The appellant complained that the respondents, instead of going to the common and public sources for materials, substantially copied both his time-tables and circular tour information, and thus took advantage of his skill and labour in condensing into a small space a huge mass of information. The respondent practically admitted that he had copied the appellant's circular tour information, and in respect of this an injunction was granted, but an injunction was refused in respect of the time-tables, apparently on the ground that the appellant had no copyright therein.

Conclusion
from these
cases.

From the above cases it seems possible to draw the conclusion that the mere process of selecting passages from works readily accessible to the public is not, but that difficulty in obtaining access to the originals or skill manifested in making or arranging the selection is, sufficient to give the character of an "original literary work" to the selection.

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

(*k*) *Wyatt v. Barnard* (1814), 3 V. & B. 77; there being no difficulty in obtaining these and no research needed.

(*l*) *Kenrick v. Danube Collieries* (1891), 39 W. R. 473.

(*m*) *Trade Auxiliary Co. v. Middlesbrough* (1880), 40 Ch. D. 425; *Cate v. Devon, &c. Newspaper Co.*, *ib.* 500; the Court in these cases being of opinion that the plaintiffs had exercised skill as well as industry.

(*n*) *Cox v. Land and Water* (1869), L. R. 9 Ex. 324; *Exchange Telegraph Co. v. Gregory*, (1896) 1 Q. B. 147.

(*o*) *Nisbet v. Golf Agency* (1907), 23 T. L. R. 370.

(*p*) *Weatherby v. International Horse*, (1910) 2 Ch. 297.

(*q*) (1891) A. C. 335.

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

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Tradesmen's catalogues.

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

Grace v. Newman.

The case of *Cobbett v. Woodward* (t) to the contrary effect, where the Court refused protection upon the ground that the work in question was a mere advertisement, was definitely overruled by the Court of Appeal in *Maple v. Army and Navy Stores* (u). In that case the plaintiffs, who were upholsterers, published an illustrated catalogue of furniture, which was duly registered under the Literary Copyright Act as a book. The illustrations were engraved from the original drawings made by artists employed by the plaintiffs, but the work contained no letterpress of such a description as to be the subject of copyright, and it was not published for sale, but was used by the plaintiffs as an advertisement. The defendants published an illustrated catalogue, many of the illustrations in which were copied from those of the plaintiffs' book. It was held by the Court of Appeal (affirming the decision of Vice-Chancellor Hall) that the plaintiffs were entitled to an injunction restraining the defendants from publishing any catalogue containing illustrations copied from the plaintiffs' book, and it was further held that a collection of prints published together in a volume was a book within the meaning of the Literary Copyright Act and the proper subject of copyright, though it contained no such letterpress as could be the subject of copyright, and it made no difference that the book was not published for sale, but only used as an advertisement. "I am not aware," said the Master of the Rolls in his judgment, "that the use to which a proprietor puts his book makes any

Cobbett v. Woodward overruled.

(r) (1863), 1 H. & M. 603.

(s) (1875), L. R. 19 Eq. 623; *Hogg v. Scott*, 18 *id.* 444.

(t) (1874), L. R. 14 Eq. 407.

(u) (1882), 21 Ch. D. 369. *Davis v. Benjamin*, (1906) 2 Ch. 491. is a case to the same effect.

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difference in his rights;” and again, “the weight of authority, is against the doctrine that there cannot be copyright in a book issued as an advertisement, and I cannot see any principle in support of that doctrine.”

Quære
whether this
decision now
holds good.

In the case of *Maple v. Army and Navy Stores*, the work was protected under the Literary Copyright Act, 1842, notwithstanding that, as was assumed in the case, the advertisement contained no such letterpress as could be the subject of copyright, and the Court preferred to grant protection under that Act rather than under the Acts relating to artistic copyright. The ground for this was that the Literary Copyright Act conferred protection upon “books,” and considerable emphasis was laid upon this fact in the judgments delivered in the case. Under the Act of 1911, however, it is not “books,” but “literary works” and “artistic works” that are protected, and it seems very doubtful whether in the case of a catalogue containing no letterpress it ought not to be protected rather as an artistic work than a literary work, but, under whichever category it should be placed, the decision in *Maple v. Army and Navy Stores* is important as indicating that a work is not to be refused protection simply because it is put to use as an advertisement.

Other cases on
catalogues.

In the case of *Maple v. Junior Army and Navy Stores*, as has been pointed out, it seems to have been assumed that there could be no copyright in the letterpress of the catalogue, but it is doubtful whether this assumption was correct. It has since been held that copyright may exist in a mere list of articles for sale (x). In the case cited the plaintiff was a chemist and druggist who had prepared a catalogue of medicines and drugs sold by him under various headings and sub-headings, under which were arranged in alphabetical order a list of articles with their prices. The defendants inserted in their catalogue copies of the above-mentioned headings and lists, omitting two preparations only, and an injunction was granted. North, J., in delivering judgment in this case remarked: “It is said this is not the subject of copyright; and a distinction is made between copyright in a large catalogue by a clever author which gives a great deal of information and is interesting to persons who read it, and a catalogue like the plaintiffs’, which is nothing whatever but a simple list of certain articles described by their common names, which every one is entitled to use in respect to them, with the addition of the price at which

(x) *Collis v. Cater* (1898), 78 L. T. 613; *Harpers Ltd. v. Barry, Henry & Co.* (1892), 20 Court Sess. Cas. 4th Ser. (Rettie), 133; cf. *Cooper v. Stevens*, (1895) 1 Ch. 567; *Marshall v. Bull* (1901), 85 L. T. 77.

they are sold." . . . "For the purpose of making such a catalogue [as the plaintiffs'] one man sets to work in a proper manner. He incurs a good deal of trouble. He does what must take a good deal of time in preparing a full catalogue, such as either of these works I have before me. To some extent it might be done by his stocktaking, but there may be a good many articles in his catalogue which are not found in stock—articles which a man does not always keep—which he may be out of, or does not keep in stock, but obtains when he receives an order for them. In one way or another a man engaged in preparing a catalogue of this sort has incurred labour in its preparation, or it may be expense and trouble in its preparation, and has done it for the advantage of having his own catalogue. As compared with his neighbour, he is better off in that he has a catalogue, while his neighbour has not; and if the latter wants to be on a level with him, he must incur the same labour or expense and trouble."

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

Directories
and adver-
tisements.

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

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

(*a*) (1893) 1 Ch. 228.

(*b*) *Ibid.* 228.

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No copy-
right in dia-
grams, &c.

Though, as we have seen, the Courts will not enter into a discussion as to the merits of a literary production, yet that which it is sought to protect must be something which can be fairly described as a literary production of some sort. Thus, the Court has refused to grant copyright in respect of a cardboard pattern sleeve containing upon it scales, figures, and descriptive words for adapting it to sleeves of any dimensions (c); in respect of a list of sporting selections (d); a scoring sheet or "tablet" used in the game of cricket (e); and (under the new Act) a card index system specially adapted for working in connection with the National Health Insurance Act, 1911 (f).

So an album for holding photographs with pictorial borders for containing views of castles, with short descriptions attached, was not a "book" within 5 & 6 Vict. c. 4, s. 41 (g); and likewise the face of a barometer, displaying special letterpress, was held not to be capable of copyright (h).

Gloved hand
printed on
card with
letterpress
entitled to
copyright.

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

No copy-
right in a
mere plan.

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

Copyright
in words
used for
telegraphy.

There may be copyright in a system of electric telegraphy in which every letter of the alphabet is expressed by a dot or a dash, or different combinations of dots and dashes, with certain pauses between them, the meaning of these dots and dashes differ-

(c) *Hollinrake v. Truswell*, (1894) 1 Ch. 420, followed *Boosey v. Whight*, (1900) 1 Ch. 122. The contrary appears to have been held in America: *Drury v. Ewing*, 1 Bond (Amer.) 540.

(d) *Chilton v. Progress Printing Co.*, (1895) 2 Ch. 29; *Fournet v. Pearson* (1897), 14 T. L. R. 82.

(e) *Page v. Wisden* (1869), 20 L. T. 435; *Kenrick v. Lawrence* (1890), 25 Q. B. D. 99.

(f) *Libraco, Ltd. v. Shaw Walker* (1913), 30 T. L. R. 22.

(g) *Schove v. Schmincké* (1886), 33 Ch. D. 546.

(h) *Davis & Co. v. Comitti* (1885), 54 L. J. Ch. 419.

(i) *Hildesheimer & Faulkner v. Dunn & Co.* (1891), 64 L. T. 452; but see *Cable v. Marks* (1882), 52 L. J. Ch. 107; and *quære* whether it is a "literary work."

(k) *Ferris v. Hexamer*, 9 Otto Rep. (Amer.) 674; *Wilkins v. Aikins* (1810), 17 Ves. 422.

ing according to the place where the pause between them is made, or its duration (*l*). So, again, a shorthand system has been protected (*m*). Newspaper telegrams may also be regarded as literary works, and consequently entitled to protection (*n*).

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Questions of great nicety and difficulty may arise as to how far a new edition of a work is a proper subject for copyright. A new edition of a book may be a reprint of the original edition, which does not entitle the author to a new term of copyright running from the new edition; or it may be so enlarged and improved as to constitute in reality a new work; for example, a scientific work twenty or thirty years old may be comparatively worthless, owing to the progress of science in the interval; but a new edition, particularly if it be the production of the original author, would be as valuable at a later period as the original edition of the book was at the time it was published. There are many courses which lie between the two extremes, and the difficulty would be to lay down any general rule as to what amount of additions, alterations, or new matter would entitle the second or new edition of a book to the privilege of copyright, or whether the copyright extends to the book as amended or improved, or is confined to the additions and improvements themselves as distinguished from the rest of the book (*o*).

How far new editions the subject of copyright.

The general rule is, that each successive edition, which is substantially different from the preceding ones, or which contains new matter of substantial amount or value, becomes entitled to copyright as a new work, and it is immaterial whether the new edition is produced by condensing, expanding, correcting, re-writing, or otherwise altering the original work; or by introducing notes, citations, or other additions. Nor is it essential that the new edition should be an improvement on the old, the sole question is whether it is substantially different. A few mere colourable alterations in the text or the addition of a few unimportant notes will not be enough to sustain copyright as in a new work. As Lord Kinloch said in *Black v. Murray* (*p*), to create a copyright by alterations of the text, these must be extensive and substantial, practically making a new book. With regard to notes, in like

(*l*) *Ager v. P. & O. Steamship* (1884); *Ager v. Collingridge* (1886), 2 T. L. R. 291.

(*m*) *Pitman v. Hine* (1884), 1 T. L. R. 39.

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

(*o*) 9 Sc. Sess. Cas. 3rd Ser. 341; *Hedderwick v. Griffin*, 3 Sc. Sess. Cas. 2nd Ser. 383. See *Thomas v. Turner* (1886), 33 Ch. D. 292; *Hutchins v. Sheard*, W. N. (1881) 20.

(*p*) 9 Sc. Sess. Cas. 3rd Ser. 341; *Hedderwick v. Griffin*, 3 Sc. Sess. Cas. 2nd Ser. 383. See *Thomas v. Turner* (1886), 33 Ch. D. 292.

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manner, they must exhibit an addition to the work which is not superficial or colourable, but imparts to the book a true and real value, over and above that belonging to the text. This value may perhaps be rightly expressed by saying that the book will procure purchasers in the market on special account of these notes. There is involved in such annotation, and often in a very eminent degree, an exercise of intellect and an application of learning which place the annotator in the position and character of author in the proper sense of the word. It will still, of course, remain open to all to publish the text, which *ex hypothesi* is the same as in the original edition. But to take and publish the notes will be a clear infringement of copyright.

An action was raised in the Scotch Court of Session at the instance of Messrs. Black against Messrs. Murray and Son for a breach of copyright, and the infringement was said to be contained in a book published by the defenders in 1869, which purported to be an edition of the "Minstrelsy of the Scottish Border," collected by Sir Walter Scott, and it was stated in the title page to be a reprint of the original edition. The peculiarity of the case was that the original edition of the "Minstrelsy of the Scottish Border" was no longer protected by copyright; and, therefore, if the book was what its title represented it to be, a mere reprint of the original edition, the complaint of the pursuers could not be maintained. But they alleged that this was a false pretence on the face of the title page, and that while all the poems and ballads contained in the original edition of the "Minstrelsy" were reproduced in this volume, there was a considerable amount of other matter borrowed from works the copyright of which had not expired. The Lord President said that in the first complaint the pursuers alleged that the defenders had illegally copied and pirated from the copyright edition of the "Minstrelsy of the Scottish Border" the advertisement, or part thereof, prepared by Mr. John Gibson Lockhart, and that they had printed the same, or part thereof, as a preface to their volume, and, further, that they had copied from the "Minstrelsy" the notes, quotations, illustrations, and references, or the essential parts thereof. The defenders could have no excuse, if this were the case, for it was distinctly stated in that advertisement that this copyright edition contained matter which was not to be found in the original edition. That there might be a copyright of notes, even when the text was not copyright, was a fixed principle in law, and most deservedly so; for there was no doubt that the addition of good notes to a standard work was a task worthy of the highest literary talent

and reputation; and it must be remembered that Mr. Lockhart stood in a position of peculiar advantage as the editor and annotator of Sir Walter Scott's works, being his son-in-law and literary executor, and having opportunities during the lifetime of Sir Walter Scott to collect materials for the performance of such a task. His lordship, after quoting numerous passages, said there was no doubt that the editor of the defenders' book of 1869 had copied these notes of Mr. Lockhart in the most slavish manner, without even verifying or attempting to make them more accurate than Mr. Lockhart's. It was quite clear to his mind that there had been an appropriation of original matter and quotations, and therefore he held that this part of the pursuers' case had been completely made out. In the said complaint it was alleged that the defender had used notes from "Old Mortality" with reference to the skirmish of Drumclog, and a letter written by Claverhouse to the Earl of Linlithgow, and also a description of the Battle of Drumclog, on Loudon Hill. He was of opinion that the note with reference to the Battle of Drumclog stood in the same position as the notes to the "Minstrelsy," and there again he held that piracy had been committed. In regard to the next complaint—that the defender had copied from volume 8 of the poetical works, containing the "Lady of the Lake" and other poems, and an account of the "Massacre of Glencoe"—he was of opinion that there had been the same kind of piracy as in the notes to the "Minstrelsy." The Court granted costs to the plaintiffs (*q*).

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

Copyright may likewise exist in a genuine and just abridgment,

Copyright
in abridg-
ments.

(*q*) *Black v. Murray*, Sol. J. Dec. 31, 1870; *Moffatt & Paige v. Gill* (1902), 86 L. T. 465.

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

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

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for it is said that an abridgment may with great propriety be called a new book (*t*), and therefore is an original literary work. Whether an abridgment is, or is not, a piracy of the original work is more doubtful; but this matter will be more appropriately dealt with in the chapter on "Infringement of Copyright" (*u*), and we have seen reasons for holding that the fact that a work is a piracy ought not of itself to disentitle it to copyright (*x*).

What constitutes an abridgment.

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

Translations.

Translations are also original literary works, and consequently entitled to protection; of course, without prejudice to the rights of the owner of the copyright (if any) in the work translated (*y*).

Copyright in digests.

Copyright may also be had in a digest. A digest or a compilation differs from an abridgment. A digest or a compilation consists of selected extracts from different authors; an abridgment is a condensation of the views of the author. The former cannot be extended so as to convey the same knowledge as the original work; the latter contains an epitome of the work abridged, and consequently conveys substantially the same knowledge. The former cannot adopt the arrangement of the works cited; the latter must adopt the arrangement of the work abridged to be a faithful abridgment. The former infringes the copyright if the matter transcribed when published impairs the value of the original book, while a fair abridgment, though it may injure the original, is possibly lawful (*z*).

(*t*) *Per* Lord Hardwick, *Gyles v. Wilcox* (1740), 2 Atk. 143.

(*u*) Chapter VIII. *post*.

(*x*) *Ante*, p. 52.

(*y*) *Byrne v. Statist Co.*, (1914) 1 K. B. 622. See Revised Convention of Berne, Article VI., *post*, Appendix B.

(*z*) See *post*, Chapter VIII. "Infringement of Copyright."

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

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Head-notes
of reports.

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

Copyright
in forms or
precedents.

(a) (1855), 16 C. B. 491. See *D'Almaine v. Boosey* (1835), 1 Y. & C. 288, 301, but there Lord Lyndhurst referred to digests such as Viner's "Abridgment" and Comyns' "Digest."

(b) *Alexander v. Mackenzie*, 5 Sc. Sess. Cas. 2nd Ser. 748.

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

Copyright
in a title.

The titles to books, newspapers, and periodicals, though often coming before the Courts on the question of copyright therein, are not in themselves the proper subjects of this right. A title is no doubt, in one sense, a part of the work itself, for one cannot read a book or turn over the title-page without finding that the title is at the commencement of the work and sometimes on every page, yet it is rather the index to the whole than part thereof.

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

Titles in-
fringed.

The registered proprietors of "Bell's Life in London and Sporting Chronicle," published weekly, at the price of 5*d.*, filed a bill against the proprietors and publishers of a new newspaper, called "The Penny Bell's Life and Sporting News," which was published at the price of a penny. The evidence produced showed that from the similarity of the two names mistakes had occurred, and were likely to occur, on the part of the public, and that inquiries had been made at the office of "Bell's Life in London," for "The Penny Bell's Life." On motion on behalf of the plaintiffs, the Court granted an injunction to restrain the defendants from the use of the words "Bell's Life" in the title of their

(c) *Longman v. Tripp* (1815), 2 Bos. & P. 67; *Ex parte Foss* (1858), 2 De G. & J. 230; *Bradbury v. Dickens* (1859), 27 Beav. 52.

newspaper, though no fraudulent intention was proved (*d*). So also in *Ingram v. Stiff* (*e*) an injunction was granted by Sir W. P. Wood, V.-C., to restrain the defendant from printing, publishing, or selling any newspaper or other periodical under the name of "The Daily London Journal," or under any other name or style of which the words "London Journal" should form part, and from doing or committing any act or default which might tend to lessen or diminish the sale or circulation of the plaintiff's periodical called "The London Journal."

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

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

There are two cases reported of novels with identical titles. In the case of *Weldon v. Dicks* (*i*) the plaintiff was the assignee of the copyright in the "Parlour Library" series consisting partly of original works, and partly of works which had been previously published. Amongst this series was a novel bearing the title "Trial and Triumph," which had been originally published in 1854, in a separate form in three volumes, and re-published in the "Parlour Library" series in 1860. In 1876 the plaintiff commenced to re-issue the series and was preparing for publication a new edition of "Trial and Triumph," which would be shortly published by him at the price of two shillings. The defendant had recently commenced to issue a series of books and novels under the general title of "Dicks' English Novels," and he had published in such series a novel under the title of "Trial and

Where precisely the same title taken.

(*d*) *Clement v. Maddick* (1859), 1 Giff. (Ch.) 98.

(*e*) (1859), 5 Jur. N. S. 947.

(*f*) (1865), 13 W. R. 804.

(*g*) *Kelly v. Hutton* (1868), L. R. 3 Ch. 703.

(*h*) *Borthwick v. The Evening Post* (1888), 37 Ch. 449.

(*i*) (1878), 10 Ch. D. 247.

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"Triumph" at the price of sixpence. The plaintiff claimed an injunction to restrain the defendant from publishing or selling any book or publication under that title, and the injunction was granted by Malins, V.-C., though the defendant was in entire ignorance that the title "Trial and Triumph" had been previously used, and though his work was quite distinct in its plot and subject-matter from the plaintiff's book. The learned judge said: "It is plain that every man who publishes a book under a particular name, the name forming part of the book, has a copyright extending to forty-two years or the life of the author, whichever lasts longest: therefore the author of 'Trial and Triumph' when it was published in 1854 acquired title for that period." If, however, the right to the title rested on copyright, it is difficult to see how the defendant had infringed the plaintiff's right, seeing he had never seen or heard of his book; but the judge granted the injunction also on the ground that the public were likely to be deceived.

The second case of novels with identical titles is *Dicks v. Yates (k)*. There the defendant had published a novel in the "World," a sixpenny newspaper, with the title "Splendid Misery," in ignorance that that was the title of a novel which had appeared a few years before in the plaintiff's periodical "Every Week," published at a penny a number. It was, however, proved that, many years before the plaintiff's novel was published, another novel had borne the same title. The Court of Appeal, reversing Bacon, V.-C., refused the plaintiff an injunction, Jessel, M. R., and Lush, L. J., on the ground of lack of originality or likelihood of mistake on the part of the public, and James, L. J., on the ground that there had been no infringement. "I do not say," said the Master of the Rolls, "that there could not be copyright in a title, as, for instance, in a whole page of title, or something of that kind, requiring invention. However, it is not necessary to decide that. But, assuming that there can be copyright in a title, what does this copyright mean? It means the right of multiplying copies of an original work. If you complain that part of your work has been pirated, you must show that that part is original, and if it is not original, you have no copyright. How can the title 'Splendid Misery' be said to be original, when the very same words, for the very same purpose, were used nearly eighty years ago?" Later on, however, he stated that it appeared to him that no authority binding on that Court had

(k) (1881), 18 Ch. D. 77.

been produced to show that there could be copyright in such a title as that, and with this opinion Lord Justice James expressed his concurrence, Mr. Justice Lush desiring to keep the point open.

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

In the case of *Broemel v. Meyer* (*n*) the plaintiff had written a play which she had entitled, "Where there's a Will there's a Way," the plot in which turned upon the fortune of two lovers, whose happiness depended upon a will, and the word "will" in the title of the play meant testamentary disposition. The defendant was the author of a play entitled, "Where there's a Will —," and in that title the word "will" also meant testamentary disposition. The plaintiff contended that the use of these words as the title of a play with the *double entendre* rendered the title an original one, and claimed copyright in it, but Mr. Justice Warrington held that she could not appropriate the words of a familiar proverb to herself by giving to them a peculiar meaning, and he refused to grant an injunction.

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

Where exact title not taken.

(*l*) *Crotch v. Arnold* (1909), 54 Sol. J. 49.

(*m*) In *Menchen v. Elite Sales Agency* (*Times*, 17th Dec., 1912), both plaintiff and defendant had given the title of "The Miracle" to a cinematograph production, and upon an application for an interlocutory injunction the defendant, at the judge's suggestion, agreed to alter his title. In *Elkin & Co. v. Francis Day* (*Times*, 27th Oct., 1910), the defendants were restrained from publishing the "Blue Bird Valse" as calculated to lead to the belief that it was the music of an opera of that name.

(*n*) (1912), 29 T. L. R. 148.

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I thought, on the whole, that their journal was calculated to mislead persons of ordinary intelligence (for these are the persons I must consider), I should grant the injunction. Now 'Punch' is well known both in name and appearance, and its price is threepence. Could anyone be misled into buying this other paper instead, which has the words 'Punch and Judy' printed on it in distinct letters with a different frontispiece, and its price a penny? I am clearly of opinion that the mass of mankind would not be so misled" (o).

In all these cases the plaintiff must prove first that his publication has been in the market long enough to acquire a public reputation (p); and secondly, that the title used by the defendant is calculated to deceive the public (q). Mere intention to deceive is not sufficient, there must be grounds for apprehending actual deception (r). Where there is a close resemblance in general style and arrangement of the contents of the book itself (s), or a claim of certain attributes which are known to belong to the original work (t), or a sudden change from an unobjectionable title, style of publication, and arrangement of contents to a style more closely resembling the plaintiff's (u), an intention to deceive may be established.

Examples.

In *Hogg v. Kirby* (x) the proprietor of "The Wonderful Magazine" succeeded in stopping the publication of "The Wonderful Magazine, New Series, Improved." So in *Chappell v. Sheard* (y), and *Chappell v. Davidson* (z), where the plaintiff's song was entitled "Minnie," and those of the respective defendants "Minnie Dale," and "Minnie, Dear Minnie"; and where the purchaser of "The Britannia" newspaper incorporated it with the "John Bull," under the name of "The John Bull and Britannia," and the former publisher of "The Britannia" began to publish "The True Britannia" (a), injunctions were issued. But although, as we have seen, in *Ingram v. Stiff* (b) the "London Journal" succeeded in preventing a rival paper

(o) *Bradbury v. Beeton* (1869), 18 W. R. 33.

(p) *Licensed Victuallers' Newspaper v. Bingham* (1888), 38 Ch. D. 139.

(q) See *Hall v. Barrow* (1863), 4 De G. J. & S. 150; *Chappell v. Davidson* (1855), 2 K. & J. 123; cf. *Warwick Tyre Co. v. New Motor Co.*, (1910) 1 Ch. 248.

(r) *Borthwick v. Evening Post* (1887), 37 Ch. D. 449.

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

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

(u) *Corns v. Griffiths*, *supra*; *Metzler v. Wood* (1878), 8 Ch. D. 606.

(x) (1803), 8 Ves. 215.

(y) *Supra*.

(z) *Supra*.

(a) *Prowett v. Mortimer* (1856), 4 W. R. 519.

(b) (1859), 5 Jur. N. S. 947.

from appearing under the title of the "Daily London Journal," and in *Clement v. Maddick* (c) "Bell's Life" succeeded in stopping a "Penny Bell's Life," the "Magazine of Fiction" failed to obtain an injunction against the "Monthly Magazine of Fiction" (d). In a case in which the proprietor of a book entitled "Post Office Directory of West Riding of Yorkshire," which included the town of Bradford, sought to restrain the intended publication by the defendants of a directory of Bradford with the words "Post Office" forming part of the title, an injunction was refused. It appeared that many years previously an officer of the London Post Office had published, with the assistance of the letter carriers, a directory which he called "Post Office" Directory. Subsequently, a brother of the plaintiff became the publisher and proprietor of the work, which was carried on by him till 1846, with the assistance of the letter carriers as before. After 1846 the plaintiff's brother was prohibited by the Post Office authorities from employing the letter carriers, and he thereupon employed a large staff of private agents to obtain the information necessary for the continuance of his directory, which was still called the "Post Office" Directory. In 1852 the plaintiff began publishing country directories, making use of his brother's staff of agents, and, with his brother's consent, called his directories "Post Office" Directories. The plaintiff alleged that his directories were distinguished and known in the trade and to the public as "Post Office Directories," and that the term "Post Office" was a very valuable trade distinction. The defendants had received assistance of the postmaster at Bradford, and it was not alleged that there had been any copying or colourable imitation of any part of the text of the plaintiff's work, neither was there any similarity in price or appearance between the two directories, and the only question was as to the plaintiff's exclusive right to the use of the word "Post Office" as applied to directories. Vice-Chancellor Bacon was of opinion that to support a claim to restrain the use by another of a name on the ground of it being a *quasi* trade-mark, it was necessary to show that the wares offered for sale were so nearly identical that the use of the particular trade-mark or name might mislead unwary purchasers. He considered that the defendants were clearly entitled to publish a directory of Bradford, and as no person wishing to possess the plaintiff's "Post Office Directory for the West Riding of Yorkshire" could be misled or deceived into

(c) (1859), 1 Giff. 98.

(d) *William Stevens v. Cassell & Co.*, *Times*, 7th Feb., 1913.

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buying the defendant's "Post Office Bradford Directory," judgment must be given for the defendants, and on appeal the Court affirmed the judgment of the Vice-Chancellor (e).

Nom de plume.

The Court has also restrained the publisher of a work from advertising it in such a way as was calculated to lead the public into believing that it was another work (f); and where a writer had been in the habit of contributing to a newspaper under a *nom de plume*, upon his severing his connection with the paper he was held entitled to his *nom de plume* as against the proprietor of the newspaper (g).

No copy-right in a libellous, immoral, or obscene work.

Copyright cannot exist in a work of libellous, immoral, obscene, or irreligious tendency (h); because in order to establish such a claim the author must, in the first place, show a right to sell; and this he cannot possibly do, he himself not being able to acquire a property therein.

Dr. Priestley's case.

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

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

(e) *Kelly v. Byles* (1886), 13 Ch. D. 682; *Primrose Press Agency v. Knowles* (1885), 2 T. L. R. 404.

(f) *Seeley v. Fisher* (1841), 11 Sim. 581.

(g) *Landa v. Greenberg* (1908), 24 T. L. R. 441, apparently decided on the ground that the defendants were using the name in a manner calculated to deceive the public: see *post*, p. 76.

(h) *Stockdale v. Onwhyn* (1826), 5 B. & C. 173; *Hime v. Dale* (1803), cited 2 Camp. 28; *Walcot v. Walker* (1802), 7 Ves. 1; *Poplett v. Stockdale* (1825), 1 Ryan & M. 337; *Gee v. Pritchard* (1818), 2 Swans. 413; *Southey v. Sherwood* (1817), 2 Mer. 435; *Murray v. Benbow* (1822), 1 Jac. 474; *Lawrence v. Smith*, *ib.* 471; *Fores v. Johnes* (1802), 4 Esp. 97; *Gale v. Leckie* (1817), 2 Stark. N. P. C. 107; *Baschet v. London Illustrated*, (1900) 1 Ch. 73.

(i) See 2 Mer. 437.

(k) (1817), 7 Mer. 435.

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

The above cases were followed in *Walcot (Peter Pindar) v. Walker (l)*, and in *Lawrence v. Smith (m)*. In the latter case the doctrine was carried very far. The plaintiff having published a work under the title of “Lectures on Physiology, Zoology, and the Natural History of Man,” filed a bill to restrain the defendant from selling a pirated edition, and obtained an injunction upon motion made *ex parte*. The defendants then moved to dissolve the injunction, and argued that the nature and general tendency of the work in question was such that it could not be the subject of copyright, and in support of this argument several passages in it were referred to, which, it was contended, were hostile to natural and revealed religion, and impugned the doctrines of the immateriality and immortality of the soul. Lord Eldon, in dissolving the injunction, said: “Looking at the general tenor of the work, and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the Scripture, considering that the law does not give protection to those who contradict Scripture (n), and entertaining a doubt, I think a rational doubt, whether this book does not violate the law, I cannot continue the injunction. The plaintiff may bring an action, and when that is decided, he may apply again.” From a note by the editor, we learn that in 1822, in *Murray v. Benbow*, Mr. Shadwell, on the part of the plaintiff, moved for an injunction to restrain the defendants from publishing a pirated edition of Lord Byron’s poem of “Cain.” The Lord Chancellor, after reading the work, refused the motion, on grounds similar to those stated in the above judgment; and in another case, Vice-Chancellor Leach dissolved an injunction which had been granted restraining an infringement of the same poet’s work, “Don Juan” (o).

No copy-right in a work of an irreligious tendency.

(l) (1802), 7 Ves. 1; see *Stockdale v. Owen* (1826), 5 B. & C. 173; *Poplett v. Stockdale* (1825), Ry. & M. 337.

(m) (1822), 1 Jac. 471; 23 R. R. 123.

(n) “Christianity is part and parcel of the law of the land:” Kelly, C. B., in *Cowan v. Milbourn* (1867), L. R. 2 Ex. 230; but at the present day it is generally considered permissible to attack the Christian religion so long as it is not done in an offensive manner. It would probably be held equally objectionable to attack the religious beliefs of any body of persons in an offensive manner.

(o) *Murray v. Benbow* (1822), 1 Jac. 474 n.

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

"Life of
Jesus."

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

declared the interdict perpetual, and found Long liable in expenses, holding that, though the doctrine that Jesus Christ is the second person of the Trinity is statute law, yet the public are entitled to criticise and controvert any part of the statute law, provided they do it in such a way as not to endanger the public peace, safety, or morality. Mr. Hopps, the sheriff considered, violated none of these conditions, and was entitled to the protection of the law.

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

No copy-right in a work of a scandalous nature.

(q) (1803), 2 Camp. 27.

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

CAP. II.

common sense and justice, this action cannot be maintained. It would be a disgrace to the common law could a doubt be entertained upon the subject, but I think that no doubt can be entertained, and I want no authority for pronouncing such a judicial opinion."

No copy-right in works intended to deceive the public.

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

(s) *Wright v. Tallis* (1845), 1 C. B. 893.

a copyright has been held not to subsist, where the work is one which is subversive of good order, morality, or religion, did not bear, he thought, on the case before him, but they had so far analogy, that the rule which denied the existence of copyright in those cases, was the rule established for the benefit and protection of the public.

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

So decided on the ground of fraud.

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

But where a publisher advertised for sale certain poems, which

(t) (1841), 11 Sim. 581.

(u) *Barnard v. Pillow*, W. N. (1868) 94.

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

In a more recent case (y), the plaintiff published an illustrated catalogue of trucks, trolleys, and barrows made by him. Many of the odd pages were headed "Inventor, patentee, and sole maker," and many of the even pages were headed "Slingsby's Patent." The plaintiff had no English patent for the various articles represented, though he had certain foreign patents. The catalogue also contained pictures of buildings on which the plaintiff's name was written in large letters, although he did not occupy the whole of them. The defendants had admittedly copied the plaintiff's catalogue, but the latter was refused an injunction upon the ground that his statements as to his being patentee, &c., were calculated to deceive the public, and that he was attempting to get trade regardless of the way in which it was obtained.

From the above cases it will be seen that the Court will refuse protection to a work which is either fraudulent or calculated to seriously mislead the public, but it is submitted that their principle would not be extended so as to disentitle a work to protection simply because that work infringes the copyright of another work (z)—that is to say, in the absence of special circumstances, such as fraud.

(x) *Ld. Byron v. Johnston* (1816), 2 Mer. 29.

(y) *Slingsby v. Bradford Patent Truck Co.*, (1905) W. N. 122.

(z) *Ante*, p. 52.

CHAPTER III.

THE SUBJECTS OF DRAMATIC AND MUSICAL COPYRIGHT.

THE next class of works referred to in sect. 1 of the Copyright Act, 1911, after literary works, are "original dramatic, and musical works." These works naturally fall to be considered together, because in both cases the authors probably expect to reap at least some portion of their reward from the public performance of their works. The author of a musical or dramatic composition—and, indeed, under the new Act, the author of any work whatsoever—has two distinct rights in his composition: one, that of copyright proper, that is to say, the right to prevent the multiplication of copies of the piece itself; the other, what may be called the acting right or performing right, that is to say, the right to prevent other persons from publicly representing or performing the piece without the author's consent. These two rights are quite distinct, each being a separate property, and each capable of being assigned without the other.

Copyright
and per-
forming
right.

As to copyright proper, both musical and dramatic compositions, when written or printed, are protected like other literary works; but public performance of a dramatic or musical work is not, under the new Act, a publication of the work (*a*), and such a work existing only in manuscript must comply with the conditions requisite for protection as an unpublished work (*b*), notwithstanding that it may have been first publicly performed in England.

Publication.

Under the old law, performing rights could only be claimed in respect of any "tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment" (*c*), or in respect of "any musical composition" (*d*); but under the new Act, the right to perform a work in public is included in the copyright of any work whatsoever (*e*).

Performing
right now
attached to
all works.

(*a*) Sect. 1 (3).

(*b*) See *ante*, p. 27.

(*c*) 3 & 4 Will. IV. c. 15, s. 1.

(*d*) 5 & 6 Vict. c. 45, ss. 20, 21.

(*e*) Sect. 1 (2).

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Importance
of distinction
between
literary and
dramatic and
musical
works.

The distinction, therefore, between a dramatic work or musical work and a literary work is not of the same importance as under the old law, yet it is one that is not wholly immaterial. For instance, it is only in the case of a dramatic work that the conversion of it into a novel or other dramatic work is forbidden (*f*), and only in the case of the like works that performance in public is expressly stated not to be a publication of the work (*g*). Again, short passages may be taken for school books from "literary works," but possibly not from dramatic or musical works (*h*), and it is only "musical works" which may be compulsorily reproduced mechanically upon the terms of payment of a royalty (*i*). Moreover, what is a matter of still greater importance, musical and dramatic pieces may be entitled to protection, notwithstanding that they do not exist as literary works at all.

Definitions.

This last point arises from the definition of a dramatic work contained in sect. 35, which enacts that that expression shall "include" any "piece for recitation, choreographic work, or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise" (*k*). On the other hand, the Act contains no definition of a musical work.

*Tate v.
Fulbrook.*

The definition of a dramatic work is adapted from Art. 2 of the Revised Convention of Berne (*l*). Under the old law, possibly, neither a pantomime nor a choreographic work was entitled to protection (*m*). In *Tate v. Fulbrook* (*n*) it was stated by the Court of Appeal that a dramatic work was not entitled to be protected against piracy by public performance unless it was capable of being printed and published. "Scenic effects, taken by themselves and apart from the words and incidents of the piece, are not," said Lord Justice Farwell, "the subject of copyright (*o*), because they cannot be the subject of printing and publication. Nor do I say that scenic effects may not be protected as part and parcel of the drama: scenes do, of course, form part of a drama,

(*f*) Sect. 1 (2) (b).

(*g*) Sect. 1 (3), but *quære* whether public performance could be a "publication" of any work. *Ante*, p. 38.

(*h*) Sect. 2 (1) (iv).

(*i*) Sect. 19 (2).

(*k*) Cinematograph productions are also included, but these are dealt with in a separate chapter: see Part III., *post*.

(*l*) Appendix B.

(*m*) *Karno v. Pathé Frères* (1908), 99 L. T. 114; (1909), 100 L. T. 260. In *Lee v. Simpson* (1847), 3 C. B. 871, the written introduction to a pantomime was protected, but it is not clear that the protection extended to the pantomime itself.

(*n*) (1908) 1 K. B. 821.

(*o*) This is contrary to the dictum of Brett, J., in *Chatterton v. Cave* (1877), as reported in 33 L. T. 256.

and it is the dramatic piece, as a whole, that is protected by the Act. It is essential, however, to such protection that there should be something in the nature of a dramatic entertainment, for a mere spectacle standing alone is no more within the Act than a singer who sings in character costume is within it." The facts of that case were that the plaintiff complained of the piracy of his sketch called "Motoring" by the defendant's sketch called "Astronomy." Both sketches were entertainments in the form of comic dialogue grounded on very slight dramatic action. The defendant used different words, but the plaintiff complained that the defendant copied certain incidents, the "make-up" of the actors from his sketch, and also that he used the same "gag." The Court held that the plaintiff could have no copyright in the incidents, the "make-up," or the "gag" (p).

It is not very clear what the Court meant by holding in this case that "there must be matter capable of being printed and published," for a description of a scenic effect might be printed and published, but their meaning apparently was that some words to be spoken or sung by an actor or actors were necessary before copyright could be claimed. If this be so, it is submitted that the new Act has effected an alteration in the law, for choreographic works or entertainments in dumb show are, as we have seen, expressly included in the class of dramatic works. It is true that "the acting form" must be "fixed in writing or otherwise." A mere description of the movements to be followed would be sufficient to fix the acting form, and this description need not even be in writing; any signs commonly used by the profession to denote certain movements or series of movements, or even any picture, photograph, or cinematograph production consisting of a series of films, would answer the requirements of the Act. At the same time, the actual decision in *Tate v. Fulbrook*, to the effect that mere scenic effects are not the subject of protection, seems to be correct, even under the new Act. Under that Act a work must be a dramatic work, pure and simple, or a choreographic work, or a dumb show. A dramatic work, pure and simple, probably predicates words spoken or sung; choreographic works and dumb shows predicate action (q). Scenic effects, characters, "get-up," and so forth are not the subjects of protection, apart from either words or defined movements, but, as was admitted by the Lords Justices in

How far
this decision
holds under
the new Act.

(p) In *Rees v. Robbins* (*Times*, 4th July, 1914), the Court doubted whether there could be copyright in the plot of a play: see *post*, Chapter VIII., "Infringement of Copyright."

(q) Cinematograph productions are expressly protected, but these convey the illusion of motion.

CAP. III. *Tate v. Fulbrook* (r), once you have dialogue, scenic effects become accessory to the dramatic work, and the whole becomes the subject of copyright (s). If the scenic effects are fitted to a totally different dialogue complaint apparently cannot be made; but, if the dialogue is not dissimilar, the fact that the scenic effects also correspond with those found in the earlier work may be evidence of plagiarism.

"Gag" not the subject of copyright.

"Gag" was held not to be the subject of copyright in *Tate v. Fulbrook* upon the grounds that, generally speaking, the author of the "gag" is not the writer of the play, but the actor who speaks the words, and that, even if the writer of the play and the speaker of the "gag" should happen to be the same person, the "gag" is not a permanent part of the play, but is intended to be changed from time to time. The new Act, it is thought, makes no alteration to the law in this respect.

As regards what is necessary to constitute a "dramatic work," the judges under the old law were somewhat hampered by the definition contained in the Dramatic Copyright Act, 1833 (t), which gave to the authors of "any tragedy, comedy, play, opera, farce, or other dramatic piece or entertainment," the sole liberty of performing it. The Literary Copyright Act (u) further declared that "the words 'dramatic piece' shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment." The Courts held that the words "other dramatic entertainment" must be construed *ejusdem generis* with the words "tragedy, comedy, play, opera, and farce." It was mainly for this reason that the Lords Justices held, in the case of *Tate v. Fulbrook* (x), above alluded to, that a dramatic work, in order to become entitled to copyright, must be capable of being printed and published. There is no such hampering definition in the Copyright Act, 1911, and it may be that the expression "dramatic work" in that Act will receive a more liberal interpretation than the expression "dramatic piece" in the earlier Acts.

What is a "musical work"?

It is perhaps unfortunate that there is no definition of a "musical work" in the Act, although there is such a definition in the Musical (Summary Proceedings) Copyright Act, 1902,

(r) (1908) 1 K. B. 832; see *Dishon v. Viviana* (*Times*, 15th Jan., 1909), where it was held under the old law that there could be no copyright in a dance.

(s) In like manner, in the case of an opera, the music and the words together form one dramatic work, and, it is submitted, the writer of the words and the composer of the music are together authors of a single work.

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

(u) 5 & 6 Vict. c. 45.

(x) (1908) 1 K. B. 821.

which remains unrepealed (*y*). That Act defines a musical work as meaning "any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced," thus expressly confining musical works to those which are printed or written. The Act of 1902 was passed with a view to protecting music publishers from the depredations of the street hawkers of pirated music, and there seems to be no reason why the definition of a musical work contained therein should be imported into the Copyright Act, 1911. The question is, whether if A. improvises a tune in B.'s presence, which B. carries away in his head, and subsequently publishes, A. has copyright in the tune, which he can sue B. for infringing? Probably A. has no such a copyright in his tune, and, in any case, the difficulties in the way of his proving that B.'s published work is an infringement of his (A.'s) improvised tune will be well-nigh insuperable. It is a musical "work" which the Act protects, and the expression seems rather to imply that the tune shall be written or printed before it becomes entitled to copyright, and this view is confirmed by the provision that in the case of an entertainment in dumb show or a choreographic work the sonic arrangement or acting form must be fixed in writing or otherwise (*z*). Against this may be set the fact that lectures and speeches are clearly the subject of copyright (*a*).

That a musical work may also be a dramatic work has been decided in several cases. An opera, not less than a play without music, is a drama. In *Russell v. Smith* (*b*) it was 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, was dramatic, even though it was sung by one person only, sitting at a piano, giving effect to the verses by the delivery, but not assisted by scenery or appropriate dress. Again, in *Clark v. Bishop* (*c*), the Court held a song, "Come to Peckham Rye," which had little, if any, of the dramatic character, to be a dramatic piece.

Musical work may also be a dramatic work.

Some doubt as to the correctness of these decisions is, however,

Fuller v. Blackpool

(*y*) 2 Edw. VII. c. 15, s. 3, *post*, Chapter on "Remedies for Infringement of Copyright."

(*z*) Sect. 35. Definition "Dramatic Work," cf. *Rees v. Robbins* (*Times*, 7th July, 1914).

(*a*) *Ante*, p. 47, and see sects. 1 (2), 2 (v).

(*b*) (1848), 12 Q. B. 217.

(*c*) (1872), 25 L. T. 908; see also *Roberts v. Bignell* (1887), 3 T. L. R. 552.

CAP. III.
*Winter
Gardens.*

raised by the case of *Fuller v. Blackpool Winter Gardens* (d), where it was held that the song "Daisy Bell," sung at the defendants' theatre in costume, and in a dramatic play or burlesque during the run of the piece, was not dramatic. In his judgment in this case Lord Justice A. L. Smith remarked (e): "I think that to constitute a song a dramatic piece it must be such a song as, for its proper representation, acting, and possibly scenery, formed a necessary ingredient, and that if neither of these be requisite to the efficient representation of the song, it is not a dramatic piece. It is an entire misnomer to call a mere common ordinary music-hall song, which required neither acting nor scenery for its production, a dramatic piece, for it is, in truth, nothing of the kind."

Musical
plays.

In the case of an opera or other musical play it often happens that the words and the music are the works of different authors. If these collaborate to produce a musical play, can they be regarded as joint authors? By sect. 16 (2) a "work of joint authorship" is defined as "a work produced by the collaboration of two or more authors, in which the contribution of one author is not distinct from the contribution of the other author or authors." Clearly the words and music can be distinguished. It may be urged that it would be more correct to class such a play amongst "collective works," which are defined as works "written in distinct parts by different authors" (f). It is thought, however, that there are three distinct copyrights in a musical play: (1) in the play as a whole; (2) in the music separated from the words; and (3) in the words separated from the music (g). The question in whom the copyright in the play as a whole is vested must depend upon the facts of the particular case; it might be vested in the two composers jointly, or in one of them, or in some third person, and the three distinct copyrights might conceivably expire at three different dates (h). The play, as a whole, is presumably a "collective work," and if so, it follows that the copyright in the same is assignable for the entire period of copyright, without being subject to the proviso to sect. 5 (2), whereby absolute assignments are prevented from being made for longer than the life of the author and twenty-five years after his death (i). If this be a

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

(e) At p. 442.

(f) Sect. 35 (1).

(g) In the case of a "musical work," it is provided that for the purpose of compulsory acquisition of the right to reproduce the same mechanically, the work "shall be deemed to include any words so closely associated therewith as to form part of the same work": sect. 19 (2) (ii).

(h) See further, "First Owner of Copyright," Chapter VI., *post*.

(i) See Chapter VII., "Assignment of Copyright," *post*.

correct statement of the law, then, in the absence of any agreement to the contrary, the composer of the music will be entitled to publish the musical score without the libretto, and to make adaptations of the music; the librettist will have the right to publish a book of the words, or extracts therefrom, without the music; but the words and music can only be published or performed together with the sanction of both composer and librettist.

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 (*k*). Adaptation of old play.

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

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, subject to the rights of the proprietor of the copyright in the original work. 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 (*n*). The pianoforte score of an opera.

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,

(*k*) (1859), 7 C. B. 268.

(*l*) *Wood v. Boosey* (1868), L. R. 2 Q. B. 340; L. R. 3 Q. B. 223.

(*m*) *Leader v. Purday* (1869), 7 C. B. 4.

(*n*) *Wood v. Boosey*, *supra*; *Boosey v. Fairlie* (1877), 7 Ch. D. 301.

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reflection, skill, and mind so to condense the opera score as to compose the pianoforte accompaniment. . . . I cannot, therefore, bring myself to think that the pianoforte arrangement of the music of an opera, which originally consisted of vocal music and instrumentation to be executed by some half-hundred instruments, can be said to be anything else than a specific, separate, and distinct work from the opera itself. And it seems to me to hold otherwise would lead to very serious consequences. Operas are very frequently arranged sometimes by the composer of the opera himself, sometimes by other persons, with the consent, or without the consent of the original composer. It may be, if the arrangement be made without the consent of the composer of the opera, such an adaptation would be an infringement of his copyright, which would subject the adapter to an action. It is not necessary to decide that. But it may be that, after the copyright has expired, an arrangement for the pianoforte may be made in the first instance, or some musical composer, thinking that an arrangement that already existed of some well-known and popular opera is not as good as it can be made, might apply his hand to the work and make a new arrangement. Can it be said that such an arrangement, useful as regards the musical world, shall not be the subject of protection under the Copyright Acts? ”

Difference between pianoforte score and original score.

And on appeal Sir Fitzroy Kelly, C.B. (o), 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

(o) L. R. 3 Q. B. 223, 229.

case may be; and there are separate and distinct lines for the accompaniment for the pianoforte; and no doubt, here and there throughout this accompaniment, and by going line by line through the score of the original opera, there may be found the same notes; but there are other parts of the accompaniment which are merely the pianoforte accompaniment, the notes forming which are nowhere to be found in the score at all. The accompaniment for the pianoforte is a work of greater or less skill. In some cases, perhaps in many cases—it may be in this for aught I know—the operation of adaptation is little more than mechanical, and what any one acquainted with the science of music, any composer of experience, might have been able to do without difficulty; but it may be, and often is, as in the case of the six operas of Mozart, 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” (p).

So also with reference to a piece of music called “Pestal,” which had been played by the military bands in the style of a

(p) 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.”

CAP. III.

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 (*q*).

The adaptation of words and accompaniment to an old air.

In *Leader v. Purday* (*r*), it was held that one who adapted words to an old air, and procured a friend to compose an accompaniment thereto, acquires a copyright in both words and accompaniment, and he might properly describe himself proprietor of the copyright in the whole composition, notwithstanding that there was no copyright in the air itself.

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

CHAPTER IV.

THE SUBJECTS OF ARTISTIC COPYRIGHT (OTHER THAN ARCHITECTURE (a)).

PREVIOUSLY to the Copyright Act, 1911, the copyright in artistic works was the subject of various statutes which dealt separately with engravings, paintings, drawings, and photographs, and works of sculpture (b). Under the new Act these all fall under one compendious phrase, sect. 1 conferring copyright upon "every original artistic work."

There are, however, certain divisions into which artistic works naturally fall. The work may be one which is wholly or mainly produced by hand, or one entirely or mainly produced by mechanical processes. Again, it may be a class of work which usually exists only in a single example, or one of which many copies can readily be made. The statute includes, amongst artistic works, "works of painting, drawing, sculpture, and architectural works of art, and engravings and photographs" (c). These works are all mainly produced by hand, with the exception of photographs, and included in the expression "photographs" are photolithographs and any works produced by any process analogous to photography (d), and "works of sculpture" include casts and models. Paintings, drawings, and works of sculpture most frequently exist in single examples: in the case of an engraving the plate itself is of little artistic value, its value lies in the fact that by means of it the picture can be readily reproduced. Included in the expression "engravings" are etchings, lithographs, woodcuts, prints, and other similar works, not being photographs (e). Certain "designs" capable of being registered under the Patents and Designs Act, 1907 (f), are excluded from the Copyright Act, 1911 (g). Definitions.

(a) Works of architecture, being for the first time protected under the Act of 1911, are dealt with in a separate chapter (Part III., Chapter III.).

(b) *Ante*, p. 19.

(d) Such as half-tone blocks.

(f) 7 Edw. VII. c. 29.

(c) Sect. 35 (1).

(e) Sect. 35 (1).

(g) Sect. 22.

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Originality.

The artistic work must be "original"—but this means no more than that the work must not be copied from another artistic work of the same character (*h*). Thus, an engraving copied from another engraving, a photograph copied from another photograph, or possibly a painting which was identical with another painting from which it was copied could not claim copyright, but on the other hand, it is submitted that an engraving of a painting or drawing, like the photograph of a picture, is an original work, and in itself the subject of copyright, subject, of course, to the rights of the proprietor of the copyright in the work from which the derivative work is taken (*i*). The majority of artistic works are, indeed, generally copied from something or other, and the artist cannot claim the monopoly of the subject of his work, but he is entitled to say: Take the trouble of going to the original from which my work is taken, but do not avail yourself of my labour who have been to the original and executed my work therefrom (*k*).

An artist
has no
monopoly in
the subject.

Where a picture is made of an object in nature, as of a particular flower or plant, the artist cannot restrain any one from executing a similar picture 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 (*l*) 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 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 *bonâ fide* make pictures 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 picture which he had made.

An engraver is almost invariably a copyist, but he 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

(*h*) *Ante*, p. 52.

(*i*) *Graves' Case* (1869), L. R. 4 Q. B. 715, *post*, p. 91.

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

(*l*) *Blackwell v. Harper* (1740), 2 Atk. 94.

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 (*m*).

In one case (*n*) it was contended that a photograph of an engraving was not an original production within the meaning of the Artistic Copyright Act, 1862 (*o*). 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 sect. 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."

Photograph is an original production.

The question of artistic merit may sometimes be taken into consideration, at least upon a question of infringement. Thus, 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. Subsequently 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 defendants' cards was in a slightly different position, though the idea was clearly taken from plaintiff's cards. It appeared that neither the plaintiff's nor the defendants' drawings were of any artistic merit, and 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 (*p*).

Absence of artistic merit.

(*m*) *Newton v. Cowie* (1827), 4 Bing. 246; *Martin v. Wright* (1833), 6 Sim. 297.

(*n*) *Graves' Case* (1869), L. R. 4 Q. B. 723. (*o*) 25 & 26 Vict. c. 68.

(*p*) *Kenrick & Co. v. Lawrence & Co.* (1890), 25 Q. B. D. 99; *Nottage v. Jackson* (1888), 11 Q. B. D. 627.

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“The mere choice of subject,” said Mr. Justice Wills in the case referred to (*q*), “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 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, notwithstand-

ing 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 this 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."

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Toy soldiers.

On the other hand, it was held in another case that toy soldiers were entitled to protection under the Sculpture Copyright Act, 1814 (*r*) (now repealed). 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" (*s*).

Maps, &c.

Under the old law a map might be protected either as a "book," under the Literary Copyright Act, 1842, or as an engraving, under the Engravings Acts, according to whether the owner of the copyright chose to call his work a "map" or an "engraving" (*t*). The Act of 1911—somewhat illogically, perhaps—includes "maps, charts, and plans" in the definition of "literary works" (*u*), so that apparently protection cannot be claimed for them as "engravings." The only importance of this seems to lie in the fact that the copyright in an engraving made to order vests in the person by whom the plate was ordered, whereas in the case of a literary work the copyright would only so vest if the person making the plate were in the employment of the person who ordered the same "under a contract of service or apprenticeship" (*x*).

Book illustrations.

A more important point arises with regard to the illustrations in a book, particularly if these are the result of some photographic process, for not only does the same point arise as to the person in whom the copyright first vests, but the period of protection for a

(*r*) 54 Geo. III. c. 56.

(*s*) *Britain v. Hawks* (1902), 86 L. T. 765; cf. *Caproni v. Alberti* (1890), 65 L. T. 785.

(*t*) This seems to be the effect of the two somewhat puzzling decisions of *Stannard v. Lee* ((1871), L. R. 6 Ch. 345), and *Stannard v. Harrison* ((1871), 19 W. R. 811), both relating to maps of the scene of war in 1870.

(*u*) Sect. 35 (2).

(*x*) Sect. 5 (1); *post*, Chapter VI., "First Owner of Copyright."

photograph is less than that for a literary work. The period of copyright in the case of a literary work is for the life of the author and fifty years after his death (*y*); that for a photograph is fifty years from the making of the negative, whether the same be published or unpublished (*z*). It was held in several cases, decided under the Literary Copyright Act, 1842, that, if the owner of the copyright in the letterpress of a book was also the owner of the copyright in the illustrations, he was in a position to sue for infringement of the copyright in the illustrations provided he had complied with the formalities required by that Act, although he had not complied with those required by the Acts relating to artistic copyright (*a*). These cases were so decided upon the ground that it was "books" which were protected under the Act of 1842, and that a "book" might consist of illustrations as well as letterpress. Inasmuch as, under the Act of 1911, it is no longer "books" but "literary works" which are the subjects of protection, it is conceived that the decisions referred to are no longer applicable, in so far as they may be taken to have decided that a book and its illustrations may be the subjects of a single copyright. On the other hand, in the case of *Petty v. Taylor* (*b*), it was held that if the proprietor of the copyright in the letterpress of a book was not the proprietor of the copyright in the illustrations, he could not, by registering under the Act of 1842, acquire the right of suing for infringement of the copyright in the illustrations. This case seems to be in favour of the proposition that under the new Act the copyright in the letterpress and the copyright in the illustrations are to be considered as separate and distinct, and that the copyright in the one may run out before the copyright in the other.

If an artistic design is intended to be used as a model or pattern to be multiplied by an industrial process, the question arises as to whether it ought to be protected as an "artistic work" under the Copyright Act, 1911, or as a "design" under the Patents and Designs Act, 1907 (*c*). The Copyright Act expressly includes works of "artistic craftsmanship" amongst artistic works entitled to the protection afforded by that Act (*d*), and also

Industrial designs.

(*y*) Sect. 3.

(*z*) Sect. 21.

(*a*) *Bogue v. Houlston* (1852), 23 Do G. & S. 267; *Maple v. Junior Army and Navy Stores* (1882), 21 Ch. D. 369; *Comyns v. Hyde* (1895), 72 L. T. 250; *Marshall v. Bull* (1901), 85 L. T. 77; *Davis v. Benjamin*, (1906) 2 Ch. 491.

(*b*) (1897) 1 Ch. 465.

(*c*) 7 Edw. VII. c. 29.

(*d*) Sect. 35 (1).

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gives to every proprietor of copyright the right to reproduce his work in "any material form whatsoever" (e). It is conceived that, apart from any special legislation to the contrary, such a work might receive protection under both Acts (f). Such special legislation is, however, provided by sect. 22 (1) of the Copyright Act, 1911, which enacts that that Act is not to apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process. By sub-sect. (2) of the same section general rules are authorised to be made under sect. 86 of the Patents and Designs Act, 1907, for determining the conditions under which a design is to be deemed to be used for such purposes as aforesaid.

Definition of a design.

By sect. 93 of the Patents and Designs Act, 1907, a "design" is defined as meaning "any design (not being a design for a sculpture or other thing within the protection of the Sculpture Act, 1814 (g)) applicable to any article, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatsoever, manual, mechanical, or chemical, separate or combined."

Advantages of protection under the Copyright Act.

The period of protection given to a design under the Designs Act is shorter than that given to artistic works under the Copyright Act, the former Act only giving copyright for a period of five years, renewable for two further periods of five years each, making a maximum period of protection for fifteen years (h). Again, there are no formalities to be observed as a condition for obtaining copyright under the Copyright Act, whereas registration and the marking of every article to which the design is applied are requisite under the Designs Act (i). The protection accorded by the Copyright Act is, therefore, superior in every respect to that given by the Designs Act, and it is important to consider what are the designs which are excluded from the benefit of the former Act.

(e) Sect. 1 (2).

(f) *Werner Motor Co. v. Gamage*, (1904) 1 Ch. 264; *Miller v. Polak*, (1908) 1 Ch. 433; *Smith Bros. v. Redfearn* (1911), 131 L. T. J. 318.

(g) 54 Geo. III. c. 56. This Act is repealed by the Copyright Act, 1911, s. 36.

(h) 7 Edw. VII. c. 29, s. 53.

(i) *Ib.* s. 54.

The fundamental distinction between a "design" and a simple "artistic work" lies, it is thought, in the applicability of the former to another article (*k*); that is to say, an artistic work is bought purely and simply for its artistic properties, an article to which a design has been applied is bought not simply because of the artistic qualities of the design, but because of the utility of the article, apart from the design. For example, the plate from which an engraving is to be printed is intended to be applied to a sheet of paper or other material, but an engraving is not usually purchased for the material on which it is printed. Therefore, engravings are *primâ facie* entitled to protection under the Copyright Act. But if it were intended that this engraving should be applied to, say, a wall-paper, then it would be different; for nobody would be likely to purchase an engraving printed upon a wall-paper, unless it was for the purpose of papering a room. In such a case the engraving would fall under the law as to designs. Applying these principles, it is submitted that a drawing or painting intended to be reproduced upon a Christmas card falls under the Copyright Act (*l*), and the same with regard to an advertisement poster, for the object of a person in designing a poster is not to cover the hoarding upon which it is to be pasted, but to produce a picture which will attract the passer-by. Picture postcards possibly present greater difficulty, for it may be contended that a purchaser of a postcard purchases the same as a means for carrying on a correspondence. It is, nevertheless, submitted that these are entitled to the protection of the Copyright Act, the postcard being subsidiary to the picture upon it.

But it is to be noticed that it is not every work capable of being registered as a "design" that is excluded from the benefit of the Copyright Act, it must also be one which is "used or intended to be used as a model or pattern to be multiplied by some industrial process." The Board of Trade have made rules for determining whether a design is "used or intended to be used" for this purpose. By these rules this is to be so: (a) where the design is reproduced or is intended to be reproduced in more than fifty single articles, unless all the articles in which the design is reproduced, or is intended to be reproduced, together form only a single set, as defined by Rule 5 of the Designs Rules, 1908 (*m*); (b) where the design is to be applied to.

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Distinction between a design and an artistic work.

What is a "model or pattern to be multiplied by some industrial process"?

(*k*) See the definition of a design stated above.

(*l*) It was so held under the old law, which did not expressly exclude designs from the benefit of the Copyright Acts: *Hildesheimer v. Dunn* (1891), 64 L. T. 452; *Miller and Lang v. Polak*, (1908) 1 Ch. 433.

(*m*) Under this rule a "set" means a number of articles of the same

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(1) printed paper hangings; (2) carpets, floorcloths or oilcloths, manufactured or sold in lengths or pieces; (3) textile piece goods, or textile goods manufactured or sold in lengths or pieces; (4) lace, not made by hand (*n*). A drawing or painting, therefore, to be reproduced upon hardware is not excluded from the Copyright Act unless more than fifty articles are intended to be manufactured bearing the same design, but a drawing or painting to be reproduced upon textile goods manufactured in lengths or pieces is so excluded, whatever be the quantity manufactured. A mere geometrical pattern, if submitted, is not an artistic work at all within the meaning of the Copyright Act—at least, if intended as a pattern for any article.

Designs made
prior to the
Act of 1911.

A point arises as to the position of the owner of a design made prior to the Copyright Act, 1911, coming into force which would have been capable of being registered under the Designs Act, but which was entitled to protection under the repealed Copyright Acts at the date when the Act of 1911 came into force (*o*). By virtue of sect. 24 (1) of that Act and the First Schedule thereto, a person entitled to copyright under the old law on the 1st July, 1912, became entitled to copyright as defined by the Act of 1911 (*p*). It is submitted that the proprietor of the copyright in such a design as above mentioned became entitled to copyright in such design for the full period allowed by the Act, notwithstanding the prohibition contained in sect. 22 above referred to (*q*). Otherwise, the Act would seem to deprive him of all protection, for he would not appear to be able to register his design under the Designs Act, 1907, for lack of novelty in his design (*r*).

general character ordinarily on sale together, or intended to be used together, all bearing the same design, with or without modification, not sufficient to alter the character, or not substantially affecting the identity thereof." Thus, for example, a dinner service consisting of 76 pieces would be regarded as one article. Where there is any doubt whether given articles do or do not constitute a set, the doubt is to be determined by the Comptroller of Patents.

(*n*) Designs Rules, 1912, Appendix E., *post*.

(*o*) *Miller v. Polak*, (1908) 1 Ch. 433; *Smith Bros. v. Redfearn* (1911), 131 L. T. J. 318.

(*p*) See Part III., Chapter VII., *post*.

(*q*) *Ante*, p. 96.

(*r*) 7 Edw. VII. c. 29, s. 49.

CHAPTER V.

THE TERM OF COPYRIGHT.

THE proper period of copyright has long been a matter of controversy. Some have contended that the period ought, in the interests of literature, to be a very short one; others urge, in the same interests, that it ought to be perpetual.

What is a fair term for copyright?

Those who argue in favour of a restricted period for copyright, speak of it as a monopoly (*a*): whilst upholders of copyright in perpetuity speak of the author's right to prevent others multiplying copies of his work as a right of property. But those who argue upon the basis of property appear sometimes to overlook the fact that a book is also property and that, by the common law, the owner of a chattel has absolute dominion over it; but the copyright laws, in effect, restrict this absolute dominion in the case of a purchaser of a book, the term of copyright in which has not expired. In truth, the controversy is not one that can be decided by a mere phrase, but by a consideration of what protection an author can reasonably demand to ensure an adequate return for his labours, it being generally admitted that literature cannot, in these days, be expected to flourish in a country possessing lax, or insufficient, copyright laws (*b*).

It is sometimes argued that the existence of the copyright laws militates against cheap literature, but it is exceedingly doubtful whether this argument is sound. Complaint can hardly be made that books are not cheap enough at the present day, and this may be said not only of books the copyright of which has run out, but of those which are still the subject of copyright. Indeed, a publisher may think it worth while to bring out a cheap edition of a work of which he is secure of a monopoly in the market for some considerable period, but could not afford to do so if he ran the risk of other cheap editions of the same work being brought out by other publishers. At the same time, it seems proper that

(*a*) As to how far this is correct, see *ante*, p. 2.

(*b*) Perpetual copyright is, at the present day, only conceded in certain Central American States.

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some period should be put to copyright, for, amongst other reasons, it would be very unfortunate if annotated editions of old works were not to be permitted without the consent of the proprietors of the copyright.

The present
period of
protection.

At the Conference of the Powers held at Berlin in the year 1907 for the purpose of considering what modifications ought to be made in the Berne Convention (*c*), it was decided that the minimum period of protection accorded to an author should be during his life and for a period of fifty years after his death. This appears to be a reasonable period, and it has now been adopted by the British Copyright Act, 1911, for all published works, with certain minor exceptions (*d*). The present law has, moreover, the very considerable advantage over the old law, that the date of publication has—save in the excepted cases, which will be dealt with later on—no bearing upon the determination of copyright protection. Under the old law, which gave an alternative period of copyright for literary works, either the life of the author and seven years after his death or a gross period of forty-two years, whichever should be the longer (*e*), the works of the same author were liable to fall into the public domain at different times, but under the new Act all the works of the same author will—save in the excepted cases—fall into the public domain at one and the same time, namely, fifty years after his death.

Exceptions.

The cases which are excepted from sect. 3 and are entitled to special periods of copyright protection are: (1) Photographs; (2) mechanical instruments; (3) Government publications; (4) joint works; and (5) posthumous works. Mechanical instruments and joint works will be treated separately hereafter (*f*).

Photographs.

The period of protection for photographs is “fifty years from the making of the original negative from which the photograph was directly or indirectly derived” (*g*). It is immaterial whether the photograph be published or unpublished, but in the case of an unpublished photograph it is thought that infringement might be restrained upon the ground of breach of trust or confidence, notwithstanding that more than 50 years had elapsed since the making of the original negative (*h*). Probably, a negative will be deemed to be “made,” not upon exposure, but upon the plate being developed and fixed.

(*c*) See *post*, Chapter “International Copyright,” Part IV., Chap. I.

(*d*) Sect. 3.

(*e*) *Ante*, p. 16.

(*f*) See *post*, Part III., Chapters II. and V.

(*g*) Sect. 21. Photograph includes photo-lithograph and any work produced by analogous process (sect. 35).

(*h*) Sect. 31.

In the case of works which have been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright is to continue for a period of fifty years from the date of the first publication of the work (i).

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Government
publications.

Literary, dramatic and musical works and engravings (k) in which copyright subsists at the date of the death of the author and which have not been published, nor in the case of a dramatic or musical work been performed in public, nor in the case of a lecture delivered in public before that date, are entitled to copyright until publication or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter (l).

Posthumous
works.

One argument that has sometimes been advanced against granting copyright protection is that it may have the effect of depriving the public of the benefit of an author's works. As an example of this may be cited the case of Wagner with regard to his opera "Parsifal." By the terms of the musician's will it was forbidden that this opera should be publicly performed at any place other than Bayreuth. Germany being a party to the Berne Convention (m), the composer's representatives were able to give effect to his wishes so long as the copyright in the work lasted. At the beginning of the year 1914 the copyright ran out, and the opera has recently been heard for the first time not only at other places in Germany, but throughout the civilized world. It is such a case as this that is, perhaps, intended to be met by sect. 4 of the Copyright Act, 1911, which is as follows:—

Compulsory
licences.

"If at any time after the death of the author of a literary, dramatic, or musical work which has been published or performed in public a complaint is made to the Judicial Committee of the Privy Council that the owner of the copyright in the work has refused to republish or to allow the republication of the work or has refused to allow the performance in public of the work, and that by reason of such refusal the work is withheld from the public, the owner of the copyright may be ordered to grant a licence to reproduce the work or perform the work in public, as the case may be, on such terms and subject to such conditions as the Judicial Committee may think fit."

(i) Sect. 18, *post*, Chapter "Crown Copyright," Part III., Chap. VI.

(k) Photographs are not included, because copyright runs from the making of the negative. Artistic works, other than engravings (for definition see sect. 35), are also not included, so that, whether these be published or not, copyright ceases fifty years after the artist's death.

(l) Sect. 17.

(m) See *post*, "International Copyright," Part IV., Chap. I.

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This section is practically a reproduction of sect. 5 of the Literary Copyright Act, 1842, only extending the provisions of that section so as to enable the right to perform a work in public to be compulsorily acquired. It is believed that the section of the repealed Act above referred to was never put into force, and it is doubtful whether this substituted section will have any greater results; but, possibly, it may operate *in terrorem*. The section as originally drafted, prior to its consideration by the House of Commons, required that applications for compulsory licences should be made to the Comptroller of Patents, and contained a provision that a work should be deemed to be withheld from the public if, by reason of the excessive price charged for copies of the work or the undue limitation of the number of copies issued, the demand of the public for the work is not reasonably met. The section was altered to its present form in Committee of the House of Commons.

Construction
of the
section.

A section which in effect expropriates the property of another ought, it is thought, to receive a strict construction. No compulsory licence can under the terms of the section be granted until after the death of the author and until after the work has been once published or publicly performed with the consent of the author⁽ⁿ⁾. Moreover, in order that a case for a compulsory licence can arise, the work must have been withheld from the public by reason of the fact that "the owner of the copyright in the work has refused to republish or to allow the republication of the work or has refused to allow the performance in public of the work." If the author's representatives are willing to republish, but only at a prohibitory price, that, it is thought, is not a refusal to republish. Presumably, it is not the intention that the section shall interfere with business arrangements. But it is not so easy to say whether, if an author was willing that his work should be performed in London, but not in any other place, that would be a refusal to allow the public performance of the work. Unless it be so, the section would not have met the case of "Parsifal."

Seem, does
not apply
to foreign
works.

The section, it is submitted, has no application to a foreigner's work. Presumably, the author's representatives would have to be served with a petition to the Privy Council, and there would seem to be no jurisdiction to serve such a petition upon a person outside the jurisdiction.

Compulsory
right to re-
produce on
payment of
royalties.

When the Copyright Bill was before Parliament, the proposed extension of the term of copyright met with considerable opposi-

(n) Sect. 35 (2).

tion, and by way of compromise between those who desired that there should be no extension of the term and those who wished to see the full term of life and fifty years accorded, the curious proviso to sect. 3 was inserted, which is as follows:—

“ Provided that at any time after the expiration of twenty-five years, or in the case of a work in which copyright subsists at the passing of this Act thirty years, from the death of the author of a published work, copyright in the work shall not be deemed to be infringed by the reproduction of the work for sale if the person reproducing the work proves that he has given the prescribed notice in writing of his intention to reproduce the work, and that he has paid in the prescribed manner to, or for the benefit of, the owner of the copyright royalties in respect of all copies of the work sold by him calculated at the rate of ten per cent. on the price at which he publishes the work; and, for the purposes of this proviso, the Board of Trade may make regulations prescribing the mode in which notices are to be given, and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, including (if they think fit) regulations requiring payment in advance or otherwise securing the payment of royalties.”

The above proviso is to apply to posthumous works as if the author had died at the date when his work was first published, performed, or delivered in public (*o*). There is no similar provision expressly extending the proviso to photographs and mechanical contrivances, and it is submitted that these cannot be compulsorily reproduced upon a royalty basis.

Application to posthumous works.

But not to photos and records.

In order to be entitled to reproduce a copyright work, a person, other than the owner of the copyright (*p*), must prove (*q*) (a) that he has given the prescribed notice of his intention to reproduce the work, and (b) that he has paid to, or for the benefit of, the owner of the copyright, royalties in respect of all copies of the work sold by him calculated at the rate of ten per cent. on the price at which he publishes (*r*) the work.

Conditions of the right to reproduce a work.

The Board of Trade have, in accordance with the power conferred on them by the above-mentioned section, issued regulations prescribing the measures to be taken by those who desire

Board of Trade Regulations as to notice.

(*o*) Sect. 17.

(*p*) The copyright returns automatically to the representatives of the author, if he was the first owner of the copyright, twenty-five years after his death: sect. 5 (2), *post*, “Assignment of Copyright,” Chapter VII.

(*q*) The burden of proof lies on him.

(*r*) N.B.—The publisher will therefore be well advised to publish at a net price.

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to publish works during the period of their non-exclusive protection (s). Notice must be sent not less than one month before any copies of the work are delivered to a purchaser by registered post to the owner of the copyright, or his agent for the receipt of notice, if the name and address of such owner or agent can with reasonable diligence be ascertained (t). The notice must contain the following particulars: (a) the name and address of the person intending to reproduce the work; (b) the name of the work which it is intended to reproduce, and (if necessary) a description sufficient to identify it.; (c) the manner in which it is intended to reproduce the work (*e.g.*, whether by painting, lithography, photography, &c.); (d) the price or prices at which it is intended to publish the work; (e) the earliest date at which any of the copies will be delivered to a purchaser (u).

As to payment of royalties.

Payment of the royalties is, in the absence of contrary agreement, to be made by means of adhesive labels to be affixed to the copies of the work. After notice of intention to reproduce the work has been given, it is the duty of the owner of the copyright to intimate by registered post to the person who has given the notice some reasonably convenient place within the United Kingdom from which adhesive labels can be obtained, and, upon tender of the price, to supply from such place adhesive labels of the required denominations at a price equal to the amount of royalty represented thereby (x).

Regulations in event of owner not being known or not delivering tickets.

So far, it is thought, no objection can be taken to the Board of Trade rules. It has been held (y), under the corresponding rules made under sect. 19 (6) with regard to the royalties payable in respect of mechanical contrivances, that payment by means of adhesive labels is a perfectly legitimate method of "securing" payment of the royalties to the author. It is much more questionable whether the regulations as to the course to be taken if the owner of the copyright cannot be found or fails to perform the obligations imposed upon him by the regulations are authorised by the Act. If the owner of the copyright cannot with reasonable diligence be found, notice is to be given to him by advertisement in the *London Gazette* (z). To this, it is conceived, there can be no objection, but the regulations then go on to provide that,

(s) Copyright Royalty System (General) Regulations, 1912. See Appendix E., *post*.

(t) Rule 3 (a).

(u) Rule 2.

(x) Rule 4 (a). As to size and design of labels, see Rule 4 (c).

(y) *Monckton v. Pathé Frères*, (1914) 1 K. B. 395. See *post*, Chapter "Mechanical Contrivances," Part III., Chap. V.

(z) Rule 3 (b).

in cases where royalties are payable by means of adhesive labels, if at any time labels of the required denomination are not available either because—(a) after the expiration of fourteen days from the date of notice the owner of the copyright has not sent to the person reproducing the work an intimation of some reasonably convenient place within the United Kingdom from which such labels can be obtained; or (b) the owner of the copyright refuses or neglects to supply such labels within fourteen days after demand duly made, then copies of the work may be delivered to purchasers without having labels affixed thereto, and the amount of royalties is to be a debt due from the person reproducing the work to the owner of the copyright, the person reproducing the work keeping an account of all such copies sold by him (a).

No doubt these regulations seem, at first sight, reasonable enough, but the question is not as to their reasonableness, but as to the jurisdiction of the Board of Trade to make them. The Act only authorises reproduction if the person reproducing "has paid" the royalty "to or for the benefit of the owner of the copyright." The Board of Trade may prescribe "the mode, time, and frequency of the payment of royalties," including regulations "securing the payment" of the royalties. Doubtless, tender of payment would be held to be equivalent to "payment," but can it be said that a direction that "the amount of royalties shall be a debt due from the person reproducing the work to the owner of the copyright" is either a "payment" or a "security for payment" of the royalties, or in any way "ensures" payment (b)? In this connection it may be recalled that under the Literary Copyright Act, 1842 (c), there was a provision to the effect that the copyright in articles contributed to an encyclopædia or periodical should, under certain circumstances, vest in the publisher of the work, if "paid for." This provision was construed strictly, and it was held not sufficient to show a contract for payment: actual payment must have been made (d). At the same time, the Board of Trade is authorised to prescribe as to the time of payment of the royalties, and perhaps the meaning of the regulation in question is that in a case where the owner of the copyright makes no reply to a notice, payment of the royalty is postponed until demand of payment is made, but, upon the whole, it is submitted that if the royalties are irrecoverable by

Quære, as to whether these regulations are intra vires.

(a) Rule 4 (b).

(b) In *Monckton v. Pathé Frères*, (1914) 1 K. B. at p. 406, this was the meaning which Kennedy, L. J., attached to the word "securing."

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

(d) *Richardson v. Gilbert* (1851), 1 Sim. N. S. 336; *Brown v. Cooke* (1846), 16 L. J. Ch. 140; *Trade Auxiliary Co. v. Middlesbrough* (1889), 40 Ch. D. 425; *Collingridge v. Emmott* (1888), 57 L. T. 864.

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reason of the insolvency of the publisher, or for any other reason, the proprietor of the copyright can sue for infringement of copyright.

Where mode of payment is agreed.

Where royalties are by agreement payable in any other mode than by means of adhesive labels, the time and frequency of the payments are to be such as are specified in the agreement (e).

Only published works may be compulsorily reproduced.

It is only "published" works that are liable to be compulsorily reproduced on payment of royalties. A dramatic or musical work is not published by public performance, nor is an artistic work by public exhibition, nor are works of sculpture and architectural works of art by the issue of photographs and engravings (f). Dramatic and musical works which have been publicly performed, but not sold in print, cannot therefore be reproduced upon the royalty system, nor can a picture, unless copies have been issued to the public.

No right to "perform" a work upon the royalty system.

The mode of reproduction is also limited. The work can only be reproduced "for sale," not for any other purpose which would be an infringement of copyright, e.g., for the purpose of gratuitous distribution. The right is to "reproduce" the work, and this reproduction must result in a saleable article, for the amount of royalty payable is to be determined by the price at which the reproducer publishes his work. Performing rights, therefore, remain exclusive throughout the entire period of protection.

Right to reproduce in another form.

It seems also to be doubtful whether a work can be reproduced under this proviso except in similar form to the original publication, or whether part only of the work can be reproduced. The proviso in question does not give the right to reproduce "in any material form whatsoever," nor does it give the right to reproduce the work, or any substantial part thereof, as in sub-sect. (2) of sect. 1. It may be, therefore, that, except in a case falling within sect. 19 (2) of the Act (g), no compulsory right can be acquired to make a record or other mechanical contrivance of a work, such mechanical records not being "copies" of the original (h).

Or a part of a work.

No doubt *primâ facie* the right to reproduce the whole work should include a right to reproduce a part, but the fact that the copyright proprietor is to be remunerated by payment of ten per cent. upon the published price of the reproduction rather militates against this construction (i). This fact also raises diffi-

(e) Rule 4 (d).

(f) Sect. 1 (3), and see as to publication generally, *ante*, p. 37 *et seq.*

(g) See Chapter "Mechanical Contrivances," *post*, Part III., Chap. V.

(h) *Boosey v. Whight*, (1900) 1 Ch. 122.

(i) As to which see *Leo v. Gibbings* (1892), 67 L. T. 263; *Springfield v.*

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Quære, whether an author's work may be compulsorily used as part of another work.

culties if it should be desired to incorporate the whole of a published work in a larger work. For instance, can a published engraving, the author of which has been dead for over twenty-five years, be taken to illustrate a book, or can a literary work be included in an encyclopædia or other collective work? If so, what is the basis for the ascertainment of the royalty payable to the owner of the copyright? Upon the whole, it is thought that the practical difficulties in giving effect to the provisions of the compulsory section are such that the Courts will probably hold that these provisions do not apply to such cases. If a picture is inserted in a volume, it cannot fairly be said that the publisher "publishes the work"—*i.e.*, the picture—at any price, and yet the section makes the royalty 10 per cent. of that price, and, if this argument be overruled, there is absolutely no machinery for determining what is the proper proportion of the price of the volume to be attributed to the picture. Some support, too, seems to be lent to the argument that a work cannot be reproduced compulsorily as part of another work by the Board of Trade Regulations, which require, in the absence of contrary agreement, that the royalty shall be payable by means of adhesive labels "affixed to the copies of the work" (*k*). The publisher of an encyclopædia might well hesitate before issuing a work dotted here and there with adhesive labels! The section, in a sense, expropriates the property of another, and the burden seems to be upon the reproducer to show that he has a right to do so.

It has been said that an author may by his conduct or by his express desire *abandon* his copyright, and give to the public a right to publish his work before the time when his copyright would expire (*l*). There is no authority on the point, and it is difficult to say what amount of evidence the Court would require as to the fact of a dedication of a copyright to the public.

Abandonment of copyright.

But it is clear that a proprietor of a copyright does not lose his right of publication by permitting his book to remain out of print and obsolete for any number of years (*m*). The copies may have been all sold, but he may exercise the right he has of republication at such periods as he thinks likely to answer his purpose and when he considers he can best find purchasers. It is a matter on which he has a right to exercise his own judgment.

Abandonment of copyright not presumed from book being out of print.

Thame (1903), 19 T. L. R. 650, and *post*, Chapter "Publishing Agreements," Part VI.

(*k*) Copyright Royalty System (General) Regulations, Rule 4 (a), *ante*, p. 104.

(*l*) 4 Burr. 2346, 2367, 2466; *Platt v. Batten* (1813), 19 Ves. 447; *Rundell v. Murray* (1821), Jac. 311, 316.

(*m*) *Weldon v. Dioks* (1878), 10 Ch. D. 247.

CHAPTER VI.

THE FIRST OWNER OF THE COPYRIGHT.

Copyright to vest in the "author."

WITH certain exceptions, which will be more fully considered hereafter, under the Copyright Act, 1911, the "author" of a work is to be the first owner of the copyright therein (a).

Meaning of "author."

As a general rule there will be no difficulty in determining who is the author of the work, notwithstanding that the Act contains no definition of "authorship"; but cases may perhaps arise in which the question is not so easy of solution. It is clear that the person who merely suggests the plot of a novel or a play to the writer, or the subject of a picture to an artist, is not the author of the novel, play or picture (b); it is equally clear that a mere amanuensis is not an author. But between these two extremes there may be gradations. It is submitted, however, that *primâ facie* the author of a literary work is the person who originates the language used, and the author of an artistic work is the person who actually executes the design. If A.'s manuscript is corrected and improved by B., it will probably be a question of the amount and value of the corrections and improvements as to whether the author is A. or B., or whether they are joint authors (c).

Kenrick v. Laurence.

The case of *Kenrick v. Laurence* (d) may be taken as the leading case on the subject. In that case the plaintiffs were a firm of printers, and 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

(a) Sect. 5 (1). The exceptions to the rule besides those dealt with in this chapter are (1) Government publications, and (2) mechanical reproductions. These are dealt with in separate chapters.

(b) *Shepherd v. Conquest* (1856), 17 C. B. 427.

(c) See *Springfield v. Thame* (1903), 89 L. T. 242, where the plaintiff had sent an account of an incident he had witnessed to a newspaper, and the account was so altered by the sub-editor of the paper that the latter was held to be the "author" of the newspaper paragraph.

(d) (1890), 25 Q. B. D. 99.

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 Fine Arts Copyright Act of 1862 (e), 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. Mr. Justice Wills remarked: "I do not see 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" (f).

The case of *Stannard v. Harrison* (g), at first sight, appears to be contrary to the case just cited. The engraver of a map, published with a view to assisting persons to follow the operations of the armies in the Franco-German war, was called as a witness, and proved that the plaintiff had brought to him his rough sketch or draft, a drawing of the same size as the stone upon which it was to be engraved, pointing out a rough sketch of the forts and towns to give the engraver an idea; he furnished him also with a large French map, and some maps published in the *Times* and *Daily Telegraph*; he also gave him notice daily of the 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. . . .

*Stannard v.
Harrison.*

(e) 25 & 26 Vict. c. 68.

(f) The Court also held that, in any case, the drawing was not one entitled to the benefit of copyright: see *ante*, p. 91.

(g) (1871), 19 W. R. 811.

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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?"

The distinction between these cases.

The distinction between these two cases lies in the wording of the different Acts upon which they were decided. The first cited case was decided under the Fine Arts Copyright Act, 1862, the second under the Engravings Acts (*h*). These latter Acts vested the copyright in the person who "shall invent or design, engrave, etch, or work, or from his own work, design, or invention, shall cause or procure to be designed, engraved, etched, or worked" (*inter alia*) a map or plan; whereas the former Act invested the copyright in a drawing in the "author." *Kenrick v. Laurence* is therefore an authority under the Act of 1911, but *Stannard v. Harrison* is not. And, although the decision in *Kenrick v. Laurence* would have actually been different if it had been decided under the Act of 1911, because of the contract of service existing between the artist and the conceiver of the design (*i*); yet it seems to be a distinct authority that the person who has no part in the physical operation of producing an artistic work cannot be its "author."

Barfield v. Nicholson.

The decisions in some other cases are also liable to misconception. Thus, in *Barfield v. Nicholson* (*j*), Sir John Leach said: "I am of opinion that, under the statute (8 Anne, c. 19), the person who forms the plan, 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 requirements, 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."

Explanation.

In this case, it must be pointed out, the Master of the Rolls was referring to collective or composite works, such as encyclopædias, where there are distinct copyrights, namely, the copyright in the entire work and the copyright in the various separate contributions. The person who plans a collective work may perhaps be the author of the work as a whole although he makes no actual written contribution to the work, but the case of *Barfield v. Nicholson* must not be taken as an authority that he becomes

(*h*) 8 Geo. II. c. 13; 7 Geo. III. c. 38.

(*i*) Sect. 5 (1) (b), *post*, p. 117.

(*j*) (1824), 2 Sim. & St. 1.