

the "author" of the separate contributions (*k*). To take a single contribution from a collective work is not necessarily an infringement of the collective work (*l*).

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On the same principle was determined the case of *Hatton v. Kean* (*m*), where the defendant, with the aid of scenery, dresses, and music, adapted one of Shakespeare's plays to the stage, and found the general design of the representation. He employed the plaintiff, a well-known musician named Hatton, for reward, to compose, and he did compose, as part of the representation, and as accessory to the dramatic piece, a musical composition, which formed part of the dramatic piece, on the terms that the defendant should have the liberty of representing and permitting to be represented the said musical composition with the dramatic piece as part thereof. And it was held that the defendant had the sole right of representing the entire dramatic piece, including the plaintiff's musical composition, and that he violated no right of the plaintiff within the 3 & 4 Will. IV. c. 15, and the 5 & 6 Vict. c. 45, by representing, without the plaintiff's consent in writing, the entire dramatic piece, including the plaintiff's musical composition. The reason assigned was that, though the plaintiff was the author of the musical composition, it appeared that the defendant was the author and designer of the entire dramatic work, and with respect to a part, accessory to that whole (that whole consisting of something produced by the skill of the defendant in its entirety), he employed the plaintiff. The production by the plaintiff would be a part of the whole, and the defendant would have the sole right of performing and representing the entire piece in conjunction with the music.

Hatton v. Kean.

This case was followed in *Wallenstein v. Herbert* (*n*). There Matthews, the manager of the St. James's Theatre, had employed Wallenstein to furnish music for that theatre. The latter engaged and paid the musicians, supplied the instruments and compositions, and conducted the orchestra. Besides playing general orchestral music for the theatre, it was his duty to provide incidental music for dramas, when necessary; and such music he might either select or compose. In performance of this duty he composed incidental music for "Lady Audley's Secret," a drama brought out by Matthews, but of which the latter was not the author, and at that time was not even the owner. In composing

(*k*) See *post*, "Newspapers and Collective Works."

(*l*) *Walter v. Howe* (1881), 17 Ch. D. 708.

(*m*) (1859), 8 W. R. 7.

(*n*) (1866), 15 L. T. 64; on appeal (1867), 16 L. T. 453; see *Hazlitt v. Templeman* (1866), 13 L. T. 593.

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the music the plaintiff had received no assistance from the manager, and had himself found the paper on which the music was written, and employed a person to copy the various orchestral parts from the original score. These parts the composer kept in his own possession, nor did the theatre have a library of music. When the engagement between Matthews and Wallenstein had ended, the former obtained from the latter a duplicate copy of the music, with permission to use it "on a provincial tour." Afterwards, when the defendant, Miss Herbert, had succeeded Matthews in the management of the St. James's Theatre, and Wallenstein had ceased to be the musical director, she obtained permission from Matthews to represent "Lady Audley's Secret," of which play he was then the owner, and received from him the duplicate copy of the music which Wallenstein had made for him. The original score was still in the possession of the composer, who had given no consent either to Matthews or to Miss Herbert to use the music in London.

The Court held that the controlling facts in the case were not different from those in *Hatton v. Kean*; that the music became an inseparable part of the drama, and was not an independent composition; that Matthews, by virtue of the contract of employment, had acquired an unlimited right to use the music; and that the defendant, as the licensee of Matthews, was also entitled to use it.

From these cases it would seem to follow that in the case of a song or a musical play, if the author of the lyrics is a different person from the author of the music, it may be a question as to which of them is the author of the song as a whole, or the play as a whole, or whether they are joint authors (*o*).

Author of
artistic work.

In the case of artistic works, other than photographs, it is the person whose hands fix the picture upon the canvas, paper, stone, copperplate, or wood who is the author. Even in the case of lithographs it is submitted that the author is the person who does the drawing upon the stone. Although it is usual to employ a special lithographic designer to draw the design for the express purpose of having the same lithographed, the latter is not, it is thought, the author of the lithograph (*p*). Nevertheless, in the

(*o*) It is submitted that they might conceivably be such notwithstanding that the definition of a joint work excludes the case where the contribution of one author is distinct from the contribution of the other, for their respective contributions to the work, considered as a whole, might be incapable of distinction.

(*p*) *Quære*, as to a map, whether the engraver or the surveyor would be the "author." A map is a "literary work" (sect. 35 (1)).

case of "engravings"—including etchings, lithographs, woodcuts, prints and other similar works, not being photographs (*q*)—if the plate or other original has been ordered by some other person and made for valuable consideration, it is provided by sect. 5, proviso (a), that the first owner of the copyright shall, in the absence of contrary agreement, be, not the "author" of the engraving, but the person by whom the plate or other original was ordered.

The difficulty under the old law of determining who was the "author" of a photograph (*r*) is solved under the new Act by providing that the person who was owner of the original negative at the time when such negative was made (*s*) is to be deemed the author of the work, and that where such owner is a body corporate, the body corporate is to be deemed for the purpose of the Act to reside within the parts of His Majesty's dominions to which the Act extends, if it has established a place of business within such parts (*t*).

Proviso (a) to sect. 5 (1) above alluded to, applies not only to engravings, but also to photographs and portraits. It does not, however, apply to any artistic works other than engravings and photographs unless they fall under the designation of "portraits." There was a somewhat similar provision in the Fine Arts Copyright Act, 1862 (*u*), to the effect that where a painting, drawing, or the negative of any photograph should be "made or executed for or on behalf of any person for a good or a valuable consideration," the copyright should belong to "the person for or on whose behalf the same shall be so made or executed" (*x*). Under this Act it was necessary, if the commissioned author was to retain the copyright in himself, that he should do so in writing.

The differences between the Act of 1911 and the Act of 1862 are (1) that under the Act of 1911 writing is not required if the artist desires to retain his copyright, the proviso only says "in the absence of any agreement to the contrary"; (2) that the 1862 Act refers to a work "made" for another, and the Act of

(*q*) Sect. 35 (1).

(*r*) See *Nottage v. Jackson* (1883), 11 Q. B. D. 627; *Melville v. Mirror of Life*, (1895) 2 Ch. 531.

(*s*) If the film were stolen prior to exposure, perhaps the law as to "confusion" would apply, and the copyright belong to the owner of the film and not to the thief: *sed quæro*.

(*t*) Sect. 21. The provisions as to residence of corporations are due to the fact that residence is essential to copyright in unpublished works: sect. 1 (1) (b), *ante*, p. 27.

(*u*) 25 & 26 Vict. c. 68.

(*x*) *Petty v. Taylor*, (1897) 1 Ch. 465; *Boucas v. Cooke*, (1903) 2 K. B. 227.

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1911 speaks of a plate or original "ordered" by some other person; (3) that the 1862 Act uses the expression "a good or a valuable consideration," whereas the Act of 1911 only has the words "valuable consideration."

Stackemann v. Paton.

In the case of *Stackemann v. Paton* (y), Farwell, J., laid some stress upon the fact that the Fine Arts Copyright Act employed the word "good," in addition to "valuable," consideration, and seemed to suggest that there might be a difference between the two. In that case the plaintiffs were photographers who were in the habit of taking photographs of schools and the pupils attending them. This they did as a speculation. Their practice was to seek permission from the principals to take the photographs, it being clearly understood that no one was to be compelled to purchase copies, although, no doubt, the photographers had reasonable expectations of being able to effect sales amongst the pupils and others. In the particular case that came before the Court, the plaintiffs had obtained permission from the principal, who had gone to some trouble in showing the photographer over the interior of the school buildings, in gathering the pupils and grouping them for the purpose of being photographed. A certain number of copies were sold to pupils and others. The defendants were publishers of a book the purpose of which was to advertise schools, and the proprietors of the school in question had supplied them with a block made from the plaintiffs' photographs to be used for advertising the school in the defendants' publication.

Mr. Justice Farwell, in these circumstances, held that the copyright in the photographs was vested in the proprietors of the school, and that, therefore, the plaintiffs had no right to complain of their reproduction in the defendants' publication. The ground for this decision was that the school proprietors had given "good" consideration by reason of their permitting the photographer to have access to private buildings. The learned judge seems to have been influenced in his decision by the consideration that the school proprietors could hardly have intended to permit the plaintiffs to publish the photographs in any manner they pleased, but in order to give effect to such intention it was not necessary to hold that the plaintiffs had parted with their copyright. The case was put by the learned judge of a photograph which produced an atrocious caricature of the sitter; but it is submitted that in such a case, even although the copyright were without doubt vested in the photographer, the latter might be restrained from publishing

the same on the ground of breach of faith or libel. There would, it is thought, be little difficulty in implying into a contract with a celebrity, even if paid to give a sitting, an undertaking by the photographer not to hold the sitter up to ridicule, or, even further, that no photographs should be published unless they had been submitted to the sitter for approval. But whether this be so or not, no such question arose in the case we are now considering. The proprietors of the school were not seeking to restrain the photographers from publishing the photographs, but were actively asserting the right to themselves publish copies of a photograph, for the making of which they had given no consideration beyond permitting the photographer to have access to the school buildings for the purpose of taking the photographs.

It is not easy to reconcile this decision with the cases of *Ellis v. Marshall* (z) and *Melville v. Mirror of Life* (a), in both of which it was held that celebrities who were requested by photographers to give sittings without any charge being made for the taking of the photographs did not acquire the copyright in the photographs, notwithstanding that they subsequently purchased some copies. The learned judge in *Stackemann v. Paton* sought to distinguish these cases upon the ground that the only possible consideration given by the celebrities was that they took the trouble to walk up to the photographer's room and to sit in his chair; but, even if quantity of consideration is a matter which ought to be considered at all, the consideration given by the principal who permitted access to his buildings seems, at least, no greater than that given by a celebrity who sacrifices his time to attend a photographer's studio.

But whether or not the case of *Stackemann v. Paton* was rightly decided under the old law, it is submitted that if similar facts were to recur, the decision would not be the same under the Act of 1911. It is doubtful whether any importance ought to be attached to the fact that the latter Act omits any reference to a "good" consideration, but it requires that not only must the plate or other original be made for valuable consideration before the copyright shall belong to a person other than the author, but also that the plate or other original shall be "ordered by some other person." No doubt an order may be given expressly or impliedly, and the mere fact that a sitting has been canvassed for is certainly not conclusive that the sitter did not order the plate; but where an "order" is given, payment in some form or other

The correctness of this decision doubted.

Seemingly, *Stackemann v. Paton* no longer law.

(z) (1895), 64 L. J. Q. B. 757.

(a) (1895) 2 Ch. 531.

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is usually expected, and the law implies a contract to pay for the work (*b*). The fact, therefore, that no payment is made will, it is thought, generally justify the inference that the plate or original was not ordered by some other person. Further, the reasonable inference from the facts in *Stackemann v. Paton* surely was that the copyright was intended to belong to the photographer, who was to have any profit that might arise from the taking of the photographs. Under the Act of 1911, consequently, it is submitted that the Court would find an "agreement to the contrary" if under similar circumstances the school proprietors were to claim the copyright in the photographs. Under the old law, as previously pointed out, no claim could be based upon this ground by the plaintiffs in *Stackemann v. Paton*, because of the absence of any written agreement to that effect.

The present law.

The new Act, therefore, it is submitted, restores the law to what it was generally thought to be prior to the decision in *Stackemann v. Paton*, namely, that if an artist or photographer solicits the making of a picture or photograph, without making any charge for doing so, the copyright *primâ facie* belongs to the artist or photographer, even although the picture or photograph could not have been made or taken without the permission of some third person, and even although the sitter pays for some copies; but that, on the other hand, if a person requests a picture or photograph to be made or taken, the law implies a promise to pay for it, and this notwithstanding that the commission may have been solicited by the artist or photographer, and the copyright will *primâ facie* belong to the person giving the commission (*c*).

"Portraits" are the only works to which the proviso applies, except in case of engravings and photographs.

It must not, however, be forgotten that it is only in the case of engravings and photographs of *any subject* that the copyright can, under the proviso to sect. 5, sub-sect. (1), vest in the first instance in the person ordering the engraving or photograph. There is no such provision in the Act in the case of any other artistic work, unless that work falls under the description of a "portrait."

What is a "portrait"?

There is no definition of a "portrait" in the Act. The dictionary definition of the word is "a representation or delineation of a person, especially of the face, made from life (*d*) by drawing,

(*b*) *Boucas v. Cooke*, (1903) 2 K. B. 227.

(*c*) Photographers requested to photograph, say, football teams or school groups will be well advised, therefore, to make special arrangements as to copyright.

(*d*) It is submitted that this is not essential in the sense that the portrait must be taken direct from the living subject, provided material exists for making an accurate likeness; *e.g.*, a picture painted from a photograph of a

painting, photography, engraving, &c." (e). The meaning of the word was much discussed in a case of *Duke of Leeds v. Amherst* (f), in which the question arose upon the construction of a will, whether a picture of the Duke of Schomberg sitting, clad in armour, upon horseback, a battle scene forming the background of the picture, passed under a bequest of "portraits"; and it was held that it did. Whether a picture is a "portrait" or not seems to depend upon what is the main purpose of the picture. If the main object is the likeness of a person, it is not the less a portrait because of the presence of subordinate accessories in the picture. It is fairly clear that a "portrait" might include the likeness of more than one individual, but that, on the other hand, the mere fact that real persons happen to be delineated in a picture does not necessarily make that picture a "portrait" (g).

Another exception to the rule that copyright vests in the first instance in the author is made by the Act in the case "where the author was in the employment of some other person (under a contract of service or apprenticeship, and the work was made in the course of his employment by that person." In that case the person by whom the author was employed is, in the absence of any agreement to the contrary, to be the first owner of the copyright (h).

When copyright vests in employer.

Whether a person is engaged under a "contract of service" or not is a question of fact and not of law, and therefore there is no appeal from a judge of first instance upon his finding upon this point (i), unless he misdirects himself or there is no evidence to support his finding (j). The meaning of the expression "contract of service" was discussed in the case of *Simmons v. Heath*

What is a "contract of service."

person would, no doubt, be a portrait, even though that person were no longer living.

(e) New English Dictionary. In a Copyright Bill drafted by the Artistic Copyright Society, a "portrait" was defined as follows:—"Any work shall be considered a portrait whose principal object is the likeness in any form of art of any specified person."

(f) (1844), 14 L. J. Ch. 73.

(g) Of course the copyright in a "snapshot" will be in the owner of the negative, for it will not have been "ordered," nor will valuable consideration have been given, and there seems to be no legal ground, unless it be "breach of confidence," upon which a person who has been "snap-shotted" can object to publication of the "snapshot"; it must be considered one of the risks of the highway.

(h) This is subject to the qualification that in the case of contributions to newspapers, magazines and similar periodicals, the proprietors of such periodicals can only reproduce the contributions as part of similar periodicals: see Chapter "Newspapers," *post*.

(i) *Smith v. General Motor Cab Co.*, (1911) A. C. 188; *Wilmerson v. Lynn Steamship Co.*, (1913) 3 K. B. 931.

(j) *Doggett v. Waterloo Taxicab Co.*, (1910) 2 K. B. 336.

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Laundry Co. (k), a case decided under the Workmen's Compensation Act, 1906 (*l*), where a similar expression is to be found. A "contract of service" is not the same thing as a "contract for services." In the case cited, it was held that the applicant, who attended at a pupil's residence to give her music lessons, was not under a contract of service with her employer. The question really turns upon the degree of control exercised by the employer over the employee. "The greater the amount of direct control exercised over the person rendering the services by the person contracting for them, the stronger the grounds for holding it to be a contract of service; and, similarly, the greater the degree of independence of such control, the greater the probability that the services rendered are of the nature of professional services, and that the contract is not one of service" (*m*). "In each case the question to be asked is, what was the man employed to do? Was he employed upon the terms that he should, within the scope of his employment, obey his master's orders, or was he employed to exercise his skill and achieve an indicated result in such manner as, in his judgment, was most likely to ensure success?" (*n*).

It is clear, therefore, that if an author or an artist is employed by a publisher to write a book or draw a picture, he does not necessarily become the servant of the publisher. The person who employs him must have the right under his contract to require the author or artist to produce such a work as the employer desires, and if the work does not meet with his approval, to require the author or artist to alter his work. Subject to these general principles, each case must depend upon its own facts (*o*).

(*k*) (1910) 1 K. B. 543; see also *Sadler v. Henlock* (1855), 4 E. & B. 578; *Yewens v. Noakes* (1880), 6 Q. B. D. 530.

(*l*) 6 Edw. VII. c. 58, s. 13. The expression also occurs in the National Insurance Act, 1911 (1 & 2 Geo. V. c. 55), s. 1.

(*m*) *Per* Fletcher Moulton, L. J., *Simmons v. Heath Laundry Co.*

(*n*) *Per* Buckley, L. J., *ib.* at p. 553.

(*o*) As examples, the following have been held not to be under a contract of service:—clergy and ministers (*Re National Insurance Act*, (1912) 2 Ch. 563; *Re National Insurance Act* (1912), 107 L. T. 143); doctors, surgeons and anaesthetists employed at a hospital (*Scottish Insurance Co. v. Royal Edinburgh Infirmary* (1913), S. C. 751); a lecturer employed to explain the merits of an airship to persons attending an exhibition (*Walter v. British Exhibition* (1909), 25 T. L. R. 441). On the other hand, a pupil teacher (*Re National Insurance Act*, (1913) 1 Ir. R. 219), and a professional footballer (*Walker v. Crystal Palace Football Club*, (1910) 1 K. B. 87), have been held to be engaged under contracts of service. In the last cited case it was held sufficient that the footballer was bound to follow the general instructions of his employers. In the case of the *Lithographers and Engravers* ((1913), 108 L. T. 894), the contract of service was admitted, and the only question was as to whether they were manual labourers. In *Re Beeton & Co.* ((1913) 2 Ch. 279), the question as to whether persons employed regularly to contribute articles to a magazine were "clerks or servants" within the meaning of the Companies (Consolidation) Act, 1910 (8 Edw. VII. c. 69, s. 209). This case is more fully set out in the chapter on "Newspapers."

In order that the copyright may vest in an employer under proviso (b) of sect. 5 of the Copyright Act, it is not sufficient that the work is made by his servant, it must also be made "in the course of his employment." In the case of *Byrne v. Statist Co.* (p) it was held that the copyright in a translation made by a person on the regular staff of a newspaper, but during his spare time, did not vest in his employers, but remained in the translator.

As to apprenticeship, "in legal acceptation an apprentice is a person bound to another for the purpose of learning his trade or calling, the contract being of that nature that the master teaches and the other serves the master with the intention of learning" (q).

Apprenticeship.

Just as where there is an undoubted contract of service between employer and author, the author may retain the copyright on the ground of an agreement, express or implied, that he shall do so; so, equally, where there is no such contract of service, there may be an agreement, express or implied, that the employee shall be entitled to the copyright. In the former case the legal title to the copyright will, upon the making of the work, vest in the author, but in the latter case no legal title to the copyright will vest in the employer without an assignment in writing; he will only have an equitable title (r). Where an author is employed by a publisher to write a book or an article for a capital sum, the law will generally presume that it was the intention of the parties that the copyright shall belong to the publisher (s). In the case of artistic works the case will, wherever there is any employment of the artist, usually fall under proviso (a) to sect. 5, and the publisher may get the legal right to the copyright without any assignment by the artist.

Agreement to the contrary.

(p) (1914) 1 K. B. 622.

(q) Per Cockburn, C. J., *Ulapham v. St. Pancras* (1860), 29 L. J. M. C. 143, 146.

(r) See Chapter VII., "Assignment and Transmission," *post*.

(s) *Sweet v. Benning* (1855), 16 C. B. 459; *Lawrence v. Aflalo*, (1904) A. C. 17, considered further in Chapter I., Part III., "Newspapers," *post*.

CHAPTER VII.

ASSIGNMENT AND TRANSMISSION OF COPYRIGHT.

Distinction
between title
to copyright
and to the
material
object.

COPYRIGHT is to be distinguished from the material object which is the subject of the copyright. The assignment of the material object does not necessarily transfer the title to the copyright, any more than the transfer of the copyright necessarily transfers the title to the material object (*a*). Probably, no purchaser of a book would suppose that he, by his purchase, acquired the right to multiply copies of it, but it is quite possible that the purchaser of an artistic work, such as a picture, even though not made to his order (*b*), may be surprised to find that his purchase does not include the right to reproduce it by such means as engravings and photographs, nor even the right to prevent the artist or anyone else from making reproductions, unless the doing so would be a breach of contract or trust (*c*). It is, nevertheless, the fact that such a purchaser can only obtain the right to reproduction of the work he has purchased by insisting upon a licence or assignment of copyright in writing (*d*). Thus, in *Cooper v. Stephens* (*e*), the plaintiffs sold certain electric blocks for the purpose of printing certain drawings. The purchasers lent these blocks to the defendants in order that they, in turn, might print from them; but Mr. Justice Romer held that the plaintiffs were entitled to restrain the defendants from doing so, notwithstanding the permission of the purchasers. "The sale of the blocks," said the learned judge, "could not have had the effect of an assignment of copyright" (*f*). At the same time the Courts consider that the retention by the vendor of a picture of the copyright therein involves an "unnatural dissociation of two kinds of property," and, consequently, they will lean towards construing any document given at the time

(*a*) See, for example, the law as to copyright in letters, *ante*, p. 43 *et seq.*

(*b*) As to which see Copyright Act, s. 5 (1) (a).

(*c*) *Ante*, p. 30.

(*d*) Sect. 5 (2). The American Copyright Act, 1909 (Appendix D), expressly so provides (sect. 41).

(*e*) (1895) 1 Ch. 567, followed by the C. A. in *Marshall v. Bull* (1901), 85 L. T. 77.

(*f*) At p. 571.

of the sale as an assignment of copyright (*g*). An assignment of copyright must, however, be made in writing (*h*). CAP. VII.

Copyright is personal property (*i*). Upon the death of the proprietor it will pass to his personal representatives for the benefit of the person to whom he has bequeathed it, or if the proprietor has died intestate, for the benefit of his next of kin (*k*). In the case of a literary work which has not been published, nor performed or delivered in public, where the ownership of the author's manuscript has been acquired under a testamentary disposition "made by the author" (*l*), that ownership is to be *primâ facie* evidence of the copyright being with the owner of the manuscript (*m*). Death of proprietor of copyright.

The copyright in a published work will also pass to the trustee in bankruptcy of the proprietor, without any assignment in writing (*n*). As regards unpublished literary works, it is submitted that the right to publish these does not pass to the trustee in bankruptcy of the author. It is true that copyright is now conferred by sect. 1 (1) of the Act of 1911 upon an author as soon as his work is "made," and probably MSS. which have an intrinsic value apart from any literary merit would pass to a trustee in bankruptcy. But, upon the whole, it is thought that the right to publish an unpublished manuscript conferred upon authors by sect. 1 (2) of the Act is of a personal nature, and, consequently, one which would remain in the author notwithstanding his bankruptcy. At all events, the trustee could not compel the author either to finish his MS. or to see the work through the press (*o*). Bankruptcy of proprietor.

There would appear to be no process whereby copyright can be taken in execution by a judgment creditor of the proprietor (*p*), although, of course, royalties due to the judgment debtor might be attached by garnishee proceedings or other process of execution. Execution.

(*g*) *London Printing & Publishing Alliance v. Cox*, (1891) 3 Ch. 291, 304.

(*h*) *Infra*.

(*i*) It was expressly so provided by the Literary Copyright Act, 1842, s. 25. There is no express provision to that effect in the Act of 1911, but it clearly is personalty.

(*k*) *Thompson v. Stanhope* (1774), Amb. 737; *Burnett v. Chetwood* (1720), 2 Mer. 441; *Latour v. Bland* (1818), 2 Stark. 382.

(*l*) The Act does not raise any such presumption in the case of a bequest by an "assign" of the author.

(*m*) Sect. 17 (2); cf. *Macmillan v. Dent*, (1907) 1 Ch. 107.

(*n*) *Mawman v. Tegg* (1826), 2 Russ. 392; *Re Currey* (1848), 12 Ir. Eq. R. 391; *Re Grant Richards*, (1907) 2 K. B. 33. But not a personal right to publish: *Lucas v. Moncrieff* (1905), 21 T. L. R. 683. As to an author's right to royalties upon the bankruptcy of his publisher, see, now, the Bankruptcy Act, 1913, *post*, Chapter "Publishing Agreements," Part VI.

(*o*) *Gibson v. Carruthers* (1841), 8 M. & W. 343.

(*p*) *Edwards v. Pickard* (1909), 78 L. J. K. B. 1108.

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Provisions of
Act of 1911
as to assign-
ment.

Sect. 5, sub-sect. (2), of the Act of 1911 is as follows:—

“The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations to the United Kingdom or any self-governing dominion or other part of His Majesty’s dominions to which this Act extends, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorised agent:

Provided that, where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) after the passing of this Act, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void, but nothing in this proviso shall be construed as applying to the assignment of the copyright in a collective work or a licence to publish a work or part of a work as part of a collective work.”

And sub-sect. (3) of the same section provides that:—

“Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee as respects the right so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and the provisions of this Act shall have effect accordingly.”

Can a work
not in
existence be
assigned?

Whether there can be a legal assignment of a work not in existence—as distinct from a work which exists, whether published or unpublished—is doubtful. Of course, if the author is under a contract of service with another, who employs him to make a work on his behalf, the copyright will vest in the employer (*q*), but in other cases (*r*) sect. 5 is precise that “the author of a work shall be the first owner of the copyright therein.”

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

(*r*) Except in the case of a Government publication (sect. 18).

There appears to be authority for thinking that, even under the old law, there could not be a legal assignment of a work not in existence at the date of the alleged assignment (s); but in the more recent case of *Ward, Lock & Co. v. Long* (t) Mr. Justice Kekewich held the contrary. In that case the plaintiffs offered to an author "£200 for the complete copyright of a story containing not less than 80,000 words," on the lines of a synopsis which had been submitted by the author to the plaintiffs, and this offer was accepted. The story, when written, consisted of only about 70,000 words, and the plaintiffs paid the author the sum of £160, and declined to make any further payment. The author thereupon purported to assign his copyright in the story to the defendants, who published the same in ignorance of the author's contract with the plaintiffs. Mr. Justice Kekewich granted an injunction against the infringement of the plaintiffs' copyright. The decision is far from being satisfactory. The learned judge seems to have hesitated to say that the letters which had passed between the author and the plaintiffs amounted to an assignment, but "an agreement to assign in matters of this kind is quite as good as a direct assignment in words, is enforceable in equity, and as between business men is complete" (u). With all deference to the learned judge, it is submitted that there is a great deal of difference between a legal and an equitable assignment, for the one is enforceable, and the other is not enforceable, against a purchaser for value without notice, and if the assignment to the plaintiffs in that case was an equitable assignment only, it is submitted that it was an entire departure from principle to hold that the same held good against the innocent defendants, who appear to have had a legal assignment. The learned judge at the same time seems to have based his decision in some respects upon the wording of sects. 2 and 3 of the Literary Copyright Act, 1842 (x). By sect. 3 of that Act it was provided that copyright should vest in the author "or his assigns," and sect. 2 defined "assigns" as including "every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether derived by sale, gift, bequest, or by operation of law or otherwise." There are no similar words in the Act of 1911 which are capable of being construed so as to vest the copyright initially in any "assign"—legal or equitable—of the author,

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Ward, Lock & Co. v. Long.

(s) *Colburn v. Duncombe* (1838), 9 Sim. 161; *Sweet v. Shaw* (1839), 3 Jur. 217.

(t) (1906) 2 Ch. 550.

(u) (1906) 2 Ch. 557.

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

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and it is submitted that, whether or not the decision of Mr. Justice Kekewich in the case referred to was correct under the old law, it does not accurately express the new law. It is submitted that under the Act of 1911 the right to the copyright will, save in cases falling within the exceptions to sect. 5, vest at law in the author notwithstanding any purported assignment made prior to the "making" of the work, although in equity the assignee, being an assignee for valuable consideration, may have a right to compel the author to execute a legal transfer, or to allow his name to be used by the assignee for the purpose of an action for infringement (*y*), but not against a subsequent purchaser for value without notice. The contrary doctrine, laid down by Mr. Justice Kekewich in *Ward v. Long*, might lead to grave injustice, for, although it is true that a legal assignment of an existing work may be suppressed, it is seldom that an assignee purchases a completed work except with a view to immediate publication, whereas the period between a contract to compose a work or paint a picture and the completion of the work might be considerable, and the purchaser of the completed manuscript or picture might have no possible means of ascertaining the existence of the contract.

What words
will effect an
assignment.

The Act does not state that the assignment of copyright shall be in any special form, beyond that it shall be in writing, signed by the owner of the right in respect of which the assignment is made, or by his duly authorised agent (*z*). A mere receipt for the purchase-money may, under some circumstances, amount to an assignment of the copyright (*a*). In *London Printing Alliance v. Cox (b)*, K. & Co., art colour printers, who were owners of a picture called "The Bride" and the copyright in it, entered into an agreement with the A. Company, the terms of which were embodied in a letter of the 19th of April, 1890, from K. & Co. "For 55,000 copies of 'The Bride' [style of reproduction described], price £13 9s. per 1,000 copies, which price includes

(*y*) *Leader v. Purday* (1849), 7 C. B. 4; *Sims v. Marryat* (1851), 17 Q. B. 281; *Tailby v. Official Receiver* (1888), 13 A. C. 523.

(*z*) Under the old law the copyright in a literary work was required to be in writing: *Leyland v. Stewart* (1876), 4 Ch. D. 419. The copyright in an engraving had to be in writing, attested by two witnesses (8 Geo. II. c. 13, s. 1); in a work of sculpture by deed, attested by two witnesses (54 Geo. III. c. 56, s. 4); and in a painting, drawing, or photograph in writing, signed by the proprietor of the copyright or his agent (25 & 26 Vict. c. 68, s. 3). It was generally considered that an assignment of literary copyright did not require to be attested, and the Act of 1911 does not appear to require any attestation (*Cumberland v. Copeland* (1861), 1 Hurl. & C. 194; but see 8 Jur. N. S., Part II., p. 148). As to an assignment by a foreigner, see *Jefferys v. Boosey* (1854), 4 H. L. C. 915.

(*a*) *Kyle v. Jeffreys* (1859), 18 Sc. Sess. Cas. 906; *Howitt v. Hall* (1862), 6 L. T. 348; *Levi v. Rutley* (1871), L. R. 6 C. P. 523; *Colburn v. Duncombe* (1838), 9 Sim. 151.

(*b*) (1891) 3 Ch. 291.

sole and entire copyright net. 5,000 copies not later than September, 1890; balance, 50,000, not later than November 15, 1890. Picture and frame to become your property for an extra sum of £17, we to insure and take all risks of picture during time of progress of work. Terms of payment, bills at five, six, and seven months from date of delivery of goods." It was held by Fry and Lopes, L. J.J., that the title to the copyright passed immediately by this letter; by Lindley, L. J., that the letter only amounted to an agreement to sell the copyright, and not to an assignment of it.

To the like effect is the case of *Savory, Ltd. v. The World of Golf (c)*. There the plaintiffs purchased from an artist a picture called "Thirteen down—Great Scot!" representing a depressed golf-player making his way to the next tee with a bundle of golf clubs hanging from his shoulder. The only memorandum of the assignment of the copyright was made prior to the Act of 1911 and took the form of a receipt as follows:—"Received of Messrs. E. W. S., Ltd., the sum of £2 6s. 6d. for five original card designs, inclusive of all copyrights. Subjects: Four Golfing subjects; one Teddy Bear painting." This was held to be a sufficient assignment in writing of the copyright. In both these cases, however, the property in the pictures themselves passed to the purchasers, and in such cases the Courts strive to hold that the copyright is not severed from the picture (*d*). In *Lacey v. Toole (e)*, it was held that an agreement to "let A. have" a certain work in discharge of a debt owing to A. was sufficient to pass the copyright in the work to A. The intention of the parties must, however, always be regarded, and, therefore, in the case of an agreement with publishers whereby the publishers agreed to pay to an author a royalty of sixpence per copy on every copy of the work sold "in consideration of Mr. W. St. J. (author) giving Mr. W. C. N. (publisher) the sole and exclusive right of printing and publishing the series of 'Music and the Higher Life,' and issuing the same in volume form," it was held that the agreement was a publishing agreement only and not an assignment of copyright (*f*).

An author who has assigned his copyright in a work is not at liberty, in the absence of stipulation to the contrary, to reproduce substantially the same matter in another publication (*g*).

Assignor may not reproduce the work.

(c) (1914), W. N. 335.

(d) *Ante*, p. 120.

(e) (1867), 15 L. T. 512.

(f) *Re Jude's Musical Compositions*, (1907) 1 Ch. 651; cf. *Edwards v. Cotton* (1905), 19 T. L. R. 34.

(g) (1861), 14 Ir. Com. Law Rep. 158; *Colburn v. Simms* (1843), 2 Ha. 543; see as to replicas, sect. 2 (1) (ii).

CAP. VII. The sub-section of the Act of 1911 now under consideration expressly authorises the owner of the copyright to assign the right "either wholly or partially and either generally or subject to limitations to the United Kingdom, or any self-governing dominion or other part of His Majesty's dominions to which this Act extends" (*h*).

Assignment limited in time.

The Act, therefore, clearly authorises an assignment limited either in point of time or in point of locality, and by sub-sect. (3) such limited assignee is to be regarded as the owner of the copyright as respects the rights assigned.

Copyright might be assigned for a limited time under the old law, and it has been determined that, in the absence of a special contract to the contrary, the assignor of a copyright is entitled, after the assignment, to continue selling copies of the work printed by him before the assignment and remaining in his possession (*i*).

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

Limited as to locality.

Whether, under the old law, copyright was divisible as to locality is not so clear, but the balance of authority is in favour of so holding (*m*); but the new Act clearly permits the copyright to be so divided, the only question being as to whether there are any limits to the permissibility. It is upon the whole submitted that the owner of an English copyright could not make an assignment to one person of rights in Lancashire and to another person of rights in Middlesex, but that he could make an assignment to one

(*h*) *I.e.* under sects. 25 *et seq.*

(*i*) *Taylor v. Pillow* (1869), L. R. 7 Eq. 418; see *Tuck v. Priester* (1887), 19 Q. B. D. 48; *Tuck v. Continental Printing Co.* (1887), 3 T. L. R. 150, 661, 826; *Troitzsch v. Rees* (1887), 3 T. L. R. 773.

(*k*) (1862), 6 L. T. 348.

(*l*) But see *Pitt-Pitts v. George & Co.*, (1896) 2 Ch. 866.

(*m*) *Jefferys v. Boosey* (1854), 4 H. L. C. 815; *Pitt-Pitts v. George & Co.*, *supra*.

person of rights in Australia and to another of rights in India (n). And where a person can secure a copyright in two countries governed by two distinct copyright laws, there could be no valid objection to his assigning his rights in one country to another, securing his rights in the other country to himself. For instance, suppose an author to be able to secure a copyright for himself both in France and in this country, he might make a valid assignment of his French copyright to one person, and his English to another (o). But this, perhaps, cannot be regarded, strictly speaking, as a division of copyright, the rights being distinct—the one conferred by one country, the other by another.

Performing rights are, in practice, frequently divided as to locality even between various parts of the same country, *e.g.*, one person may be given the exclusive right of performing in London and another in the provinces, and so on, but these would appear to be not true assignments, but exclusive licences only (p).

There is yet a third manner in which copyright may be divided, and that is as to the mode of reproduction. The words of the Act are very wide, permitting an assignment of the copyright “wholly or partially.” Thus, the performing rights, the translating rights, the gramophone rights, the photographic rights, the engraving rights, and so forth, are all capable of separate assignment, and it follows from sub-sect. (3) of sect. 5 that the assignee of these separate rights can sue for the infringement of his own particular right without making the assignor a party to his action. But it must be remembered that a partial assignee has no right to sue for infringement of any other right than that assigned to him, however much the infringement of the right not assigned may commercially damage him. For instance, in *Dick v. Brooks* (q), it was held that the proprietor of the engraving rights in a picture called “The Huguenot” had no right to bring an action against a defendant who had published a chromo-printed pattern for wool-work copied from the original picture (r).

Having regard to the various derivative rights which flow from ownership of copyright, an assignor of copyright should always take care that the assignment is drawn in such a way as not to carry rights in excess of those intended to be assigned. The assignment of the material thing, such as the manuscript or the

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Limited as to mode of reproduction.

Care to be taken in framing assignments of copyright.

(n) *Holt v. Wood* (1896), 17 N. S. W. R. 36.

(o) *Pitt-Pitts v. George*, *supra*.

(p) *Neilson v. Horniman* (1909), 25 T. L. R. 188; see *post*, p. 130.

(q) (1880), 15 Ch. D. 22.

(r) This, it is submitted, is the true explanation of this case; see *post*, Chapter “Infringement.”

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picture, does not of itself carry the copyright (s), but any document purporting to assign copyright ought to be carefully worded. Under sect. 22 of the Literary Copyright Act, 1845 (t), it was provided that no assignment of any book consisting of, or containing a dramatic piece or musical composition should, *prima facie*, be taken to convey to the assignee the performing rights. There is no similar provision in the Act of 1911, and an assignment of "copyright" would, no doubt, operate, in the absence of contrary intention, to convey to the assignee all the rights which go to make up copyright (u).

The proviso to sect. 5 (2)

There is, however, one limitation to the powers of assigning copyright, namely, that contained in the curious proviso to subsect. (2) of sect. 5 of the Act, previously set out (x), depriving an author of the right to assign any interest in his copyright beyond the expiration of twenty-five years from the author's death.

only applies if the author is the first owner of the copyright.

It is to be noticed that this proviso only applies in a case where the author was the first owner of the copyright. In the case, therefore, of an engraving, photograph, or portrait, where the plate or other original was ordered by some other person and was made for valuable consideration, or in the case of a work made by an author in the employment of some other person under a contract of service or apprenticeship, the proprietor of the copyright is at liberty to assign it for the full term, for in neither of these cases does the copyright vest in the author in the first instance (y).

Proviso does not apply to collective works.

The proviso in question is not to apply "to the *assignment* of the copyright in a collective work or a *licence* to publish a work or part of a work as part of a collective work" (z). The words here employed should be noticed. In a collective work there may be several distinct copyrights—there is the copyright in the complete work, considered as a whole, and the various copyrights in the distinct contributions to the work. An "assignment" of the copyright of the complete work may be made for the full period of protection, and a "licence" to publish a contribution as part of the collective work may also be granted for the like full period; but an "assignment" of the copyright in the contribution cannot

(s) *Ante*, p. 120.

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

(u) Copyright Act, 1911, s. 1 (2); *Cumberland v. Planché* (1834), 1 A. & E. 580; cf. *Ex parte Hutchins & Romer* (1878), 4 Q. B. D. 90, 483.

(x) *Ante*, p. 122.

(y) Sect. 5 (1) (a) and (b).

(z) A "collective work" means (a) an encyclopædia, dictionary, year-book, or similar work; (b) a newspaper, review, magazine, or similar periodical; and (c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated (sect. 35 (1)).

be made for the period commencing twenty-five years after the author's death (a).

Inasmuch as it is only the author himself who is prohibited from assigning the entire copyright, the proviso cannot apply to posthumous works, which are entitled to protection until publication and for a period of fifty years thereafter (b).

On the other hand, the proviso seems to apply to works in existence prior to the Act.

It is questionable whether the proviso against assignment applies to photographs and mechanical instruments, the copyright in both of which is for a period of fifty years from the date of the making of the negative or plate, as the case may be, and vests in the owner of the negative or plate, who is to be "deemed to be the author of the work" (c). The proviso did not form part of the Bill as it was originally laid before the House of Commons, but was drafted and added to the Bill during its passage through Committee of the House. It would almost seem as though the draftsman of the proviso had overlooked the fact that, in the case of some works, the period of copyright protection bears no relation to the lives of their authors, and although the words of the proviso, at first sight, seem wide enough to cover photographs and records, it is submitted that the Courts ought to endeavour to exclude its application to such works. One reason, no doubt, for fixing the period of twenty-five years from the death of an author as the limit of the assignability of copyright is because at that date a work ceases to have exclusive copyright, and any person—including, of course, the assignee of the copyright, who then ceases to have the benefit of his assignment—can publish the work upon a royalty basis (d). It is, however, doubtful whether a photograph or a record can be published upon this basis (e). The assignee of the copyright in a photograph or record whose author died shortly after the making of the negative or plate would therefore be in an unfair position as compared with an assignee of, say, literary copyright. Another reason for excluding photographs and records from the proviso against assignment is that a corporation may be deemed to be the "author" of either of these works, and in such a case the proviso could have no possible application. Again, the proviso refers

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nor to posthumous works ;

but, *semble*, does to existing works.

Quere, as to photographs and mechanical instruments.

(a) Possibly an assignment for the full term might be construed as a licence.

(b) Sect. 17.

(c) Sects. 19, 21.

(d) Sect. 3, proviso, *ante*, pp. 102 *et seq.* In the case, however, of works existing prior to the Act, this right does not arise until after thirty years from the death of the author (sect. 3). There is thus left a hiatus of five years.

(e) *Ante*, p. 103.

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to the interest of the author after the termination of the period of his assignment as "the reversionary interest in the copyright expectant on the termination of that period." If works as to which the existence of any reversionary period is problematical (for the author of a photograph might live for twenty-five years after the making of the photograph) were intended to be included, it would have been more in accordance with the rules of good draftsmanship to have added after "reversionary interest" the words "if any."

Illusory nature of the benefits enforced by the proviso.

The proviso to sect. 5 (2) was, of course, inserted in the interests of an author's family, to prevent, if possible, a successful author from making improvident contracts to the detriment of his dependants. In practice it will probably be found that the benefits to the author's family or dependants will be quite illusory. The proviso does render null and void any attempt by a living author to dispose of his copyright for longer than the period of his life and twenty-five years after his death, but the weakness of the proviso seems to lie in the fact that it declares that the reversionary interest shall, "on the death of the author," devolve on his legal personal representatives "as part of his estate." This reversionary interest, then, unassignable during the author's lifetime, becomes an asset of the author's estate and assignable immediately upon his death. It will consequently be liable to be sold by his executors for the payment of his debts, and even if not required for that purpose, it will frequently be the duty of the executors to realize the interest for the purpose of winding up the author's estate (f). Supposing the author made a specific bequest of his reversionary interest in his copyright, the specific legatee will probably be ready to sell that interest forthwith, rather than wait for a chance of income twenty-five years later. The only possible purchaser, at any rate in the case of a literary work, will, save in exceptional cases, be the author's publisher, and the amount which he will be prepared to give for a reversionary interest in a copyright falling into possession twenty-five years later is not likely to be very large, particularly having regard to the fact that he will, even if he declines to purchase the reversion, be entitled to continue to publish the work, if he thinks it worth while to do so, upon payment of a royalty to the owner of the copyright, and that if he does purchase, he cannot acquire an exclusive copyright (g).

Licences.

The owner of a copyright may, as an alternative to assigning the same, grant a licence to produce and copy his work. Such

(f) For instance, the rule, well known to equity lawyers as the rule in *Howe v. Lord Dartmouth* (1802, 7 Ves. 137), would apply.
(g) Sect. 3.

licences must be in writing, signed by the owner of the copyright or his agent, and, where the author is the first owner of such copyright, cannot be made for a longer period than the life of the author and twenty-five years after his death (*h*).

A distinction must, however, be made between a licence where invoked in aid of an action of infringement and where invoked as a defence to such an action (*i*). As copyright is only infringed by a person who does certain acts "without the consent of the owner of the copyright" (*k*), and there is no suggestion that for this purpose the consent must be in writing, a verbal licence will be a good defence in an action for infringement of copyright by the person who gave the licence. Such a licence would often be presumed from the circumstances of the case (*l*).

Verbal licence a defence to action for infringement.

The distinction between an assignment and a licence lies in the fact that an assignment conveys an interest in the property assigned, whereas a licence does not, unless it is coupled with a grant, carry any proprietary rights in the property but merely creates a contractual relationship between the parties, or, as it was put by Tindal, C. J., in *Muskett v. Hill* (*m*), "a dispensation or licence properly passes no interest, but only makes an action lawful which, without it, would have been unlawful." It has been held, therefore, that a licensee from a copyright owner has no title to sue in his own name for infringement (*n*), but that his proper course is to join as co-plaintiff with himself the owner of the copyright (*o*), who does not lose his right to sue by reason of his having granted a licence (*p*). Again, in the case of *London Printing Alliance v. Cox* (*q*), Vaughan Williams, J., held that a purchaser of the copyright in a picture without notice of the existence of a previous licence to copy the picture in monochrome was not bound by the licence and could sue the licensee for doing that which he was authorised by the licence to do.

Distinction between an assignment and a licence.

These cases were all decided under the repealed Copyright Acts, and it seems to be arguable whether the recent Act has not altered

Whether the Act of 1911 has altered the law.

(*h*) Sect. 5 (2).

(*i*) *Strahan v. Graham* (1868), 17 L. T. 457.

(*k*) Sect. 2 (1). This, no doubt, means without the consent of the owner of the copyright at the date when the alleged infringing act is performed.

(*l*) *E.g.*, *Cooper v. Stephens*, (1895) 1 Ch. 567; *Dannison v. Ashdown* (1897), 13 T. L. R. 226; *Boucas v. Cooke*, (1903) 2 K. B. 227, 236; and see *ante*, p. 45.

(*m*) (1839), 5 Bing. N. C. 694; *Heape v. Hartley* (1889), 40 Ch. D. 461.

(*n*) *Neilson v. Horniman* (1909), 25 T. L. R. 685; cf. *Heape v. Hartley*, *supra*; *Wooley v. Broad*, (1892) 1 Q. B. 806.

(*o*) *Macmillan v. Dent*, (1907) 1 Ch. 107. If the owner refused to join, the proper course would be to make him a defendant.

(*p*) *Marshall v. Bull* (1901), 85 L. T. 77.

(*q*) (1891) 3 Ch. 291.

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the law. If a licence is "coupled with an interest" the licensee can sue in his own name, and a purchaser, with or without notice, will be bound by the licence. Sect. 5 (2) authorises the owner of the copyright "to grant any interest in the right by licence." This seems to imply that there may be such a thing as a licence in respect of copyright "coupled with an interest," and if so, it is thought that an irrevocable and exclusive written licence would be construed as a licence coupled with a grant (*r*). If so, this will avoid troublesome questions of construction such as have sometimes arisen, as to whether the words used in a particular document amount to an exclusive licence only, or to a partial assignment of the copyright (*s*).

Whether a licence is revocable.

But before a licence can be held to pass any legal interest in the copyright it would have to be shown that the licence was both irrevocable and exclusive. A simple licence has often been stated to be revocable at any time upon reasonable notice (*t*), but it seems more correct to say that it is revocable unless the intention of the parties is shown to be to the contrary: and if the licensee has paid a lump sum for the licence this is evidence that it was not the intention of the parties that the licence should be revocable (*u*). It is, indeed, questionable whether the old cases as to revocability of licences still hold good, and it has been held that a licence, coupled with a contract for good consideration not to revoke it, confers an enforceable right (*x*).

Whether licence is exclusive.

Whether a licence is or is not exclusive must turn upon the words of the particular agreement. *Primâ facie*, it would appear that a licence is not exclusive and the grantor is at liberty to grant similar licences to others (*y*). In one case, a pencil note "Here-with the MS. of your song 'Men'" was held not to be sufficient to give a permanent and irrevocable licence to sing the song.

In another case (*z*), where the plaintiff gave her manuscript to a

(*r*) Against this argument, however, must be set sub-sect. 3 of sect. 5, which only refers to partial assignments.

(*s*) *E.g.*, *Re Jude*, (1907) 1 Ch. 651.

(*t*) *Wood v. Leadbitter* (1845), 13 M. & W. 838; as to damages if it is revoked, see *Kerrison v. Smith*, (1897) 2 Q. B. 445.

(*u*) *Guyot v. Thomson*, (1894) 3 Ch. 388 (patent case). And *quære*, whether the doctrine of *Wood v. Leadbitter*, if still good law, ought not to be confined to licences in respect of land. In a case of *Williams v. Feldman* (*Times*, Oct. 1913), a letter was produced appointing the defendants as agents for the sale of songs "for a period of twelve months, to pay us 10 per cent. royalty on all copies sold of our various publications." Mr. Justice Sargant remarked, "On the face of it that was an authority coupled with an interest, which could not be revoked."

(*x*) *Hurst v. Picture Theatres, Ltd.* (1914), 30 T. L. R. 642; and see *Lowe v. Adams*, (1901) 2 Ch. 598.

(*y*) *Warne v. Routledge* (1874), L. R. 18 Eq. 497.

(*z*) *Rundell v. Murray* (1821), Jac. 311.

publisher, with a parol licence to publish it at his own risk and expense, and disclaimed any intention to receive any emolument from it, and the defendant published it for fourteen years (the first term under the statute then in force) and continued to publish and sell it afterwards, and the plaintiff then applied for an injunction to restrain its further publication by the defendant: Lord Eldon refused the injunction, upon the ground that the defendant had been licensed to publish without any limitation of time. The question, however, was left undecided whether the right to publish did not remain in the plaintiff concurrently with the defendant, or whether the defendant had acquired any right as against the public. The defendant's counsel expressly disclaimed any title to the copyright, admitting that there was no legal assignment of it. The case therefore proceeded upon the effect of a parol licence to publish, and shows that such licence conveys no copyright to the exclusion of the author.

Primâ facie, a licence is assignable, but this will not be so if there is any evidence that the licensee was chosen on account of his personal skill or reputation (a).

Whether
assignable.

Where the proprietors of the copyright in two pictures assigned the same to the plaintiffs upon the plaintiffs' undertaking not to reproduce the same without the assignor's consent, the purpose of the assignment being to enable the plaintiffs to sue for infringement of the copyright in the pictures, it was held that the assignment was not *bonâ fide*, and that the plaintiffs could not sue without joining the assignors as co-plaintiffs (b).

Assignment
of copyright
not *bonâ fide*.

The question as to the rights of an assignee of copyright to make alterations in the work is treated in another place (c).

(a) *Re Jude*, (1907) 1 Ch. 651; *Stevens v. Benning* (1854), 1 K. & J. 168; *Hole v. Bradbury* (1879), 12 Ch. D. 886; *Griffith v. Tower Publishing Co.*, (1897) 1 Ch. 21.

(b) *Landeker & Brown v. Wolf* (1907), 52 Sol. J. 45.

(c) See Chapter "Publishing Agreements," *post*, Part VI., which see generally upon the subject of assignment.

CHAPTER VIII.

INFRINGEMENT OF COPYRIGHT.

(a) *Literary and General.*

Definitions of
infringement.

By the Literary Copyright Act, 1842 (*a*), copyright was, for the purposes of that Act, defined as meaning "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject" to which that Act applied: and any act which invaded this sole and exclusive liberty was an infringement of copyright. Similarly, the Act of 1911 provides (*b*) with regard to all works, that the copyright therein "shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright," but the section goes on to provide that six specific acts therein mentioned (*c*), which might otherwise have been deemed to be infringements of copyright, shall not be considered to be such. It is probably correct to say that any act which would have been an infringement of copyright under the old law—unless it be one of the above-mentioned six acts—will be an infringement of copyright under the new law, but that, on the other hand, there are several acts which were not infringements under the old law, but which are made so by the new Act. In particular, whereas under the Act of 1842 copyright conferred the exclusive liberty of "printing or otherwise multiplying copies" of a work, the Act of 1911 confers a wider right upon the copyright owner, namely, "the sole right to produce or reproduce the work or any substantial part thereof *in any material form whatsoever.*"

Same work
may be in-
dependently
arrived at.

The question of what is, and what is not, a piracy must necessarily often be a matter of difficulty, and it is always important to bear in mind that plagiarism is not necessarily an invasion of copyright, for there can be no copyright in an idea (*d*); moreover, the

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

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

(*c*) These six acts are all examples of what might be considered "fair dealing" with the original work (*post*, p. 137). They will be treated in greater detail later in this Chapter.

(*d*) See *ante*, p. 2.

owner of a copyright does not stand in the same position as the owner of a patent. A patentee has the sole right to use his invention within certain limits, and if anybody uses that patent, although he has made independent investigations, he infringes the patent. But in the case of copyright that is not so. It is always possible to arrive at the same result from independent sources, and the fact that the defendant produces something like the plaintiff's earlier work does not necessarily create an infringement: it must be shown that the defendant has derived his work from the plaintiff's (e).

Copyright being a proprietary right, except in those cases where the Act especially provides to the contrary (f), ignorance is no excuse for infringement (g). Ignorance no excuse.

Part of the monopoly of the owner of the copyright is to "authorise" any of the acts of which he is given the exclusive right (h). Liability for acts of agent. From this it follows that a principal will be liable for the acts of his agent if he has expressly authorised him to commit them, and even probably if the agent was acting within the apparent scope of his authority (i). If, on the other hand, it could be shown that the actual infringement was committed by an independent contractor, without instructions from his employer, the latter would not be liable. Thus, in the case of *Kelly's Directories v. Gavin* (k), the defendant Gavin published a book which was an infringement of the plaintiffs' copyright. The defendants Lloyd had agreed to print the book for Gavin, but in order to save time, at Gavin's request, they subsequently relinquished their contract as to part of the work, and Gavin employed other printers to print the pirated portion. When the book was published it bore on the title page the statement "Printed at Lloyd's," but Lloyds were ignorant of the piracy until they were informed of it after the publication. The Court was satisfied by the evidence that Gavin and Lloyds were not partners or co-adventurers in the publication of the book, and that the printers who printed the pirated matter were agents of Gavin and not of Lloyds, and held that Lloyds had not

(e) *Rees v. Robbins*, *Times*, 6th Feb., 1914; on appeal, *Times*, 4th July, 1914; *Corelli v. Gray* (1913), 29 T. L. R. 570.

(f) *E.g.*, in cases falling under sect. 2, sub-sects. (2), (3).

(g) *Mansell v. Valley Printing Co.*, (1908) 2 Ch. 441; *Lee v. Simpson* (1847), 3 C. B. 871; *Wittman v. Oppenheim* (1884), 27 Ch. D. 260; *Byrne v. Statist Co.*, (1914) 1 K. B. 622. Ignorance may, however, affect the remedies: see sect. 8, *post*, Chapter "Infringement of Copyright."

(h) Sect. 1 (2).

(i) *Marsh v. Conquest* (1864), 17 C. B. 418; *Monaghan v. Taylor* (1885), 2 T. L. R. 685.

(k) (1901) 1 Ch. 374.

Cap. VIII. "caused" it to be printed within the meaning of sect. 15 of the Literary Copyright Act, 1842 (*l*).

A person, *semble*, may be liable for "authorising" an act which has not been committed.

It would also seem that the new Act has enlarged the protection accorded to the owner of a copyright by thus making it part of his monopoly to "authorise" any of the acts referred to in subsect. (2) of sect. 1, and that a person may be liable to an action for infringement of copyright if he has, without the consent of the owner of the copyright, "authorised" any of those acts, although the authorised act has not been completed. Under the old law a person was only liable if he "caused" a work to be performed or printed, and in the case of *Russell v. Biant* (*m*) Wilde, C. J., says, "No one can be considered as an offender against the provisions of the Act so as to subject himself to an action of this nature, unless by himself or his agent he actually takes part in a representation which is a violation of copyright." Again, in the case of *Karno v. Pathé Frères* (*n*), it was held that a person who sold cinematograph films, knowing that the purchasers intended to exhibit them publicly, had not "caused to be represented" the plaintiff's sketch from which the films were taken. But, under the new Act, where the defendant had announced, by means of posters and handbills, their intention to exhibit a cinematograph film in which the plaintiffs had the copyright, at certain theatres, the defendants had authorised "a performance of the film" within the meaning of sect. 2 (1) of the Act and were consequently liable in damages (*o*).

Modes in which copyright may be infringed.

Copyright in a published literary work may be invaded in several ways (*p*):—

- 1st. By reprinting the whole work *verbatim*.
- 2nd. By reprinting *verbatim* a part of it.
- 3rd. By imitating the whole or a part, or by reproducing the whole or a part with colourable alterations.
- 4th. By reproducing the whole or a part under an abridged form.
- 5th. By reproducing the whole or a part under the form of a translation.
- 6th. By converting it into a dramatic work.

(*l*) See also *Bolton v. London Exhibitions* (1898), 14 T. L. R. 550; *Green v. Irish Independent*, (1899) 1 Ir. R. 386; *Colburn v. Simms* (1843), 2 Ha. 543, 547.

(*m*) (1849), 8 C. B. 836, at p. 848; *Lyon v. Knowles* (1863), 3 B. & S. 556; but see *Marsh v. Conquest* (1864), 17 C. B. N. S. 418.

(*n*) (1909), 100 L. T. 260.

(*o*) *Fenning Film Service v. Wolverhampton, &c. Cinemas*, (1914) W. N. 338. At the time of writing no full report of this case has been published.

(*p*) As to unpublished works, see further, *ante*, p. 30 *et seq.*

Piracies of the nature of the first class are comparatively seldom committed, on account of the ease with which they can be detected (*q*).

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1. By re-printing the whole *verbatim*.

When such cases do arise generally either the defendant has mistaken his rights or the infringement has been imported from abroad.

It must be remembered that, according to sect. 1, sub-sect. (2), of the Copyright Act, copyright is "the sole right to produce or reproduce" a work, and to constitute a piracy there must be an invasion of this right. To *make use* of a book is not a piracy, if the copies are not multiplied. To take a familiar instance, it is the custom for many Law Societies to print general conditions relating to the sale of real estate. A. and B. enter into a contract for sale and incorporate by reference into their agreement "the Conditions of Sale of the X.Y. Law Society." Assuming these conditions to be the subject of copyright, A. and B. are not infringing that copyright if they confine themselves to a reference and do not copy the conditions into their agreement.

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

2. By re-printing *verbatim* a part.

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

The exclusive right of the owner of the copyright is to produce or reproduce the work "or any substantial part thereof" in any material form (*s*).

Whilst, therefore, it is recognised that it is not every abstraction from the work of another which constitutes a piracy, the amount taken must not exceed the limits of what is fair.

If so much is taken that the value of the original is sensibly diminished, or the labours of the original author are substan-

What is a "fair use" of an earlier publication?

(*q*) Such piracies are, however, by no means unknown.

(*r*) *Tinsley v. Lacey* (1861), 1 H. & M. 747; *Warner v. Seeborn* (1888), 39 Ch. D. 73; and see *Trade Auxiliary Co. v. Middlesbrough* (1889), 40 Ch. D. 425.

(*s*) Copyright Act, 1911, s. 1 (2).

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tially, to an injurious extent, appropriated by another, that is sufficient, in point of law, to constitute a piracy *pro tanto*. The entirety of the copyright is the property of the author; and it is no defence that another person has appropriated a part and not the whole of such property. Recent cases have been more favourable to the owner of the copyright than some of the earlier ones, and it is no longer essential that the alleged infringing work should be of a character which would compete in the market with the original work—it is sufficient that the copyist has deprived the author of profits which he might otherwise have reasonably expected to make. In a recent case (*t*), Mr. Justice Parker made the following remarks:—“Then it is said that the real and only test as to whether or not the defendants have made an unfair use of [the plaintiff’s work] lies in the answer to the question whether there will be any competition between such volume and the defendants’ book. It is no doubt true that where, as is often the case, it is a difficult matter to determine whether in preparing one publication an unfair use may be made of another, the nature of the two publications and the likelihood or unlikelihood of their entering into competition with each other is not only a relevant, but may be even the determining factor of the case. But, in my opinion, an unfair use may be made of one book in the preparation of another, even if there is no likelihood of competition between the former and the latter. After all, copyright is property, and an action to restrain the infringement of a right of property will lie, even if no damage be shown. In the present case there may not be much probability that anyone will buy the defendants’ book instead of [the plaintiff’s book], but the fact remains that in preparing this book the defendants have utilized, wholesale and without permission, lists prepared by the plaintiffs at much trouble and expense. In so doing they have appropriated the result of this labour and expense to their own use; and even if they have injured the plaintiffs in no other way, they have, at any rate, deprived them of the advantage which their copyright conferred on them of being able to publish such a book as the defendants’ book at much less labour and expense than anyone else.”

Quantity
taken only a
slight test.

In the case from which the above remarks are taken, the learned judge considered that the defendants had been saved six-sevenths of the labour which would have been required if they had made no use of the plaintiff’s book; but whether the limits of fair use

(*t*) *Weatherby v. International Horse Exchange*, (1910) 2 Ch. 297, 304; 79 L. J. Ch. 609, 612; cf. *Sweet v. Cater* (1841), 11 Sim. 580.

have been exceeded or not can seldom be determined simply by looking to the quantity taken. CAP. VIII.

Lord Cottenham, in the cases of *Bramwell v. Halcomb* (u) and *Saunders v. Smith* (x), adverting to this point, said: "When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value; that is always looked to. It is useless to refer to any particular cases as to quantity." In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, direct or indirect, or supersede the objects of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases a considerable portion of the materials of the original work may be fused into another work; so as to be indistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot fairly be treated as a piracy; or they may be inserted as a sort of distinct and mosaic work into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy. If a person should, under colour of publishing "elegant extracts" of poetry, include all the best pieces at large of a favourite poet, whose volume was secured by copyright, it would be difficult to say why it was not an invasion of that right, since it might constitute the entire value of the volume. The case of *Mawman v. Tegg* (y) is to this purpose. There was no pretence in that case that all the articles of the encyclopædia of the plaintiffs had been copied into that of the defendants; but large portions of the materials of the plaintiff's work had been copied. Lord Eldon, upon that occasion, held that there might be a piracy of a part of a work, which would entitle the plaintiffs to a full remedy and relief in equity. In prior cases he had affirmed the like doctrine. In *Wilkins v. Aikin* (z), he said: "There is no doubt that a man cannot, under the pretence of quotation, publish either the whole or a part of another's book, although he may use, what in all cases it is difficult to define, fair quotation."

But it is in cases of this kind that the character of the books In these cases,

(u) (1836), 3 My. & Cr. 737; *Neale v. Harmer* (1897), 13 T. L. R. 209.

(x) (1838), 3 My. & Cr. 711.

(y) (1826), 2 Russ. 385.

(z) (1810), 17 Ves. 422.

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 character of
 works may be
 regarded.

may be looked at; for an author will be allowed greater freedom of quotation if he is writing a book of an entirely different character from that from which he quotes, than if the books directly compete with one another. This is well illustrated by the case of *Bradbury v. Hotten* (a), one which is very near the line. There the publication complained of was "The Man of his Time," the object of which was to illustrate the career of Napoleon III. by caricatures taken from leading English and foreign illustrated papers. Nine caricatures, with their original headings and references, but much reduced in size, were copied from nine numbers of "Punch," comprised within the period extending from 1849 to 1867. It was declared that the selections had been taken for the sole purpose of illustrating the career of Napoleon. While admitting that limited extracts might be taken from copyright works for a fair purpose of this kind, the Court found that the defendant had republished the caricatures in "Punch" for the same purpose as they were originally published, namely, to excite the amusement of his readers. It was held that the defendant had gone beyond the privilege of fair quotation, and therefore a case of piracy was made out.

In the course of his judgment in this case, Kelly, C. B., gave the following illustrations:—"A traveller publishes a book of travels about some distant country like China. Amongst other things, he describes some mode of preparing food in use there. Then the compiler of a cookery book republishes the description. No one could say that that was piracy. So again, an author publishes a history illustrated with woodcuts of the heads of kings, and another person, writing another history of some other country, finds occasion to copy one of these woodcuts. That, again, would not be a piracy. Yet, on the other hand, the copying of a single picture may, under some circumstances, be an infringement. For example, take the case of a work illustrated by one engraving of the likeness of some distinguished man, where no other likeness is extant. No one could have a right to copy that into a book upon any subject whatever, and a jury would in such a case rightly find that there had been an infringement of the copyright."

"Thackeray-
 ana, Notes
 and Anec-
 dotes." For
 biography.

A similar case to the last cited was that concerning the book entitled "Thackerayana, Notes and Anecdotes, illustrated by nearly Six Hundred Sketches, by William Makepeace Thackeray." It purported to be a kind of biography of Thackeray, based on

(a) (1872), L. R. 8 Exch. 1; cf. *Leslie v. Young*, (1894) A. C. 335.

the assumption that his own experiences were narrated in certain of his novels. Besides some previously unpublished sketches and caricatures by Thackeray, the work contained extensive selections from his published works, the copyright of which belonged to the plaintiff. The extracts were prepared by, and interspersed with original comments by the compiler. The Court found that the effect of the book was to supersede to a damaging extent the works from which the selections had been made, and accordingly held it to be a case of piracy (b).

In *Walter v. Lane* (c) it was decided that a reporter may acquire copyright in his report of a speech delivered on a public occasion. The speeches in question were delivered by Lord Rosebery, and the defendant published a book called "Appreciations and Addresses: Lord Rosebery," in which were contained four entire speeches of Lord Rosebery, taken *verbatim* from the "Times." An injunction was granted restraining this copying, but, in accordance with the principles laid down by Kelly, C. B., in the above-cited case of *Bradbury v. Hotten*, it is considered that in such a case the Courts would give a liberal interpretation to the meaning of "fair quotation"; for, obviously, the speech was public property, though the report belonged to the "Times."

Reports of
public
speeches.

Where the plaintiff published "The Standard Telegram Code," a book containing 100,000 words selected from eight languages, which words he considered specially adapted for correct telegraphic transmission, and the defendants printed a book containing some 70,000 of the words comprised in his book with the addition of interpretations suited for the purposes of the timber trade, which book they called "Shadbolt's Telegraph Code," an injunction was granted. The defendants maintained that having purchased one of the plaintiff's books, they were perfectly justified in selecting, as they had done, words from it, and in attributing to these and to other words chosen by themselves meanings in ordinary language suitable for the purpose of their trade, and in having the book so formed printed and used by themselves and their correspondents, and they insisted that this was a legitimate use of the plaintiff's book—that they had used it for the purpose for which it was compiled, *i.e.*, by their own ingenuity and with original matter of their own had turned it into a private code for the purposes of their business and correspondents. Mr. Justice Kay, however, pointed out that if what the defendants had done was lawful, a person

Telegraph
codes.

(b) *Smith v. Chatto* (1874), 31 L. T. 775.

(c) (1900) A. C. 539.

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Law reports.

It is manifest, from what fell from Lord Chancellor Cottenham in *Saunders v. Smith* (*e*), that he entertained no doubt (although he did not decide the point) that there might be a violation of the copyright of volumes of reports, by copying *verbatim* a part only of the cases reported. It is questionable, how far and to what extent certain cases in Law Reports may be reprinted at length in a treatise on the particular subject to which they relate; but it is clearly piracy to collect together, and reprint from the reports all the cases upon a particular subject, though the collection and classification may be new, and the publication be adorned with the addition of several unpublished decisions and notes (*f*). In the case last cited, however, the substance and value of the book consisted mainly of the cases pirated; and a case presenting greater difficulty was that of the well-known book entitled "Smith's Leading Cases," where the annotations really form the substance and essence of the work. In regard to the legal right in the last-mentioned case (*g*) Lord Cottenham said: "In this case I find the publication complained of to be of a character which, whether it be or be not an infringement of the copyright of the plaintiffs, is a course of proceeding which has been pretty largely admitted, and pretty generally adopted. Several cases occurred to me, and several were mentioned to me at the bar, in which a gentleman at the bar, desirous of publishing a work upon a particular subject, has collected the cases upon that subject, and has taken these cases, generally speaking *verbatim*, from reports which are covered by copyright: No instance has been represented to me in which those entitled to the copyright have interfered; no judgment, therefore, has been pronounced upon that subject. I am not stating whether the owner of the copyright is entitled to interfere in such a case, or whether the use of published reports is or is not to be permitted. That is a question of legal right upon which I find at present no reason for coming to an adjudication." But in a

(*d*) *Ager v. Collingridge* (1886), 2 T. L. R. 291, following *Ager v. P. & O. Steam Co.* (1884), 26 Ch. D. 637; cf. *Pitman v. Hine* (1884), 1 T. L. R. 39.

(*e*) (1838), 3 My. & Cr. 711; *Butterworth v. Kelly* (1888), 4 T. L. R. 430.

(*f*) *Hodges v. Welsh* (1840), 2 Ir. Eq. R. 266.

(*g*) *Saunders v. Smith*, *supra*.

subsequent case, where eleven cases only had been copied *verbatim*, and a considerable number of what were called abridged cases were mere copies of the plaintiff's with slight variation, Sir L. Shadwell, V.-C., granted an injunction (*h*). He distinguished the case from *Saunders v. Smith*. "In that case," said he, "there was no question but some parts of the plaintiff's work had been copied in the defendant's work. But there the publication of the defendant appeared to me to be altogether distinguished from that in which the cases originally appeared, and one could never be substituted for the other. In this case, from the class of persons who are held out as likely to be purchasers of the defendant's publication, I think it may be materially injurious to the sale of the plaintiff's work."

The right to make extracts from copyright works for educational purposes is now definitely recognised by the Copyright Act, 1911. Sect. 2, sub-sect. (1) (iv), states that the following shall not constitute an infringement of copyright: "The publication in a collection mainly composed of non-copyright matter, *bonâ fide* intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists: Provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged" (*i*).

Extracts for
school books.

The liberty accorded by this sub-section is a very limited one. It only applies to literary works, and these must be published, and not themselves intended for the use of schools. It would seem, therefore, that passages cannot be taken from dramatic and musical

(*h*) *Sweet v. Shaw* (1839), 3 Jur. 217; but see *Weatherby v. International Horse Exchange*, cited *ante*, p. 138.

(*i*) See Revised Berne Convention, Article X., Appendix B., *post*. With regard to this sub-section, the Council of the Publishers' Association has passed resolutions which have been approved by the Society of Authors, to the following effect:—(1) The Council of the Publishers' Association is of opinion that it will be to the interest of everyone concerned if any publisher proposing to make use of copyright matter in a school book in accordance with the provisions of the Copyright Act, 1911, s. 2 (iv), gives notice of his intention to the owner of the copyright. (2) The Council considers that vexatious litigation may be avoided if some general understanding is arrived at as to what constitutes a 'short passage' from a published literary work, and they beg to suggest the following:—(a) a 'short passage' from a prose work should not exceed 1,000 words; (b) a 'short passage' from a poetical work should not exceed 100 lines: Provided that a 'short passage' should not in either case contain more than one-third of the complete poem, essay, address, story or other literary work from which it is extracted."—*The Author*, 1st Nov., 1913. It hardly needs to be pointed out that these resolutions do not bind the Courts, but they indicate the views of those best equipped to determine what should be considered fair.

CAP. VIII. works, nor, of course, can school books be illustrated from copyright artistic works.

Private study
and criticism.

Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary, is also expressly permitted by the Act (*k*). This permission is extended not only to the case of published works, but also to that of unpublished works. The reason for thus extending the permission is, doubtless, because a dramatic or musical work is not published by public performance (*l*), and the object is to authorise effective criticism of a play which has been performed but not printed or published. In any case, however, where there has been no presentation of a work before the public in any shape or form any dealing with the same for the purposes above mentioned would probably be held to be "unfair" (*m*).

It is not very clear why the provision authorising fair dealing with any work for the purposes above mentioned should have been expressly inserted in the Act, for fair dealing for other purposes has always been, as pointed out above, permitted and, presumably, it was not intended to cut down the rights of fair user previously enjoyed under the old law. Similarly, the right to make extracts for the purposes of criticism was well recognised under the old law, and the cases decided under the old law may be taken as guides to what will be considered as fair dealing for the purposes of criticism.

Reviews or
criticisms.

In a case in which the work alleged to be pirated was a play extending over forty pages, and the defendant had published a journal of theatrical criticism in which, as illustrative of his critical remarks, he had introduced broken and detached fragments of the piece in question, amounting in the whole to six or seven pages, some weight appears to have been allowed by the Court to the fact of the extent of the extracts being so inconsiderable, as affording ground for doubt whether the defendant had transgressed the limits of fair quotation (*n*).

The Great
Western
Railway
inquiry.

In *Bell v. Whitehead* (*o*) the plaintiffs had published in the "Monthly Chronicle" an article entitled "The Great Western Railway Inquiry," occupying nineteen pages; the defendant had extracted four pages and a half from this, and published it in the "Railway Times," a weekly paper, with animadversions. A con-

(*k*) Sect. 2 (1) (i).

(*l*) Sect. 1 (3).

(*m*) *Gilbert v. Star Newspaper Co.* (1894), 11 T. L. R. 4.

(*n*) *Whittingham v. Wooler* (1817), 2 Swan. 428.

(*o*) (1839), 8 L. J. Ch. 141.

troverſy was, at that time, going on as to the principles upon which a railway ſhould be conſtructed, on the one ſide being Mr. Brunel, and on the other Dr. Lardner. The "Railway Times" took the ſide contrary to Dr. Lardner, and the article taken from the "Monthly Chronicle" was in favour of Dr. Lardner's views, and the defendant's object in taking it was to criticise it. Under theſe circumſtances Lord Cottenham, C., diſſolved an injunction which had been obtained.

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

Copying ſhort ſtories for review.

There can be no "cuſtom" authoriſing the copying of articles from one newspaper into another. This was decided by the caſe of *Walter v. Steinkopff* (q). There the proprietors of the "Times" brought an action againſt the proprietor and the publisher of the "St. James's Gazette," to reſtrain the defendants from further publishing any copy of a newspaper containing any copy of an article by Mr. Rudyard Kipling, or ſubſtantial portions thereof, and alſo certain other extracts taken from the "Times" and contained in twenty-two ſeparate paragraphs of the "Gazette" of the 13th of April. It was not denied by the defendants that they had copied ſome two-fifths of the Kipling article, and all the extracts from the "Times," practically *verbatim*, but it was contended that the conſent of the proprietors of the "Times" might be aſſumed if the four following conditions were obſerved:—

(i.) That the ſource of the information was acknowledged;

(ii.) That the paper copying and the paper copied were not direct rivals or competitors; (iii.) That the paper copied from had alſo copied, thereby implying that it agreed to a free interchange of

Custom is no excuſe for piracy.

(p) *Maxwell v. Somerton* (1874), 30 L. T. 11.

(q) (1892) 3 Ch. 489.

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literary and other matter; (iv.) That the editor of the paper copied had given no notice of his objection to matter being copied. It was proved by the "Times" that the copyright in the Rudyard Kipling article and in some of the twenty-two paragraphs was vested in them. Mr. Justice North, in delivering judgment, said that the plaintiffs could not have asked successfully for the interference of the Court with respect to the paragraphs in which they had not proved that they had any copyright: their claim to relief was confined to the Rudyard Kipling article, and three of the paragraphs in which they had proved that they had copyright. With regard to the article the plaintiffs' case was clear, it was practically undisputed by the defendants' advisers, the defendants had deliberately reprinted the most attractive portion of an article which they admitted they knew had been acquired by the plaintiffs at a high cost. There were purposes, no doubt, for which, notwithstanding the plaintiffs' copyright, the defendants might legitimately have made reasonable extracts, as, for instance, if they had been criticising Mr. Kipling's works, &c., but in the present case there was a mere reproduction of copy without trouble or cost. The same remarks applied also to the three paragraphs. It was said that there was no copyright in news, but there was or might be in a particular form of language or modes of expression by which information was conveyed, and not the less so because the information might be with respect to the current topics of the day. With regard to the quality of the matter copied, the paragraphs pirated were taken in their entirety for the very purpose for which they were used in the "Times," viz., to convey information to the readers of the paper. It was not a case of the selection of a part or quotation, or an extract. The defendants had failed to prove that the first three of the four alleged conditions had been observed, but even if they had, the plea of the existence of such a custom or practice of copying as was set up could no more be supported when challenged than the highwayman's plea of the custom of Hounslow Heath. It had often been relied on, but had always been repudiated by the Courts. In the result, therefore, the defendants were entirely wrong.

Defence of
"common
source."

The defence of "fair quotation" may be pleaded where the copyist has taken original *copyright* matter from a previous work. Another common defence is raised where the previous writer has embodied in his work information which is matter of common knowledge or common observation, and which cannot well be put in different language, or selections from non-copyright sources.

This defence is chiefly raised in cases of compilations. All

definitions of the same thing must be nearly the same, and descriptions which are definitions of a more lax and fanciful kind must always have in some degree that resemblance to each other which they all have to their object. Consequently, in compiling such works as dictionaries, gazetteers, grammars, maps, arithmetics, almanacs, concordances, encyclopædias, itineraries, guide books, and similar productions, the materials, to a considerable extent, must be nearly identical, and the prior compiler cannot monopolise what did not originate with himself, nor a subsequent compiler employ a prior arrangement and materials to such an extent as to be a substantial invasion of the anterior compilation.

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

(r) (1867), L. R. 3 Eq. 718; *Morris v. Ashbee* (1868), L. R. 7 Eq. 34; *Maxman v. Tegg* (1826), 2 Russ. 398; *Jarrold v. Houlston* (1857), 3 K. & J. 708; *Cox v. The Land and Water Co.* (1869), L. R. 9 Eq. 324; *Trade Auxiliary Co. v. Middlesbrough and District Tradesmen's Protection Association* (1889), 40 Ch. D. 425; *Cato v. Devon and Constitutional Newspaper Co.* (1889), 40 Ch. D. 500.

(s) (1866), L. R. 1 Eq. 697.

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

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

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

(*t*) *Morris v. Wright* (1870), L. R. 5 Ch. 279; *Scott v. Stanford* (1867), L. R. 3 Eq. 718; *Cox v. Land and Water Journal Co.* (1869), 9 Id. 324; *Pike v. Nicholas* (1870), L. R. 5 Ch. 251; *Hogg v. Scott* (1874), L. R. 18 Eq. 444; *Lamb v. Evans*, (1892) 3 Ch. 462; (1893), 1 Ch. 218; *Kelly's Directories v. Gavin and Lloyds*, (1901) 1 Ch. 374; (1902) 1 Ch. 631.

(*u*) (1868), L. R. 7 Eq. 34.

(*x*) *Morris v. Ashbee* (1868), L. R. 7 Eq. p. 41.

(*y*) (1870), 38 L. J. Ch. 259.

rities, he made no unfair or improper use of the plaintiff's book" (z).

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

How far prior literature may be used.

At the present day, however, the *animus furandi* will not, it is thought, be taken into consideration, except in doubtful cases (b).

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

Sale of a sheet almanac printed from a directory restrained.

In *Leslie v. Young* (d) 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, *inter alia*, 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 com-

Railway guides.

(z) *Per* Giffard, V.-C., *Morris v. Wright* (1870), 22 L. T. at p. 82. "The true principle in all these cases," said Vice-Chancellor Hall, in *Hogg v. Scott* (1874), L. R. 18 Eq. 458, "is that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work; that is, in fact, merely to take away the result of another man's labour, or, in other words, his property."

(a) (1802), 4 Esp. 168.

(b) *Scott v. Stanford* (1867), L. R. 3 Eq. 718; cf. *Mansell v. Valley Printing Co.*, (1908) 2 Ch. 441.

(c) *Kelly v. Hooper* (1840), 4 Jur. 2.

(d) (1894) A. C. 335.

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plained 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 the House of Lords refused an injunction in the case of the time-tables.

This case is not very easy to follow, and the facts are not very clearly reported, but the Lords Justices seem to have based their decision as much on the ground that the appellant's time-table was not a proper subject for copyright, as upon the ground that the respondents had not infringed it.

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

In *Jarrolld v. Houlston (c)*, the publishers of Dr. Brewer's "Guide to Science" obtained an injunction against the publication of the "Reason Why." The works in controversy were written on the same plan, and presented, in the form of question and answer, popular information on a variety of scientific subjects. The earlier book, Dr. Brewer's "Guide to Science," had evidently been used to a considerable extent in the preparation of the later one, although copying was denied. The judge said: "I take the illegitimate use, as opposed to the legitimate use of another man's works on subject-matters of this description to be this: if, knowing that a person whose work is protected by copyright has, with considerable labour, compiled from various sources a work in itself not original, but which he has digested and arranged. you, being minded to compile a work of a like description, instead of taking the pains of searching into all the common sources, and obtaining your subject-matter from them, avail yourself of the labour of your predecessor, adopt his arrangements, adopt, moreover, the very questions he has asked, or adopt them with but a slight degree of colourable variation, and thus save yourself pains and labour by availing yourself of the pains and labour which he has employed, that I take to be an illegitimate use." But where the same plaintiffs filed a bill against the publishers of a work called "Class Book of Modern Science," compiled by Messrs. Thomas and Francis Bullock, as being a piracy of their "Dr. Brewer's Guide," and it was admitted by the defendant that he had referred to the plaintiffs' book in the course of compiling the "Class Book," but he insisted that every fact or illustration referred to in the "Class Book" was verified by the

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

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

A compiler must produce an original result.

(f) *Jarrold v. Heywood* (1870), 18 W. R. 279.

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does not deny the use made of such preceding works, and the alterations are not merely colourable (*g*).

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

The case of a dictionary analysed.

To further illustrate the principle, take the case of a dictionary. There may be a certain degree of skill exhibited as to order and arrangement, and there may be a good deal of ingenuity exhibited in the selection of phrases and illustrations, which are the best exponents of the sense in which the word is to be used: and there may also be great labour in the logical deduction and arrangement of the word in its different senses, when the sense of the word departs from its primary signification; but there cannot be copyright in much of the information contained in the numerous dictionaries published, each necessarily having a large number of words identically similar. The great point to decide in such cases is, as we have already stated, whether in the particular case the work is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work (*i*).

The case of *Spiers v. Brown*.

Lord Hatherley, while Vice-Chancellor, in the case of *Spiers v. Brown* (*k*), thus summed up the law in his peculiarly lucid style: All cases of copyright were very simple when a work of an entirely original character was concerned, being a work of imagination or invention on the part of the author, or original in respect of its being a work treating of a subject common to mankind, such as history, or other branches of knowledge varying much in their mode of treatment, and in which the hand of the artist would be readily discerned. But the difficulty that arose

(*g*) *Spiers v. Brown* (1858), 6 W. R. 352; *Reade v. Lucy* (1861), 1 J. & H. 524; and in the case of a catalogue, *Hotten v. Arthur* (1863), 1 H. & M. 603.

(*h*) *Hogg v. Scott* (1874), L. R. 18 Eq. 444; *Cary v. Keursley* (1802), 4 Esp. 168; *Matthewson v. Stockdale* (1806), 12 Ves. 270; *Longman v. Winchester* (1809), 16 Ves. 269; *Bailey v. Taylor* (1829), 3 L. J. O. S. 66; *Bramwell v. Halcomb* (1836), 3 My. & Cr. 737; *Kelly v. Hooper* (1840), 4 Jur. 21; *Murray v. Bogue* (1852), 1 Drew. 353.

(*i*) *Vide Wilkins v. Aikin* (1810), 17 Ves. 422; *Bramwell v. Halcomb* (1836), 3 My. & Cr. 737; *Cornish v. Upton* (1861), 4 L. T. 863.

(*k*) (1858), 6 W. R. 352.

in cases of the class then before him was that they not only related to a subject common to all mankind, but that the mode of expression and language was necessarily so common that two persons must, to a very great extent, express themselves in identical terms in conveying the instruction or information to society which they were anxious to communicate. The most obvious case was that of figures, such as the table of logarithms—the case before Sir John Leach—where it would be impossible to deviate in the calculations, or to vary the order, and the result must be identical. The same might be said of directories, calendars, Court guides, and works of that description. These were cases in which the only mode of arriving at the amount of labour bestowed was by the common test resorted to of discovering the copying of errors and misprints, indicating a servile copying (*l*).

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Where a writer has edited a non-copyright work with notes, he cannot, of course, prevent another from editing the same work, but the later writer must go to original sources and not copy directly from the previous writer's work. Thus, where the plaintiff had issued an edition of the "Letters of Dorothy Osborne," the originals of which had subsequently come to the British Museum and, it was alleged, were not the subject of copyright, and the defendants, in publishing a new edition of the same letters, had sent the plaintiff's text of the letters directly to the printers, instead of having them copied from the MSS. in the British Museum, Mr. Justice Farwell indicated such a strong opinion that this method could not be defended, that the defendants submitted to a perpetual injunction (*m*).

Editing a non-copyright work.

It is obvious that in many cases of compilations their whole merit lies in their accuracy and completeness; but in the case

Selections and quotations from

(*l*) This is one of the surest tests of copying, see *Kelly v. Morris* (1866), L. R. 1 Eq. 697; *Pike v. Nicholas* (1870), L. R. 5 Ch. 251; *Cox v. Land and Water* (1869), L. R. 9 Eq. 324. In *Murray v. Bogue* (1852), 1 Drew. 353, 366, where instances were stated in the bill and at the bar in which the defendant had the plaintiff's errors, Vice-Chancellor Kindersley said, "Now the use of showing the same errors in both is, that where the defendant says he has got his information, not from the plaintiff, but from other sources, if the evidence is unsatisfactory on the question whether the defendant did use the plaintiff's work or not, to show the same errors in the subsequent work that are contained in the original, is a strong argument to show copying." It will be in the defendant's favour if he shows that the matter in his own book is free from many of the errors in the plaintiff's; but still the errors may have been corrected in copying. In *M'Neill v. Williams* (1840), 11 Jur. 344, it appeared that seven errors in the plaintiff's mathematical tables were also found in those of the defendant. The latter declared that this was accidental, and that the plaintiff's book contained seventy errors not to be found in his own. It does not appear what importance the Court attached to this circumstance; but the injunction was refused.

(*m*) *Parry v. Moring and Gollancz*, Farwell, J., 3rd April, 1903, see *ante*, p. 53.

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non-copy-
right
sources.

of a work comprising selections or quotations from various works which are not the subject of copyright, there is often an additional merit in the selection. It has been contended that the same principles govern both classes of works, but this contention was, in a modern case (*n*), repudiated by Lord Justice Collins. "Counsel justified," he said, "annexing another man's quotations on the ground that you may follow an indication given in another book as to the place where you will find authorities; that you have the right to consult them; and that all the defendant Mr. Marshall does, being directed by a reference to a particular quotation, is to go and look to the author and see whether the quotation corresponds with the text, and, if so, the text being common property, he is at liberty to annex that quotation. I cannot admit that for a moment. He rather suggested that it was justified by the cases relating to directories, which say that you can, where another man has compiled a directory, simply take his sheets with you and go and see whether the existing facts concur with the description in the sheets, and that, if you do, you may publish the result as your own. Certainly; but are you at liberty to apply the same principle to a series of quotations—to take the references given by one author, although he quotes such and such a passage as illustrating a particular matter and to say: 'I will just go and see if that is correctly copied or not, and if it is correctly copied, I propose to introduce it with any other which illustrates the particular passage, and I propose to adopt that as my own work'? That leaves out the whole merit; the felicity of the quotation; its adaptability to a particular end; its illustration of a particular characteristic; all those things enter into the choice of one quotation as apart from another. If you obey a certain direction to go to a certain place, it does not entitle you to annex the skill and judgment and taste which has dictated the selection. . . . It seems to me that the law is clearly such as to entitle the plaintiff to complain if quotations selected and arranged by him are imitated and adopted by the defendant."

Edition of
"As You
Like It."

The case last cited (*o*) is an instructive one upon the whole subject of infringement. The plaintiffs, Moffatt & Paige, Ltd., were the registered proprietors of the copyright of an annotated edition of Shakespeare's play "As You Like It," edited by Thomas Paige

(*n*) *Moffatt and Paige v. Gill & Sons* (1902), 86 L. T. at p. 470; cf. *Macmillan v. Suresh Chunder Deb*, 17 Ind. L. R. (Calcutta Ser.), 951, where an infringement of the "Golden Treasury" was restrained.

(*o*) *Moffatt and Paige v. Gill & Sons* (1901), 84 L. T. 452; on appeal (1902), 86 L. T. 465.

and published in the year 1893. In March, 1900, the defendants, Messrs. Gill & Sons, published an annotated edition of the same play, edited by the defendant Marshall. Messrs. Gill & Sons had in the year 1899 produced another edition of the same play, by the same editor, and an action had been brought by Messrs. Moffatt & Faige in respect of that edition. This action, in respect of the earlier edition, to which the defendant Marshall was not a party, was disposed of by consent, Messrs. Gill & Sons agreeing to pay certain damages and costs and undertaking to destroy any copies in their possession. After this, Messrs. Gill & Sons instructed the defendant Marshall to prepare another edition, and it was in respect of this later edition that the plaintiffs now sued. The plaintiffs, by their particulars, alleged infringements under five heads: (1) That the general arrangement of the defendants' book, including a glossary, was copied from the plaintiffs'; (2) that sketches of character were copied; (3) that certain passages were copied, instancing a passage from Lady Martin's "Shakespeare's Female Characters" set out in the plaintiffs' book; (4) that literary notes were copied; and (5) certain other infringements. The defendant Marshall alleged that his book was the result of independent labour, making a legitimate use of the plaintiffs' book in common with the works of other commentators.

The way in which the second edition was prepared is thus described by Lord Justice Collins in his judgment:—"The first edition could not be defended. That was admitted by the publishers. It was not admitted by the author in the first proceedings, because he was not a party thereto. But, as a result of the examination in the present action, there is a practical admission by the author himself that the first edition could not be defended. What is the process that the defendant has adopted by which his second edition has been developed? He has in his possession the proofs of the first edition; he carefully re-reads those proofs, and he puts marks, which, though they do not efface them from his view, do denote the fact that certain particular passages are such that he thinks they cannot stand, having regard to what happened at the first trial. He marks those passages, but they are so worked as to be still obvious to the eye and capable of being read, although they are not to appear as in that edition. He has before his eye his own edition, no doubt; but, in fact, so far as the matters in the case are concerned it is practically the work of the defendants, because it is a copy of the plaintiffs' book. It is garbled to a certain extent, but it is nothing better than a copy. Having that before him, he makes certain notes, indicating what passages cannot stand, and

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for which, therefore, some substitution must be found. We have heard and we see as the result in the second edition changes of expression which he has made, while conveying the same thing in substance—the alteration of the order of quotations, while leaving the quotations there themselves, the retention of the string of quotations used, and the purpose to which they were applied; and, further, the same general system of analysis of character, which had been reproduced by the defendant, Mr. Marshall, in the first edition of his own. That, broadly speaking—I am not pretending to treat the matter with exactitude of detail—is the process by which the second edition was reproduced” (*p*). In the result, the Court of Appeal, reversing Kekewich, J. (who decided on the ground of want of an *animus furandi*), granted a perpetual injunction.

Infringe-
ment by
imitation.

Distinction
between a
copy and an
imitation.

Copyright may be infringed by imitating the whole or part or by reproducing the whole or part with colourable alterations.

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

(*p*) 86 L. T. at p. 468. In *Black v. Murray* (9 Sc. Sess. Cas. 3rd Ser. 355), where Lockhart’s annotated edition of Scott’s “Minstrelsy of the Scottish Border” was in question, and it appeared that of the 200 notes added by the editor, all but fifteen were quotations from common sources, and the ballads themselves were common property, Lord Kinloch said: “To a considerable extent the notes borrowed (to use an euphemism) from Messrs. Black’s edition consist of quotations from various authors, employed by Mr. Lockhart to illustrate ballads in the ‘Minstrelsy.’ It was perhaps thought that to repeat quotations from well-known authors was not piracy. If so, I think a great mistake was committed. In the adaptation of the quotation to the ballad which it illustrates, the literary research which discovered it, the critical skill which applied it, there was, I think, an act of authorship performed, of which no one was entitled to take the benefit for his own publication, and thereby to save the labour, the learning, and the expenditure necessary even for this part of the annotation.”

by furnishing himself with thoughts and elegancies out of the same general magazine of literature can with little more propriety be reproached as a plagiarist than the architect can be censured as a mean copier of Angelo or Wren because he digs his marble from the same quarry, squares his stones by the same art, and unites them to columns of the same order.” CAP. VIII.

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

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

Cases such as those referred to, namely, those where there is a resemblance between the substance and the general scheme of the One test,
substantial
identity.

(q) (1789), 1 East, 363, n.
(r) (1845), 3 Story (Amer.), 768, 793.

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two works in question, while at the same time the language of each is by no means similar, occasion great difficulty. The inquiry usually resolves itself into a matter of fact which rests with the Court to determine—Is there such a resemblance between the two works in controversy as to make it clear that one has been copied from the other?

Alternative explanations of similarities.

Wherever it is alleged that there are similarities between the plaintiff's work and that of the defendant, those similarities may be due to any one of four hypotheses, namely: (1) to mere chance; (2) to both works being taken from a common source; (3) to the plaintiff's work being taken from the defendant's; or (4) to the defendant's work being taken from the plaintiff's (s). Every case must depend upon its own circumstances. Particularly in the case of dramatic works of a similar class, such as melodramas, there are certain stock characters and stock situations; the fact, therefore, that there are similarities between the plaintiff's and the defendant's works is not conclusive that they have copied the one from the other (t). A combination of ordinary materials may, however, be original, and when such a combination has arrived at a certain degree of complexity, it becomes practically impossible that they should have been arrived at independently by a second individual, and the inference is that one has copied from the other (u).

By abridgment.

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

It is, perhaps, unfortunate that the right to make an abridgment of his work is not one of the rights specifically reserved to the proprietor of the copyright by the Copyright Act, because the decisions on the subject are somewhat inconsistent (x).

What is an abridgment?

To constitute a proper abridgment, the arrangement of the book abridged must be preserved, the ideas must also be taken, and expressed in language not copied, but condensed. To copy certain passages and omit others, so as to reduce the volume in bulk, is not such an abridgment as the Court would recognise as sufficiently original to protect the author. The judgment of the abridger must be called into play in condensing the views of the author. There is a clear distinction between an abridgment and a compila-

(s) *Per* Sargant, J., *Corelli v. Gray* (1913), 29 T. L. R. 570; aff. 30 T. L. R. 116.

(t) *Rees v. Robbins*, *Times*, 6th Feb., 1914; 4th July, 1914, "A Beggar Bride."

(u) *Corelli v. Gray*, *supra*.

(x) An abridgment made for purposes of "private study" is not an infringement of copyright (sect. 2 (1) (i)).

tion. As an American judge (*y*) well observed: "A compilation consists of selected extracts from different authors; an abridgment is a condensation of the views of the author. The former cannot be extended so as to convey the same knowledge as the original work; the latter contains an epitome of the work abridged, and consequently conveys substantially the same knowledge. The former cannot adopt the arrangements of the works cited; the latter must adopt the arrangement of the work abridged. The former infringes the copyright if matter transcribed, when published, shall impair the value of the original book; a fair abridgment, though it may injure the original, is lawful."

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

*Dodsley v.
Kinnersley.*

In *Hawkworth v. Newbery* (*b*), Lord Chancellor Apsley, having spent some hours in consultation with Mr. Justice Blackstone, decided that an abridgment, where the understanding is employed in retrenching unnecessary and uninteresting circumstances which rather deaden the narration, is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work. It requires both invention

*Hawkworth
v. Newbery.*

(*y*) *Story's Exors. v. Holcombe*, 4 McLean (Amer.), p. 314.

(*z*) (1761), Amb. 403; *Gyles v. Wilcox* (1740), 2 Atk. 141.

(*a*) It is no defence to say that the pirated work is not offered for sale itself, but merely used to promote the sale of the books mentioned in it: *Hotten v. Arthur* (1863), 1 H. & M. 603.

(*b*) (1774), Loft, 775; *Butterworth v. Robinson* (1801), 5 Ves. 709.

CAP. VIII. and judgment, and displays frequently a deal of learning. Lord Hardwicke thus stated the rule (c):—"Where books are colourably shortened only, they are undoubtedly within the meaning of the Act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgment. But this must not be carried so far as to restrain persons from making a real and fair abridgment; for abridgments may, with great propriety, be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shown in them, and in many cases are extremely useful (d), though in some instances prejudicial, by mistaking and curtailing the sense of an author" (e).

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

Butterworth v. Robinson.

In the case of *Butterworth v. Robinson* (g), a motion was made upon certificate of the bill, for an injunction to restrain the defendant from selling a work entitled "An Abridgment of Cases argued and determined in the Courts of Law, &c." until answer or further order. A copy of the work was handed to the Lord Chancellor. In support of the motion, it was stated that this work was by no means a fair abridgment; that, except in colourably leaving out some parts of the cases, such as the arguments of counsel, it was a mere copy *verbatim* of several of the reports of

(c) *Gyles v. Wilcox* (1740), 2 Atk. 141.

(d) *Hodges v. Welsh* (1840), 2 Ir. Eq. Rep. 266.

(e) This paragraph seems to confuse the distinct questions (a) whether an abridgment is an original work entitled itself to copyright, and (b) whether the abridgment is a piracy of the abridged work. There is little doubt that an abridgment is, subject to the rights of the proprietor of the copyright in the original, itself capable of acquiring copyright: see *ante*, p. 63.

(f) *Bell v. Walker* (1784), 1 Bro. C. C. 451; *Story's Exors. v. Holcombe*, 4 McLean (Amer.), 308.

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

cases in the Courts of law, and among them of the "Term Reports," of which the plaintiff was proprietor; comprising not a few cases only, but all the cases published in that work; the chronological order of the original work being artfully changed to an alphabetical arrangement under heads and titles to give it the appearance of a new work. In support of the motion, *Bell v. Walker* (*h*) was cited. The Lord Chancellor said: "I have looked at one or two cases, with which I am pretty well acquainted, and it appears to me an extremely illiberal publication. Take the injunction upon the certificate of the bill filed, to give them an opportunity of stating what they can upon it."

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In the case of *Sweet v. Benning* (*i*), the defendants were restrained from taking *verbatim* the headnotes from a series of law reports and arranging them in a different manner. In the course of his judgment, Jervis, C. J., remarked as follows:—"I admit that a digest may be made from a copyright work without piracy upon it, but that is a work in which a man applies his mind to the labour of extracting the principles of the original work, and by his labour really produces a new work. It is not so where he merely reduces extracts or passages of another man's work to an alphabetical order, which is a work a clerk might accomplish, and requires neither learning nor study, but may be little more than a merely mechanical operation of cutting out and classifying under certain letters of the alphabet. In one of the cases cited, the 'Term Reports' were so dealt with, and it was held to be a piracy. I think that case is decisive of the present, and therefore that the plaintiffs are entitled to our judgment."

Sweet v. Benning.

In *D'Almaine v. Boosey* (*k*), the question arose as to the right to make adaptations of music. Lord Lyndhurst, then Lord Chief Baron, observed that it was a nice question, what should be deemed such a modification of an original work as should absorb the merit of the original in the new composition. "No doubt," said he, "such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are in their nature original. Their compiler intends to make of them a new use; not that which the author proposed to make. Digests are of great use to practical men, though not so, comparatively speaking, to students. The same may be said of an abridgment of any study; but it must be a *bonâ fide* abridgment, because if it contains many chapters of the original work, or such as made that work

D'Almaine v. Boosey.(*h*) (1784), 1 Bro. C. C. 451.(*i*) (1855), 16 C. B. 459.(*k*) (1835), 1 Y. & C. 288.

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most saleable, the maker of the abridgment commits a piracy. Now, it will be said that one author may treat the same subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite distinct from that of others who preceded him; but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the author, and which may in such case be the subject of piracy; and you commit a piracy if, by taking, not a single bar, but several, you incorporate in the new work that in which the whole meritorious part of the invention consists."

Dickens v. Lee.

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

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

It will be noticed that there has been no modern decision as to the rights of an abridger, and, having regard to the tendency of later cases to depart from the stringency of the earlier decisions and the recognition of the principle that an author is entitled to the indirect, as well as the direct, fruits of his labour (n), it is considered

(l) (1844), 8 Jur. 183.

(m) (1861), 1 H. & M. 747.

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

probable that it will be held that abridgments of copyright works are no longer permissible. CAP. VIII.

5th. Copyright may be infringed by reproducing the whole or part under the form of a translation. By translation.

If there was any doubt, under the old law, as to whether a translation infringed the copyright in the original work (*o*), it is set at rest by the Act of 1911, which expressly includes in the copyright which is conferred upon an author, the sole right "to produce, reproduce, perform, or publish any translation of the work" (*p*).

If A.'s work is translated by B., and C. re-translates from B.'s translation into the original language, C. infringes A.'s copyright (*q*). Re-translation.

The right to prevent public performance of a work is not now confined to musical and dramatic works, but is extended to all works (*r*). By sect. 35 of the Act "performance" means "any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument." Under the Literary Copyright Act, 1842 (*s*), the author of a literary work had no right to complain of portions of his work being recited or read aloud in public (*t*). This would appear to be no longer so. The definition of "performance" seems wide enough to cover a mere recitation, even without action or costume, and the fact that sect. 2 (1) (vi) expressly authorises "the reading or recitation (*u*) in public by one person of any reasonable extract from any published work," leads to the inference that the reading or recitation of an unreasonable extract is an infringement. In considering whether the length of extract recited is reasonable or unreasonable no doubt greater latitude will be permitted in the case of recitations or readings from non-dramatic works than from dramatic works (*x*). Infringement by public performance.

It is no longer permissible, as it was under the old law, provided the actual words were not copied (*y*), to convert a novel or other non-dramatic work into a dramatic work. Infringement by dramatization of non-dramatic works.

(*o*) *Burnett v. Chetwood* (1720), 2 Meriv. 441; cf. *Cate v. Devon Newspaper Co.* (1889), 40 Ch. D. 500. A translation was held not to be a piracy in America (*Stowe v. Thomas*, 2 Am. L. R. 231), and in India (*Macmillan v. Shamsul* (1895), 19 Ind. L. R. (Bombay Scr.) 557).

(*p*) Sect. 1 (2) (a); *Byrne v. Statist Co.*, (1914) 1 K. B. 622.

(*q*) *Murray v. Bogue* (1852), 1 Drew. 353, 368.

(*r*) Sect. 1 (2).

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

(*t*) *Per Stirling, J., Hanfstaengl v. Empire Palace*, (1894) 3 Ch. 109, 116.

(*u*) But not "singing."

(*x*) See further as to infringement by public performance, *post*, p. 174.

(*y*) *Reade v. Conquest* (1861), 9 C. P. 755; *Tinsley v. Lacy* (1863), 32 L. J. Ch. 535; *Parne & Co. v. Seebohm* (1888), 39 Ch. D. 73.

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dramatic work or an artistic work into a dramatic work by way of performance in public or otherwise (z). This effects a considerable extension of the rights of the proprietor of the copyright in a novel, because the result is to give protection not merely to the form of the words in the novel, but sometimes to the situations contained in it, so that if it is found that a series of incidents in combination have been taken from a copyright novel an injunction will be granted, even though there is not a single sentence used in the dramatic work which is similar to one used in the novel (a).

Gratuitous circulation.

It is no defence that the copying is made for the purpose of gratuitous circulation (b), unless it be for private study or research (c): nor that the work has been copied not directly from the work itself, but only indirectly from another work (d).

Certain dealings with pirated copies may be infringement of copyright.

It is not only the person who reproduces or publicly performs in whole or in part a copyright work who is liable to an action for infringement: persons who deal with infringing copies may also be exposed to a like action, but in this case only if they do so knowingly. This is the result of sect. 2 (2), which is as follows:—

“Copyright in a work shall also be deemed to be infringed by any person who—

(a) sells or lets for hire, or by way of trade exposes or offers for sale or hire; or

(b) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or

(c) by way of trade exhibits in public; or

(d) imports for sale or hire into any part of His Majesty's dominions to which this Act extends,

any work which to his knowledge infringes copyright or would infringe copyright if it had been made within the part of His Majesty's dominions in or into which the sale or hiring, exposure, offering for sale or hire, distribution, exhibition, or importation took place.”

Meaning of “infringing” copy.

“Infringing,” when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation

(z) Sect. 1 (2) (c). The words “or otherwise” presumably qualify “performance” not “public.” They are not, it is thought, intended to convey that a performance in private of a dramatized work is to be an infringement of copyright.

(a) *Per Cozens-Hardy, M. R., Corelli v. Gray* (1913), 30 T. L. R. 116.

(b) *Novello v. Sudlow* (1852), 12 C. B. 177; *Ager v. P. & O. Steamship Co.* (1884), 26 Ch. D. 637.

(c) Sect. 2 (1) (i).

(d) *Cate v. Devon Newspaper* (1889), 40 Ch. D. 500.

made or imported in contravention of the provisions of the Copyright Act (e). To sell a work which has been lawfully made, unless it was made in a foreign country, is not, therefore, an infringement of copyright (f).

Acts complained of must be committed within the jurisdiction.

The section does not, except as to importation, expressly state that the act complained of must be done within those parts of the world to which the Act extends, but copyright only extends throughout the parts of His Majesty's dominions to which the Act extends (g), and the English Courts have no jurisdiction to entertain actions for infringements of copyright committed abroad (h). In order, therefore, that a person can be sued for knowingly selling a work which to his knowledge infringes copyright it must be shown that the sale took place in the United Kingdom, and the fact that goods are despatched from another country pursuant to an order received from England does not make it a sale in England (i). Similarly, an agent who orders goods to be delivered at a foreign port to an English firm who then import them into England does not "sell" in England (k).

A person who simply attempts to effect a sale does not thereby infringe copyright (l), unless he "by way of trade exposes or offers for sale or hire" the infringing article. The new Act does not go so far as the Literary Copyright Act, 1842, which made it an infringement of copyright for any one knowingly "to have in his possession for sale or hire" an imported book which infringed copyright (m).

Selling or exposing for sale infringing works.

As we have seen, it is no defence to any one who has directly infringed copyright to say that he did so without the intention of making any profit thereby (n), but in order to render liable a person who merely *distributes* an article which to the knowledge of the distributor infringes copyright, it must be shown that he has done so "either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright." It is not, however, very easy to imagine a case in which gratuitous distribution

Distribution for trade purposes.

(e) Sect. 35.

(f) This point seems to have been overlooked in the recent case of *Monckton v. Pathé Frères* ((1914) 1 K. B. 395), more fully considered in the chapter on "Mechanical Contrivances," Part III., Chapter V.

(g) Sect. 1 (1).

(h) *Morocco Bound v. Harris*, (1895) 1 Ch. 534.

(i) *Badische Anilin und Soda Fabrik v. Basle Chemical Works*, (1898) A. C. 200.

(k) *Saccharin Corporation v. Reitmayer*, (1900) 2 Ch. 659; *Badische Anilin und Soda Fabrik v. Hickson*, (1906) A. C. 419.

(l) *Wolff v. Wood*, *Times*, 31st Oct., 1903; *Britain v. Kennedy* (1903), 19 T. L. R. 122.

(m) 5 & 6 Vict. c. 45, s. 17.

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

CAP. VIII. would not prejudicially affect the owner of the copyright. Likewise, "exhibition" must be "by way of trade."

Infringement
by importa-
tion.

As regards importation of infringing works, again, the Act of 1911 is not so stringent as the Literary Copyright Act, 1842. Under sect. 17 of the latter Act it was an offence to import piracies, whether or not the importer had knowledge that the works were piracies (*o*). Under the Act of 1911, to render the importer liable to be sued as an infringer of copyright, it must be proved that he imported for "sale or hire" and that the imported works "to his knowledge" infringe copyright; but, inasmuch as by sect. 7 it is provided that all infringing copies of "any work in which copyright subsists or of any substantial part thereof" are to be deemed the property of the owner of the copyright, it would seem that an innocent importer who deals with the copies in his possession may be liable in damages for the conversion of what is not his own property, but the property of the owner of the copyright (*p*). In fact sect. 7 seems calculated in many cases to deprive any person who is deemed to infringe copyright under sect. 2 (2) of any material benefit arising from his innocence.

Proof of
knowledge.

The burden of proof as to knowledge appears to lie upon the plaintiff (*q*), and the best method of proving knowledge is by giving notice prior to instituting proceedings (*r*). The defendant's ignorance must, however, be of the facts and not of the law (*s*), and probably the knowledge of an agent would be imputed to his principal.

(b) *Dramatic and Musical.*

Same
principles
applicable as
in piracies
of literary
copyright.

In considering what amount of copying or imitation will constitute piracy of a dramatic or musical work, similar rules to those already laid down with reference to literary copyright may be applied.

Two leading cases on infringement of dramatic copyright are the cases of *Planché v. Braham* (*t*), and *Chatterton v. Cave* (*u*). In the first of these cases the defendant used the words of two or three songs of the plaintiff as the vehicle of some airs in an English version of Weber's opera of "Oberon," and the action was brought under the above Act. The rest of the version had

(*o*) *Cooper v. Whittingham* (1880), 15 Ch. D. 501.

(*p*) As to seizure of piracies by the Customs authorities, see *post*, Chapter IX., "Civil Remedies for Infringement of Copyright."

(*q*) Cf. sects. 2 (3), 8, where the burden of proof is thrown upon the defendant.

(*r*) *Cooper v. Whittingham*, *ubi sup.*

(*s*) *Burton v. Bevan*, (1908) 2 Ch. 240.

(*t*) (1837), 4 Bing. N. C. 17.

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

been written by another person. There was no question as to appropriation of the music; and Lord Chief Justice Tindal left it to the jury to say whether there had been a representation of a part of the plaintiff's dramatic production. The jury found that there had been; and gave a verdict accordingly for the statutory penalty. Serjeant Wilde moved to set aside the verdict on the ground that as there had been no representation of a part of the plaintiff's piece—the words of the songs adapted to the music being immaterial to the development of the drama—the defendant was entitled to a judgment. But the Court affirmed the verdict, holding that the question before it must in all cases be determined by a jury. "It is difficult," said the Chief Justice, "to say what is or is not a representation of a part of a dramatic production, . . . and it must be left to a jury to determine the fact."

The second case was an action against the defendant in respect of his having committed an infringement of the copyright of the plaintiffs in a drama founded on the novel by Eugène Sue called "The Wandering Jew." There had been a drama in French founded on the same novel, and the version claimed by the plaintiffs, prepared by Mr. Lewis and assigned by him to them, was an adaptation from the French. The defendant had since brought out another adaptation, which it was alleged was, in part, an imitation of the former, and had thereby committed an infringement of the plaintiffs' copyright. The judge found there had been two "scenes or points" of the plaintiffs' drama taken by the defendant without recourse either to the French novel or to the drama constructed from it, and he directed the verdict to be entered for the defendant. The finding was as follows: "I find in this case that two scenes or points of the drama of the defendant have been taken direct from the drama of which Mr. Lewis was the author and the plaintiffs the assignees, without recourse to either the French novel or the French drama, originals common to the dramas of both the plaintiffs and defendant. I find this, first, in respect of the final scene of the defendant's drama; and secondly, of the appearance of the Wandering Jew, and the stage business connected with that appearance, which are to be found in the second scene of the second act of the defendant's drama, and in the fourth scene of the first act of the plaintiffs' drama. I find that the drama of the defendant is not, except in these respects, a copy from or a colourable imitation of the drama of the plaintiffs. I direct the verdict to be entered for the defendant. I assess the damages at 40s. if upon argument, as provided by the terms agreed to at

CAP. VIII. the trial, the Court should be of opinion that the verdict ought to be entered for the plaintiffs." The case was argued upon a rule obtained to enter the verdict for the plaintiffs. This rule was discharged (x), and on appeal this decision was affirmed (y). The plaintiffs appealed to the House of Lords, and it was argued that the scenes, or points, as they were called, were material, valuable, and striking points, and affected considerably the attractiveness of the drama, and no one doubted that they had been copied from the plaintiffs' production, but the House affirmed the decisions of the Court below, Lord Hatherley saying: "There is indeed one obvious difference between the copyright in books and that in dramatic performances. Books are published with an expectation, if not a desire, that they will be criticised in reviews, and if deemed valuable, that part of them will be used as affording illustrations by way of quotation or the like, and if the quantity taken be neither substantial nor material, if, as it had been expressed by some judges, 'a fair use' only be made of the publication, no wrong is done and no action can be brought. It is not, perhaps, exactly the same with dramatic performances. They are not intended to be repeated by others, or to be used in such a way as a book may be used, but still the principle *de minimis non curat lex* applies to a supposed wrong in taking a part of dramatic works, as well as in reproducing a part of a book. The minimum of damages to be awarded when the fact of damage and the right to damages have been once established, was no doubt fixed because of the difficulty of proving with definiteness what amount of actual damage had been sustained, by perhaps a single performance at a provincial theatre of a work belonging to a plaintiff, whilst at the same time his work might be seriously depreciated if he did not establish his right as against all those who infringed upon it. . . . I think, my lords, regard being had to the whole of the case, to the finding of the Lord Chief Justice that the parts which were so taken were neither substantial nor material parts, and the impossibility of damage being held to have accrued to the plaintiff from such taking, and the concurrence of the other judges before whom the case was brought, that this appeal should be dismissed, and dismissed with costs" (z).

It is worthy of note here that when the question was raised in the Common Pleas, Lord Coleridge set out fully the reasons which had dictated his direction, and it then appeared that though

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

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

(z) 3 A. C. 488, 492, 493.

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

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

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

What amounts to substantial identity.

This scene was reproduced, but with variations, by Mr. Boucicault in his drama entitled "After Dark." In that play he made one of the characters, from a wine vault where he had been thrown, see, through a door into an adjoining vault, two persons pass through a hole in the wall the body of a man who had been made unconscious by drugs. With an iron bar he enlarges an orifice in

(a) *Warne v. Seoborn* (1888), 39 Ch. D. 73.

(b) *Daly v. Palmer* (1868), 6 Blatch. (Amer.) 256.

CAP. VIII. the wall of the vault, which opens on an underground railway, and sees lying insensible on the track the person whose body has just been put there by the two men in the adjoining vault. Hearing the noise of a coming locomotive, he quickly makes his way through the opening in the wall and moves the body from the track, just in time to prevent it from being run over by the passing train.

In Daly's drama this incident occupied the third scene of the fourth act, and during its progress there is considerable conversation between the several characters on the stage. In Boucicault's drama it was represented in three scenes of the third act, chiefly by action, but partly by monologue spoken by one of the characters after he has seen the body on the track.

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

"The adaptation of such series of events to different characters who use different language from the characters and language in the first play is like the adaptation of the musical air to a different instrument, or the addition to it of variations or of an accompaniment. The original subject of invention, that which required

genius to construct it and set it in order, remains the same in the adaptation. A mere mechanic in dramatic composition can make such adaptation, and it is a piracy if the appropriated series of events, when represented on the stage, although performed by new and different characters using different language, is recognised by the spectator, through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in the mind, in the same sequence or order. Tested by these principles, the railroad scene in Boucicault's play is undoubtedly, when acted, performed, or represented on a stage or public place, an invasion and infringement of the copyright of the plaintiff in the railroad scene in his play."

It is, of course, clear that there can be no plagiarism in dramatizing the same incidents taken from a source common to all (c), but it may be different where great originality is shown (d). "Stage business" and "gag" are not the subject of copyright, and therefore similarities in such matters cannot be made the subject of an action for infringement of copyright; but "where a question of plagiarism arises, and the words of two dramatic pieces are to some extent similar, it is legitimate to look at scenic effects and dramatic situations in order to see whether they do not help to show that there has been a borrowing of an idea, or of an expression of an idea, by the one piece from another" (e). In a case of *Scholtz v. Amasis* (f) it was laid down by the Court of Appeal that, as a matter of law, for the subject of the copyright to obtain protection, it was necessary for it to be embodied in the words, and that a similarity of plot and general outline was not sufficient to constitute infringement. But in the more recent case of *Corelli v. Gray*, where Miss Corelli (g), the novelist, complained that her novel, "Temporal Power," had been dramatized by the defendant in a sketch called "The People's King," it was held that there might be copyright in a combination of stock incidents, and consequently an infringement of copyright, although no single sentence in the defendant's play was similar to any sentence used in the plaintiff's novel. In a case (h), however,

Common
source.

(c) *Reichardt v. Sapte*, (1893) 2 Q. B. 308; *Rohl v. Palazzo Theatre* (1911), 28 T. L. R. 69; *Tate v. Fulbrook*, (1908) 1 K. B. 821; *Rees v. Robbins*, 4th July, 1914.

(d) *Daly v. Palmer*, *supra*.

(e) *Per Kennedy*, L. J., *Tate v. Fulbrook*, (1908) 1 K. B. 821, at p. 834, see *ante*, p. 80.

(f) C. A. 1909.

(g) (1913), 29 T. L. R. 570; on appeal, 30 T. L. R. 116.

(h) *Rees v. Robbins*, *Times*, 6th Feb. 1914; on appeal, *Times*, 7th July, 1914.

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where the defendant had admittedly had the manuscript of the plaintiff's melodrama in his possession at one time, and had subsequently produced a melodrama bearing some resemblance to that of the plaintiff, the Court declined to hold that the defendant had been guilty of piracy. The plaintiff was defeated upon the finding of fact by the learned judge in the Court of first instance that the defendant's play was substantially constructed independently of the plaintiff's play, and that the resemblances between the two plays were only of the same nature as were likely to arise between any two melodramas of the same class. In the course of his judgment, the Master of the Rolls stated that he had read the two plays, and was satisfied that there was no ground for the contention that the defendant's play infringed the plaintiff's copyright, so far as it was a literary production. With regard to the contention that in the case of an alleged infringement of dramatic copyright it was sufficient to show that the plot was taken, although in every other respect there might be no similarity, he found it difficult to understand copyright in a mere plot. He did not, however, decide the case upon that ground, but upon the ground that he regarded the defendant's play as an original production. He did not think that the circumstance that in each play the hero would either lose a fortune or fail to get it, unless he married before a certain day, and that the fortune was secured or preserved by a marriage at the last moment to a beggar girl, entitled the plaintiff to say that her dramatic copyright had been infringed.

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

As to what amounts to an infringement of the copyright in a musical composition, it has been decided that to publish, in the form of quadrilles and waltzes, the airs of an opera in which there exists an exclusive copyright, amounts to such. In *D'Almaine v. Boosey* (i), the plaintiff published first the overture, and then a number of airs and all the melodies. It was admitted that the defendant had published portions of the opera containing the melodious parts of it; that he had also published entire airs; and that in one of his waltzes he had introduced seventeen bars in succession containing the whole of the original air, although he added fifteen other bars which were not to be found in it. This, it was contended, was not a piracy: first, because the whole of each air had not been taken; and, secondly, because what the plaintiff had purchased of the original author was the entire opera, and the opera consisted, not merely of certain airs and melodies, but of the whole score. Lord Lyndhurst, Chief Baron, however, held,

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

as to the first argument, that piracy might be of part of an air as well as of the whole; and with reference to the second, that, admitting that the opera consisted of the whole score, yet if the plaintiff was entitled to the work, *à fortiori* he was entitled to publish the melodies which formed a part. The Lord Chief Baron regarded the subject of music on a different principle to that on which he regarded other literary works; for he would not admit that the adapting for dancing, or otherwise, from the original composition, in which some degree of art is needed, could be deemed such a modification of an original work as should absorb the merit of the original in the new composition. It is the air or melody which is the invention of the author, and which may, in such case, be the subject of piracy; and a piracy is committed if, by taking, not a single bar, but several, that in which the whole meritorious part of the invention consists is incorporated in the new work.

“If,” said Lord Lyndhurst, “you take from the composition of an author all those bars consecutively which form the entire air or melody, without any material alteration, it is a piracy; though, on the other hand, you might take them, in a different order, or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now, the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is when the appropriated music, though adapted to a different purpose from that of the original, may still be recognised by the ear. The adding variations makes no difference in the principle” (*k*).

Under the old law it was held that perforated rolls and other mechanical devices for reproducing musical airs were not infringements of copyright, upon the ground that they could not be regarded as “copies” of a sheet of music (*l*); but the Act of 1911 provides that it shall be an infringement of copyright to make any

Mechanical
contrivances.

(*k*) See also *Fairlie v. Boosey* (1879), 4 A. C. 711; *Leader v. Purday* (1849), 7 C. B. 4.

(*l*) *Boosey v. Whight*, (1900) 1 Ch. 122; *Newmark v. National Phonograph Co.* (1907), 23 T. L. R. 439; *Mabe v. Connor*, (1909) 1 K. B. 575; *Monckton v. Gramophone Co.* (1912), 106 L. T. 84.

CAP. VIII. record, perforated roll, cinematograph film, or other contrivance by means of which a literary, dramatic or musical work may be mechanically performed or delivered (*m*).

Private performances not infringement.

In order that the performance of a work may be an infringement of copyright, it is necessary that it takes place in public (*n*), a strictly private performance not entitling the owners of the copyright to take any proceedings.

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

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

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

(*m*) Sect. 1 (2) (d). See Chapter "Mechanical Contrivances," *post*, Part III., Chap. V.

(*n*) Under the 3 & 4 Will. IV. c. 15, the representation was required also to be in a "place of dramatic entertainment": see *Russell v. Smith* (1848), 12 Q. B. 217.

(*o*) *Duck v. Bates* (1884), 12 Q. B. D. 79; 13 Q. B. D. 843; cf. *Caird v. Sims* (1887), 12 A. C. 326; *Selig v. Polyscope Co.* (1911), 27 T. L. R. 554.

in an unfurnished house hired for the occasion." The representation in that case is also "domestic and private." There must be present a sufficient part of the public who would also go to a performance licensed by the author as a commercial transaction. "Suppose that a member for a Parliamentary borough organizes dramatic entertainments to which the inhabitants are admitted without payment. Suppose that an amateur company chooses to act some drama for a charitable object, with admission upon payment of money or by tickets issued generally. In each of these instances an infringement of the statute has been committed." Fry, L. J., while agreeing that the place need not be habitually used for dramatic entertainments and that the representation need not be for reward or hire, differed as to the necessity for publicity (*p*), holding that "there may be internal and domestic representations which are well within the purview of the statute, as when a nobleman gives a dramatic performance in his mansion to guests staying in his house, and to invited residents in the neighbourhood—what would be the chance of the next company which came to the adjoining town to perform the same piece, getting together as good an audience as they could get had the piece not been performed in the nobleman's mansion?"

It was held, under the old law, that a person who had let for hire a place of entertainment for public performance of songs and music was not, from the mere fact of letting, to be held liable if copyright songs were sung without the consent of the proprietors of the copyright (*q*). But in the case of *Marsh v. Conquest* (*r*) the defendant was the owner and manager of the Grecian Theatre, and for £30 he had let for one night to his son, who was the stage manager, the use of the theatre, company, and all persons employed. The son selected and brought out a play, for which representation the Court held the defendant liable. The judgment was based on the fact that the defendant had the control and management of the theatre and the company during that performance. "I think," said Erle, C. J., "the defendant is responsible for that representation. He was the proprietor of the theatre, and had entire control over the establishment and all belonging to it; and what was done by his son was done by his permission. The

Liability of the person who lets a place of entertainment.

(*p*) There is, of course, under the new Act no doubt as to the necessity for publicity. The Act (3 & 4 Will. IV. c. 15) only required that the performance should take place at a "place of dramatic entertainment." The dissenting judgment of Fry, L. J., in *Duck v. Bates* may therefore, it is thought, be ignored.

(*q*) *Russell v. Briant* (1849), 8 C. B. 836; *Lyon v. Knowles* (1863), 3 B. & S. 556.

(*r*) (1864), 17 C. B. 418.

CAP. VIII. case of *Lyon v. Knowles* seems to me to recognise that distinction. There the defendant merely let his theatre with the scenery, scene-shifters, bands, lights, &c. to Dillon, who brought his own company to represent pieces of his own selection, the plaintiff having no control whatever over any person employed in the representation. Here, however, the piece is performed by the defendant's own *corps dramatique*, his son being one of them; and the performance takes place for the defendant's profit to the extent of £30. I think, therefore, it is impossible to say that the defendant did not cause the piece to be represented."

So in another case (*s*), the defendant was the proprietor of a music-hall, and had engaged a singer who on numerous occasions sang a song called "We are going to reform some day," the copyright of which was in the plaintiff as assignee. The defendant at the trial denied that he had directed the song to be sung; he was in the hall when it was being sung, but had never heard the whole of it. The Court held that inasmuch as the singer was hired by the defendant to sing what songs he liked and no supervision or control was exercised as to copyright, there was evidence of agency and authority to sing the song complained of.

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

The cases of *Marsh v. Conquest* and *Monaghan v. Taylor*, it is presumed, still represent the law, and that a person is liable for directly infringing a performing right if the performers can fairly be regarded as his servants, or as authorised by him to perform the particular piece (*t*), even although he be ignorant that the works are to be performed without the consent of the proprietor of the performing right. But now, by sub-sect. (2) of sect. 2 of the Copyright Act, 1911, "a person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public" of any work without the consent of the owner of the copyright is to be deemed to infringe copyright, "unless he was not aware and had no reasonable ground for suspecting that the performance would be an infringement of copy-

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

(*t*) *Ante*, pp. 135, 136.

right." This sub-section seems to overrule the cases of *Russell v. Briant* (u) and *Lyon v. Knowles* (u), unless innocence can be proved.

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It will be noticed that in order to bring the case within this sub-section, the defendant must have permitted user "for his private profit," so that a person who gratuitously allows a place to be used for a public performance is not liable under the sub-section, but the person "permitting" need not necessarily be remunerated by a fixed rent; it would be sufficient if he were to receive a share of the profits, even if there were in fact no profits, for he none the less, it is thought, permits the place of entertainment to be used "for" his private profit (x). There is a growing practice amongst proprietors of hotels and restaurants to engage orchestras to play during specified hours, with a view to attracting customers. These proprietors, it is submitted, permit their premises to be used for the performance of the pieces played for their "private profit," and consequently may be liable under this sub-section if the orchestra were to play copyright music without the permission of the owner of the copyright (y).

The user must be "for his private profit."

The place in which the public performance takes place must be a "theatre or other place of entertainment." Under the 3 & 4 Will. IV. c. 15, the performance had to be at a "place of dramatic entertainment," and the question arose, in several cases, as to the meaning of this expression. The cases of *Russell v. Smith* (z) and *Wall v. Taylor* (a) appear to be authorities to the effect that the very fact that a dramatic entertainment to which the public are invited is given in a particular building makes that building, for the time being, a "place of dramatic entertainment," and that that is sufficient to satisfy the statute. In the latter case, Brett, M. R., is reported to have definitely stated: "performing a dramatic piece makes the place where it is performed a place of dramatic entertainment" (b). In the later case of *Duck v. Bates* (c), however, the Master of the Rolls qualified this dictum. "Is a breach of the statute," he says (d), "committed only when a dramatic piece is represented in a place ordinarily kept for dramatic entertainment? If this question is to be answered in the affirmative, the statute will be infringed only when the performance takes place in a licensed theatre. But a

Performance to be at a "theatre or other place of entertainment."

(u) *Ubi supra*.

(x) *Quære*, whether an agent who received a commission for letting a theatre could be said to "permit" the use of the theatre for his private profit. Probably not.

(y) *Sarpy v. Holland*, (1908) 2 Ch. 198; *Monaghan v. Taylor*, *supra*.

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

(a) (1883), 11 Q. B. D. 102.

(c) (1884), 13 Q. B. D. 843.

(b) At p. 408.

(d) At p. 846.

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dramatic piece may be acted elsewhere than in a licensed theatre, and persons without the author's consent may act his drama in places not habitually devoted to dramatic entertainment. In my opinion, in order to come within the prohibition of the statute, a place need not be kept habitually for the exhibition of dramatic entertainments: it is not correct to say that the statute is infringed only when the place is habitually used for dramatic entertainments. It seems to have been supposed that I said that the representation of a dramatic piece, wherever it may be acted, makes the place where it is performed a place of dramatic entertainment. I believe I did not say so; *but if I did I was wrong*. I do not pretend to have expressed myself with sufficient clearness, but I do not think that my words will really bear that construction. In describing the place to which the statute is to apply, the legislature uses the words, 'any place of dramatic entertainment.' From these words it is obvious to me that there is some place where a dramatic piece may be represented without an infringement of the statute: if it is not a place of dramatic entertainment, no breach is committed: the statute requires that the dramatic representation shall be performed at a place of dramatic entertainment." Applying these observations to the Copyright Act, 1911, it may be urged that when the legislature refers to a person who permits the use of a "theatre or other place of entertainment," it is obvious that it does not intend to include "any place whatsoever." Moreover, the fact that "place of entertainment" is used in conjunction with the word "theatre" suggests that possibly the *ejusdem generis* construction should be applied, and that the sub-section is only intended to apply to lessors of theatres and other places of entertainment of a like character. On the other hand, the fact that the lessor can plead ignorance as an excuse is a strong argument in favour of not limiting the expression in this manner, for there can be no logical ground for distinguishing between a person who lets a theatre and a person who lets a barn for the purpose of a public performance of a piece which the lessor knows to be an infringement of copyright, although the law might require a greater degree of care from the lessor of a place habitually used for public performances of plays than from the lessor of a building which is ordinarily used for totally different purposes.

Burden of
proof.

The burden of proof as regards ignorance seems to lie upon the defendant. This was not so under the Copyright (Musical Compositions) Act, 1888 (*e*) (now repealed), where the plaintiff had

(*e*) 51 & 52 Vict. c. 17, s. 3.

to prove that the person permitting his premises to be used for an unauthorised representation or performance had done so "wilfully" (f).

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(c) *Artistic.*

There is, in some cases, greater difficulty in determining what is an infringement of the copyright in an artistic work than in either a literary work or a dramatic work. There is no great variety in the methods by which a literary or dramatic work can be reproduced or performed, but the general idea or design of a picture can be conveyed in a variety of ways—by lithography, photography, sculpture, or even by tableaux vivants, and it may be copied upon paper, canvas, or any other material, with the object either that the copy shall be sold as a distinct article or used to embellish another article.

Distinguishing features of artistic piracies.

In considering how far the cases decided under the old law apply to the Act of 1911, it may be well to point out the differences in the language employed. The Fine Arts Copyright Act, 1862 (g), provided by sect. 1 that the copyright in a picture, drawing, or photograph, should confer "the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photographs, and the negative thereof, by any means and of any size"; and by sect. 6 of the same statute, penalties were imposed upon any person who, without the consent of the proprietor of the copyright, should "repeat, copy, colourably imitate, or otherwise multiply . . . any such work or the design thereof." In the case of engravings, copyright was infringed by any person who "shall copy in the whole, or in part, by varying, adding to, or diminishing from the main design" (h); and, in the case of works of sculpture, by any person who should make or import "any pirated copy or pirated cast" of the original sculpture (i). Under the Copyright Act, 1911, the proprietor of the copyright in an artistic work has the sole right to produce or reproduce his work or any substantial part thereof in any material form whatever (k), and his copyright is infringed by any person who invades this right without his consent (l). There is no reference in this Act to the "design" of the artistic work.

What were infringements under the old law.

(f) *Sarpy v. Holland*, (1908) 2 Ch. 198; *Moul v. Coronet Theatre*, *Times*, 11th Dec. 1901; on appeal, *Times*, 4th Feb. 1903.

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

(h) 17 Geo. III. c. 57.

(k) Sect. 1 (2).

(i) 54 Geo. III. c. 56, s. 3.

(l) Sect. 2 (1).

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Probably, no alteration in law made by Act of 1911.

It is doubtful whether the new Act has made any alteration in the law as to what is a direct infringement of the copyright in an artistic work. The absence of any reference to the "design" of the work is probably not material. There was no reference to the "design" in the old Engraving Acts, but Lindley, L. J., in the case of *Hanfstaengl v. Empire Palace* (m), remarked: "although it is very true, as was pressed upon us by Mr. Scrutton, that the word 'design' is not used in the Engraving Acts, still the object of the Acts in protecting engravings is exactly the same as the object which the legislature had in view in protecting paintings, drawings, and photographs in this Act." Again, although some of the old cases seem to turn upon the meaning of the word "copy"—a word which does not appear in the Act of 1911—it is not very easy to draw any distinction between a "reproduction" and a "copy." In fact the language of the Fine Arts Copyright Act, 1862 (n), differs very slightly from that of the Act of 1911, for by the first-named Act the author of every original painting was given the exclusive right of "copying . . . reproducing and multiplying such painting . . . by any means."

"Living pictures."

The meaning of these words was fully considered in the series of cases, known as the "Living Picture" cases (o).

The defendants, the Empire Palace, in the year 1894, produced on their stage certain tableaux vivants, which were intended to be representations of pictures the copyright in which belonged to the plaintiff. The representations were exact reproductions, as tableaux vivants, of the pictures, and the backgrounds, taken from photographs of the original pictures, were painted on canvas, the whole being enclosed in a large gilt frame. The plaintiff gave notice of motion for an interlocutory injunction to restrain this exhibition, contending that the groups of living persons were a reproduction of the design of his pictures within the meaning of the Act of 1862. The motion coming on for hearing before Mr. Justice Stirling, that learned judge was of opinion that the representation of the designs of the pictures by means of groups of living persons was no infringement of the plaintiff's rights, and upon the defendants undertaking to keep until the trial the backgrounds to the "Living Pictures," or to take and keep photographs of the backgrounds used in respect thereof, and to keep an

(m) (1894) 2 Ch. 1, at p. 6.

(n) 25 & 26 Vict. c. 68, s. 1.

(o) *Hanfstaengl v. Empire Palace*, (1894) 2 Ch. 1; *Hanfstaengl v. Newnes*, (1894) 3 Ch. 109; *Hanfstaengl v. Baines*, (1895) A. C. 20.

account of the moneys received at all exhibitions at which any such backgrounds were exhibited, and the number of times each such background was exhibited, no order was made on the motion. The plaintiff thereupon appealed to the Court of Appeal, who confirmed the opinion of Mr. Justice Stirling, and dismissed the appeal (p).

In giving judgment, Lord Justice Lindley, after referring to the terms of sect. 1 of the Act, said: "We are asked to say that the words 'copying and reproducing by any means' include reproducing in the sense of imitating or representing by means not equivalent to drawing or painting or photographing, or any such means, but by totally different means, by the exhibition of living figures. Is that what is aimed at? It appears to me obviously and plainly it is not. When we look at the language used, where an idea of that kind was present to the mind of the legislature, we find a totally different class of words selected. The word 'represent' is the word used in the Dramatic Copyright Act (3 & 4 Will. IV. c. 15) but there is not a word about representing in the Act with which we are dealing. It does not say that the author of a picture shall be entitled to prevent anybody from representing his picture. It is intended to protect the author of the picture from anybody's producing a painting, drawing, or photograph of his picture so as to compete with him in the market. The language appears to me to be incapable of being stretched so as to touch such a representation as is sought to be restrained by this case. Light is thrown upon the true construction of sect. 1 by sect. 6, which provides for the forfeiture, and sect. 10, which prohibits the importation of copies unlawfully made. Those sections are not applicable to this Act if it is construed as the plaintiff asks us to construe it. But I do not rely so much upon those sections as upon the clear, and what I consider the unquestionable, meaning and intention of Parliament in passing this series of Acts. If we are to go out of the language and look further, I think a good deal of light is thrown upon this question by the case of *Dicks v. Brooks* (q), because, although it is very true, as was pressed upon us by Mr. Scrutton, that the word 'design' is not used in the Engraving Acts, still, the object of the Acts in protecting engravings is exactly the same as the object which the legislature had in view in protecting paintings, drawings, and photographs in this Act. It was not intended to give them the right to restrain Madame Tussaud from

(p) *Hanfstaengl v. Empire Palace*, (1894) 2 Ch. 1.
 (q) (1880), 15 Ch. D. 22, *post*, p. 187.

CAP. VIII. exhibiting a representation of a painting in waxwork; but to restrain people from producing something which would compete in the market with the originals or with authorised copies of them."

So Lord Justice Kay: "A reproduction of a painting must, one would think, be by another painting or something which is equivalent to another painting. The argument has been rather put on the ground that this is a reproduction of 'the design thereof' within the meaning of the Act. What does 'reproduction' really mean? Reproduction is producing again. Is this a producing again the design of this painting within the meaning of the Copyright Act? I cannot think that it is. It seems to me that in order to reproduce the painting you must have something which itself is and would be properly described as a picture."

This case subsequently went to trial, when the Court adhered to its former opinion as to the groups, but held that the backgrounds were infringements of the plaintiff's copyright (*r*).

At the same time that the plaintiff, in the case above referred to, commenced his proceedings against the Empire Palace he also took proceedings against two daily newspapers—the "Daily Graphic" and the "Westminster Budget"—for having published in their papers sketches, made by artists who had visited the Empire, of the tableaux vivants that had been represented on the stage of the theatre, alleging that these sketches were infringements of the copyright of his pictures, though the sketches were not taken directly from the pictures, but indirectly through the tableaux vivants. Mr. Justice Stirling held that, though the tableaux vivants were not themselves infringements of the plaintiff's copyright, nevertheless the sketches published in the newspapers were reproductions of the design of the pictures, and he granted an injunction (*s*).

From this decision the "Westminster Budget" did not appeal, but the "Daily Graphic" did, and succeeded in obtaining a reversal of Mr. Justice Stirling's decision in the Court of Appeal (*t*), and the decision of the Court of Appeal was finally affirmed by the House of Lords (*u*).

Mr. Justice Stirling considered, on the authority of *Ex parte Beal* (*x*), that the fact that the sketches were indirect, and not

(*r*) (1895), 11 T. L. R. 314, 368; (1895), W. N. 76.

(*s*) *Hanfstaengl v. Nownes*, (1894) 3 Ch. 109.

(*t*) *Ibid.*

(*u*) *Hanfstaengl v. Baines & Co.*, (1895) A. C. 20.

(*x*) (1868), L. R. 3 Q. B. 387.

direct, copies of the pictures made no difference, and that the sketches must be treated as copies of the pictures. The answer to the argument that the illustrations in no way competed with copies of the pictures authorised by the plaintiff appeared to him to be that the illustrations constituted a violation of the exclusive right conferred by the statute of 1862; that, in the language of Kelly, C. B., in *Bradbury v. Hotten* (y), the defendants were thereby applying for their own use and for their own profit what otherwise the plaintiff might have turned, and possibly might still turn, to a profitable account.

In the Court of Appeal, Lord Justice Lindley was not prepared to say, as a matter of law, that although the sketches were made from something in which there was no copyright, and although they represented something which was not of itself an infringement of the plaintiff's copyright, the sketches might not infringe the plaintiff's rights, if they could be fairly regarded as reproductions of his pictures, or of the designs thereof. To hold otherwise would be to open the door to indirect piracies, which he was not at all disposed to do. A copy of a foreign copy of an English painting would not, he apprehended, be protected by sect. 2 (z), and the judgment of Lord Blackburn in *Ex parte Beal* (a) showed that if a painting is, in fact, reproduced, it is immaterial what the intermediate steps might be by which the reproduction was arrived at. His decision was based upon different and wider grounds. "The sketches are not intended to be, and are not, in fact, copies of the pictures at all, neither are they intended to be, nor are they, in fact, reproductions of the designs of the pictures. They do not represent any of the beauties. They are rough sketches, made for a different purpose and answering a very different purpose, that purpose being, not to give an idea of the plaintiff's pictures, but to give a rough idea of what is to be seen at the Empire Theatre. In giving that idea, it is true that they also give a very rough idea of the subject represented in the plaintiff's pictures. It is also true that in *West v. Francis* (b) Mr. Justice Bayley said: 'A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original.' But in apply-

(y) (1872), L. R. 8 Ex. 1, 6.

(z) See *Murray v. Bogue* (1852), 1 Drew. 353.

(a) *Ubi sup.*

(b) (1822), 5 B. & Ald. 737, 743. In *Hanfstaengl v. Smith*, (1905) 1 Ch. 519, at p. 524, Mr. Justice Kekewich preferred the following definition: "A copy is that which comes so near to the original as to suggest that original to the mind of every person seeing it."

CAP. VIII. ing this to any particular case the degree of resemblance is all-important, and the possibility of injury to the plaintiff must be regarded. It is only by a great stretch of language and by the exercise of much imagination that these sketches can be regarded as copies of the plaintiff's pictures or the designs thereof. The case is very unlike *Gambart v. Ball* (c), where engravings were copied by photography. I cannot bring myself to say that the sketches complained of are, in any fair sense of the words, copies of the plaintiff's pictures or reproductions of the designs thereof within the meaning of the statute to which I have referred. The question, if it came before a jury, would be one of fact for the decision of the jury, or a proper exposition by the judge of the meaning of the statute, and I do not believe that any jury, properly directed, would find these sketches to be copies of the plaintiff's pictures or reproductions of his designs. The defendants have not, in fact, directly or indirectly, intentionally or unintentionally, made any use, certainly not any unfair use, of the plaintiff's pictures or of the brains of their authors" (d).

In the House of Lords Lord Herschell, L. C., was equally clear that the defendants had not infringed the plaintiff's copyright. It was obvious, he said, that the plaintiff could not successfully claim to have a monopoly of every treatment of such common subjects as love and courtship, or charity. He was far from saying that a "Living Picture" might not be so arranged to represent an existing painting that a photograph or drawing of the "Living Picture" would be a copy of the design of that painting. All that he could say was that this must depend upon the character of the picture, and what is justly to be regarded as its design. In the present case, the sketch most favourable to the plaintiff's case was admittedly that representing "Courtship." As to that, "there is no doubt a resemblance between the sketch and the photograph from the painting. In each case a young man and a young woman are standing beside one another close to a stile or fence. In each case the woman is shading her head by a parasol, and the dress of the man is somewhat similar in the two. The idea suggested is, of course, the same, each represents 'Courtship,' but the idea of a young man courting a young woman at a country stile is of great antiquity. It has often formed the subject of pictorial representation. This cannot be said to be the design of the plaintiff's painting within the

(c) (1863), 14 C. B. N. S.

(d) (1894) 3 Ch. p. 131.

meaning of the Act. Much more must be comprehended than this. There can only be a copy of such a design if the treatment of the subject be the same. Now, comparing the sketch with the photograph from the painting, I do not think this can be said to be the case. The faces are different; the mode in which the woman's hair is arranged is different; the pose is different; the attitudes are different; the background is different; and in the case of the sketch the foreground is wanting. In the artist's design all these things play a part, and, though I do not say that a variation in one or even more of these respects would prevent the sketch being a copy of the design, yet comparing the two, and considering the design of the painting as a whole, I cannot avoid the conclusion that the sketch is not a copy of the painting or of the design thereof, and therefore that there has been no infringement" (e).

Too much stress must not be placed upon the fact that in these cases some of the judges attached importance to the fact that the alleged piracies could not compete in the market with the plaintiff's pictures. A photograph hardly competes in the market with a painting, yet the owner of the copyright in a painting clearly has a right to prevent sales of a photograph of it, for the artist himself may some day make and sell such a photograph. In *Hanfstaengl v. Holloway* (f), copies of the plaintiff's pictures were put on pill boxes, yet this was held to be an infringement of copyright. Nor again did the decisions in the "Living Pictures" cases turn entirely on the fact that the copies were bad imitations. The effect of the decisions, it is submitted, rather is that the combination of circumstances must be looked at; and that, if it be found that the alleged copies are made for entirely different objects from the original picture, then it is of importance to examine how close a copy the alleged infringement is of the original picture (g). Another matter that may be taken into consideration is whether the conception of the picture is original or hackneyed.

It is, upon the whole, submitted that the "Living Picture" cases have not been overruled by the Copyright Act, 1911. The difference in language between the statutes does not appear to be substantial, and the argument upon which the Court in the case of *Hanfstaengl v. Empire Palace* (h) laid some stress, that

Effect of decisions in the "living picture" cases.

Seemingly, these cases still law.

(e) (1895) A. C. p. 24.

(f) (1893) 2 Q. B. 1; cf. *Hildesheimer v. Faulkner*, (1901) 2 Ch. 552; *Weatherby v. International Horse Agency*, (1910) 2 Ch. 297.

(g) See *Guggenheim v. Ling* (1896), 12 T. L. R. 491.

(h) (1894) 2 Ch. 1.

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the Act under consideration seemed to contemplate a copy which is capable of delivery, can equally be urged under the new Act, which, by sect. 7, confers the right upon the proprietor of the copyright to recover all "infringing copies." It could hardly be urged that a person who produces a spectacle is the author of an artistic work, and therefore an artistic work is not "reproduced" by a spectacle (*i*).

"Performance" of an artistic work.

It may indeed be urged that the Copyright Act, 1911, for the first time confers upon the author of an artistic work the exclusive right of public performance (*k*), and that a tableau vivant is a "performance" of a picture. "Performance" is, however, defined by the Act (*l*) as "any acoustic representation of a work, and any visual representation of any dramatic *action* in a work." It is submitted that there can be no "performance" of a work within the meaning of the Copyright Act if there is an absence of both words and action. It must, indeed, be confessed that if this is so, it is not very easy to imagine how there can be any "performance" of a single artistic work, but probably this provision of the statute is satisfied by referring it to a series of pictures, *e.g.*, a cinematograph film.

Infringement predicates multiplication of copies.

Subject to sect. 2 (2) of the Act, there must be some multiplication of the copies of the artistic work in order to make an infringement of copyright. The fact that copies lawfully produced are used for purposes other than those permitted by the proprietor of the copyright, does not constitute an infringement of copyright, though it may be a breach of contract. Thus in a case where the owners of the copyright in an engraving gave a licence to a publisher to use the picture once only as a small wood block in a pamphlet illustrative of certain pictures, the defendants, who had purchased a number of the pamphlets and cut out the wood-cut in question and mounted it on cards, which they sold, were held not to be guilty of infringement of copyright (*m*).

Alterations and copying part of a work.

It is equally an infringement of copyright whether the size of the copy has been increased or reduced (*n*), and whether the whole or part only of the original has been copied.

Thus where a man had a drawing of his wife made, having attached to her arm and dress a dress-holder, a patented inven-

(*i*) (1894) 2 Ch. at p. 8.

(*k*) Sect. 1 (2).

(*l*) Sect. 35 (1).

(*m*) *Frost v. Olive Series Publishing Co.* (1908), 24 T. L. R. 649; cf. *Murray v. Heath* (1831), 1 B. & Ad. 804.

(*n*) *Hanfstaengl v. Holloway*, (1893) 2 Q. B. 1; cf. *Gambart v. Ball* (1863), 14 C. B. N. S. 306; 1 B. & Ad. 804; *Cooper v. Stephens*, (1895) 1 Ch. 567; *Marshall v. Ball* (1901), 85 L. T. 77.

tion of his own, and substituted for his wife's head that of the Princess of Wales, taken from a photograph, the copyright in which belonged to the plaintiff, and from the combination so obtained made and printed cabinet-size photographs for the purpose of advertising his invention, that was held to be an infringement (o).

In another case, the plaintiff was the owner of the copyright in a picture and engraving known as "Can't you talk?" which represented a collie dog seated on his haunches on a stone floor looking down at the upturned face of a child; there was a wall in the background with a door on one side through which a cat was looking; above the dog was a table on which was a tub with a spoon in it. The defendants were the owners of a periodical in which was a wood-cut that almost exactly reproduced the whole of the plaintiff's engraving, with the exception of the child, whose position was replaced by a tortoise and two cats. The wood-cut was given as an illustration of a story entitled "A Strange Visitor." It was held that, as the defendants had taken a substantial portion of the plaintiff's engraving and reproduced it in the wood-cut with slightly different surroundings, this constituted an infringement of the plaintiff's copyright, and that the latter was accordingly entitled to an injunction (p).

In another case the plaintiff was the proprietor of the copyright in an oil painting of considerable size, called "Nature's Mirror," which portrayed the draped figure of a "Psyche" with wings, kneeling on a rock, and looking into a pool of water, there being a suitable background to the picture. In the advertisement page of a magazine a number of photographic reproductions of pictures used in well-known advertisements appeared, one such reproduction being a rude copy of the figure in "Nature's Mirror" without the wings and without the background, the reproduction being about the size of a halfpenny. This was held to be an infringement of the copyright in the picture (q).

The copyright in a work may be infringed by being produced by a different process from that employed in the original, and this whether the copy be made direct from the original itself or through intervening copies (r).

Reproduction
by different
process.

The question as to whether the copyright in an artistic work

*Dicks v.
Brooks.*

(o) *London Stereoscopic Society v. Kelly* (1888), 5 T. L. R. 160.

(p) *Brooks v. Religious Tract Society* (1895), 45 W. R. 476.

(q) *Hanfstaengl v. Smith & Son*, (1905) 1 Ch. 519.

(r) *Ex parte Beal* (1868), L. R. 3 Q. B. 387; *Gambart v. Ball* (1863), 14 C. B. 806; *Graves v. Ashford* (1867), L. R. 2 C. P. 410.

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could be infringed by the design being transferred to an article of manufacture arose in the case of *Dicks v. Brooks* (s). Plaintiffs were the publishers and proprietors of a weekly periodical called "Bow Bells." Defendants were the proprietors by assignment of the copyright of a print called "The Huguenot," engraved from Millais' picture, and of a photograph taken from the print. The plaintiffs had published for their Christmas number of 1877 a chromo-printed pattern for wool work, called "The Huguenot," taken, as they stated, from a Berlin wool pattern which had been imported by a German warehouse. The leading incident of Millais' picture, the farewell of two lovers of different creeds on the eve of the massacre of St. Bartholomew, was to be found in the Berlin wool pattern, but a different background had been introduced, and the colours were not the same as those of the picture. In December, 1877, the defendants issued a circular containing a warning against the sale of any copy of the subject, "The Huguenot," without the stamp or imprint of their firm, in whom the sole subsisting copyright existed, and that all such unstamped copies were imitations and unlawfully made. The plaintiffs, alleging that the publication of this circular was a false and malicious libel on their print and pattern, which was not an imitation of any picture to the copyright of which the defendants were entitled, and that their sale of the publication had been greatly damaged by such circular, brought an action to restrain, and obtain damages for, this alleged libel and slander of title. The defendants by their statement of defence and counterclaim asserted their title to the engraving, averring that the plaintiffs had unlawfully copied it in whole or in part, and greatly damaged the defendants' property therein; and they claimed an injunction and the penalty of 5s. under the Act 8 Geo. II. c. 13, for every copy sold by the plaintiffs, and damages.

Vice-Chancellor Bacon held that the defendants had the exclusive right of publishing the subject delineated in the print taken from Millais' picture. He considered that the plaintiffs' pattern was to all intents and purposes a direct copy of that print. Were they then entitled, said he, to despoil the defendants of their property, and foist upon the public a very coarse imitation of a very celebrated picture? Being mere pirates, they complained that their title was being slandered, and that they were injured by the circular issued by the defendants for the

(s) (1880), 15 Ch. D. 22; cf. *Martin v. Wright* (1833), 6 Sim. 297.

protection of their property. It was the old story of the wolf and the lamb. There was no pretence for the first action, which he accordingly dismissed with costs; and as the defendants had established the right set up by their counterclaim to restrain this piratical publication by the plaintiffs, he decided that they were entitled to the statutory penalty of 5s. for every copy sold by the plaintiffs. The Court, however, on appeal held that a pattern for Berlin wool-work could not be regarded as a copy of an engraving within the meaning of the statutes, inasmuch as though there was a reproduction of the design, there was no reproduction of anything which constituted the work of the engraver. And they accordingly reversed the judgment of the Vice-Chancellor.

In delivering the judgment of the Court of Appeal, Lord Justice James said: "The question before us resolves itself into this, whether this pattern for working in Berlin wool is a piratical copy of the print of which the defendants are the proprietors. It appears to me that the Vice-Chancellor fell into (if I may venture so to call it) the error of supposing that the case was within the Act 8 Geo. II. c. 13, which gave a protection, not to a mere engraver, but to a man of genius who by his industry, pains, and expense, invented a design, 'or engraved, etched, or worked, or from his own work and invention caused to be designed and engraved, etched, or worked,' and so on, 'any historical print.'

"Those words were intended to give protection for the genius exhibited in the invention of the design, and the protection was commensurate with the invention and design. That Act was afterwards extended to embrace the case of persons engraving from something which was not the design of the engraver. Now it appears to me that the protection given by the subsequent Acts to the mere engraver was intended to be, and was commensurate with, that which the engraver did, and the engraver did not acquire against anybody in the world any right to that which was the work of the original painter, did not acquire any right to the design, did not acquire any right to the grouping or composition, because that was not his work but the work of the original painter. What, as it seems to me, the Act gave him, and intended to give him, was protection for that which was his own meritorious work. The art of the engraver is often of the very highest character, as in the print before me. It is difficult to conceive any skill or art much higher than that which has by a wonderful combination of lines and touches reproduced the very

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texture and softness of the hair, the very texture and softness of the dress, and the expression of love and admiration in the eyes of the lady looking up at her lover. That art or skill was the thing which, as I believe, was intended to be protected by the Acts of Parliament, and what we have to consider is, whether the wool pattern before us (the maker of which must have been aided in the production of it by having before him the defendant's print, or some kind of copy of it, because the wool pattern follows the print in some particulars in which the engraving differs from the picture) is a copy of the engraver's work? It appears to me that without going into any etymological definitions of the word 'copy,' and using the word in the ordinary sense of mankind as applied to the subject-matter, the question is, Is this a copy, is it a piracy, is it a piratical imitation of the engraving—of that which was the engraver's meritorious work in the print? I am of opinion, as a matter of fact, that the wool pattern is not a copy, is not a piratical imitation, with colourable variations of the defendant's engraving. The alleged copy is not a thing intended as a print in the ordinary sense of the word. It was intended to be printed, and was printed, as a pattern for Berlin wool, not put forward in any way fraudulently or as a sham, but really in truth intended solely for that purpose. Now, I am of opinion that whatever may be the similarities between the one and the other, the attempt not to reproduce the print, but to produce something which has some distant resemblance to the print, not by anything in the nature of the engraver's work, but by what I may call a mosaic of coloured parallelograms, is not in any sense of the word a piratical imitation of the print. Nobody would ever take it to be the print, nobody would ever buy it instead of the print, nobody would ever suppose that it was, to use the language of the first Act, a base copy of the print. It is a work of different class, intended for a different purpose, and, in my opinion, no more calculated to injure the print *quâ* print, or the reputation of the engraver, or the commercial value of the engraving in the hands of the proprietor, than if the same group were reproduced from the same engraving by waxwork at Madame Tussaud's, or in a plaster of Paris cast, or in a painting on porcelain. I cannot conceive that such a reproduction of the subject in tapestry, or Berlin wool, or upon china, or in earthenware, is within the meaning of the Act of Parliament. Whether dealing with it as a matter of law, or dealing with it, as we must do, as a matter of fact, I am satisfied that the appellant's pattern is not a copy or piracy of any part of that which con-

stituted the real merit and labour of the engraver of the defendant's print" (t). CAP. VIII.

In this case the defendants were not the proprietors of the copyright in the original picture, "The Huguenot," and it is submitted that the decision goes no further than that the Berlin wool pattern was not an infringement of the engraving rights, which were the only rights vested in the defendants. It is not clear that if the action had been brought against the proprietor of the copyright in the picture the decision would have been to the same effect, although if an artist parts with the engraving or photographic rights, the person who sues for infringement must show that the infringement was taken from his copy (u). Even if this be not so, it is submitted that whatever the law may have been prior to the Act of 1911, the copying of a picture upon an article of manufacture is under that Act an infringement of copyright, the Act forbidding the reproduction of a work in "any material form whatsoever" (x). Little weight would, it is thought, be attached at the present day to the argument that the infringing article is not likely to compete in the market with the original (y).

It is more difficult to say whether the copyright in a plastic work can be infringed by a reproduction in the flat or whether the copyright in a work originally produced in the flat can be infringed by a reproduction in the round or in relief. The point appears never to have come up for decision under the old law, but the general opinion was, it is believed, that the copyright in a work of sculpture was not infringed by a photograph, because the Sculpture Copyright Act, 1814 (z), only expressed it to be an infringement of copyright to make, import, or expose for sale "any pirated copy or pirated cast" of the original sculpture, "whether such pirated copy or pirated cast be produced by moulding or copying from, or imitating in any way" the original. These words, it was thought, did not naturally apply to a reproduction in the flat. It was also thought by many that it was no infringement of the copyright in a picture to reproduce it in relief. The only authority for such a belief appears to have been the "Living Picture" cases (a), and particularly the dictum

Effect of this decision.

Whether copyright in statuary infringed by a photograph, &c., and vice versa.

(t) 15 Ch. D. at p. 34.

(u) *Lucas v. Cooke* (1880), 13 Ch. D. 872.

(x) Sect. 1 (2).

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

(z) 54 Geo. III. c. 56, s. 3.

(a) *Ante*, p. 180 *et seq.*

CAP. VIII. of Kay, L. J., in *Hanfstaengl v. Empire Palace Co.* (b), "that in order to reproduce the painting you must have something which itself is and would be properly described as a picture." It is submitted, however, that under the Act of 1911, which forbids the reproduction of an artistic work "in any material form whatsoever," that copyright in a plastic work is infringed by reproduction in the flat, and this view receives some confirmation from sect. 2 (1) (iii), which, by expressly authorising the making or publishing of paintings, drawings, engravings, or photographs of works of sculpture or artistic craftsmanship in certain cases, impliedly forbids the same in other cases (c). It is also submitted that equally will it be, under the new Act, an infringement of the copyright in a painting, drawing, or engraving to make a work of sculpture from it. It is very doubtful whether the dictum of Kay, L. J., above referred to meant anything more than that the copyright in an artistic work having a more or less permanent form could not be infringed by the transitory grouping of living persons in such a way as to bring the original picture to the memories of the audience at the theatre. And if the definition of a "copy" suggested by Mr. Justice Kekewich, namely, that it means "that which comes so near the original as to suggest the original to the mind of the person seeing it," be taken as correct, it would seem to cover the case of a piece of statuary copied from a painting (d).

Public
exhibition.

The statute does not make it any infringement of copyright to publicly exhibit an original picture whether for trade or otherwise (e), and it is only an infringement of copyright to exhibit unlawful copies when it is done "by way of trade" (f).

Specific cases
not infringe-
ment of
artistic
copyright.

In addition to the permission, which applies to all works, whether literary, dramatic, or artistic, to fairly deal with a work for the purposes of private study or research (g), the Act authorises the copying of artistic works in two other cases, viz., (1) where the author of the artistic work is not the owner of the copyright therein he may use any mould, cast, sketch, plan, model, or study made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of the work;

(b) (1894) 2 Ch. 1, 7, 8.

(c) It has been so held in America: *Bracken v. Rosenthal* (1907), 151 Fed. R. 136.

(d) Plastic effect can be given to a picture by the use of a stereoscope.

(e) Cf. *Martin v. Wright* (1833), 6 Sim. 297; *Turner v. Robinson* (1860), 10 Ir. Ch. R. 121, 510.

(f) Sect. 2 (2).

(g) *Ante*, p. 144.

(2) anyone may make or publish paintings, drawings, engravings or photographs of works either of sculpture or artistic craftsmanship permanently situate in public places (*h*).

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The first of these liberties is personal to the artist. The artist may not be the owner of the copyright either because (a) the work is a portrait made for valuable consideration (*i*); or (b) the work was made in the course of his employment under a contract of service (*k*); or (c) he has assigned his copyright (*l*). It is, perhaps, not very easy to say when the study will repeat or imitate the "main design" of the work. In *Hanfstaengl v. Baines* (*m*), Lord Watson expressed the opinion that the "design" of a work "means nothing more than the particular forms and arrangements (whether of lines or colouring) which the copyright author has selected as the vehicle for conveying his idea to those who see his work." If, therefore, a picture is made up of a group of persons or things, each the subject of a separate study, the artist will be at liberty to make replicas of the separate studies, but not to group them in such a way as to give the general impression of the completed work for which the studies were originally made. The expression that the artist is to be at liberty to "use" his studies is peculiar, but, probably, it includes the right not only to "use" them for the purpose of making other artistic works, but also to sell the studies themselves or make exact copies of them.

Use of plans, studies, &c. by artist.

With regard to the liberty to make copies of works permanently situate in public places or buildings, it will be noticed that this does not apply to paintings and drawings, but it is strictly confined to works of sculpture and artistic craftsmanship (*n*). It is not clear what will be considered to be a "public place or building" within the meaning of the sub-section, but it is thought that statuary situate in the public streets and squares or in national or municipal galleries or halls may be reproduced without infringing copyright, but that the permission does not apply to

Works situate in public places.

(*h*) Sect. 2 (1) (ii) and (iii). As to drawings, &c. of architectural works, see Part III., Chap. III.

(*i*) Sect. 5 (1) (a), *ante*, p. 113.

(*k*) Sect. 5 (1) (b), *ante*, p. 117.

(*l*) Sect. 5 (2), *ante*, p. 122.

(*m*) (1895) A. C. 20, 27.

(*n*) Works of sculpture include "casts and models" (sect. 35 (1)); works of artistic craftsmanship are not defined by the Act. It has been pointed out that there is a possible doubt as to whether a reproduction in the flat of a work of sculpture is an infringement of the copyright in the latter work (see *ante*, p. 191). The fact that the Act expressly authorises such reproduction if the sculpture is in a public place suggests the inference that the reproduction in this manner would be an infringement, if the sculpture were not situate in a public place.

CAP. VIII. statuary placed in, say, a theatre or other place to which the public are generally only admitted upon payment. And although, as regards works of sculpture and artistic craftsmanship permanently placed in public galleries, they may be painted, drawn, or photographed without infringing copyright, there is, it is submitted, nothing in the Act to prevent the curators of galleries and museums making regulations curtailing the liberty of visitors to make copies, for breach of which regulations an action could lie for breach of contract or confidence (o).

(o) See sect. 31.

CHAPTER IX.

CIVIL REMEDIES FOR INFRINGEMENT OF COPYRIGHT.

THE remedies given by the Copyright Act for infringement of copyright are of two classes, civil and criminal. As to the civil remedies sect. 6 provides as follows:—

The various remedies open.

“When copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction or interdict, damages, accounts and otherwise, as are or may be conferred by law for the infringement of a right.”

The remedies are given to the “owner of the copyright,” that is to say, the original owner or a person deriving title under him by assignment, but an equitable assignee can take action notwithstanding that he has not obtained an assignment in writing, if he is in a position to compel a legal assignment (a). “This Court,” said the Vice-Chancellor, in *Bohn v. Bogue* (b), “always takes notice of the equitable interest; and if the equitable right to the copyright is complete, this Court will take care that the real question shall be tried, notwithstanding there may be a defect in respect of the legal property.” But a mere agent to sell has not such an interest in the work as to entitle him to claim relief (c). On the other hand, a licensee is not the owner of the copyright or any part of it, and therefore cannot bring an action for infringement in his own name; he must join the proprietor of the copyright either as co-plaintiff with himself or as defendant (d).

Who may sue.

The English Courts have no jurisdiction to entertain an action for infringement of copyright in a foreign country (e).

Infringement abroad.

The first and most usual remedy for infringement of copyright

Remedy by injunction.

(a) *Sweet v. Cater* (1840), 11 Sim. 572; *Hodges v. Welsh* (1840), 2 Ir. Eq. 286; *Sims v. Marryat* (1851), 17 Q. B. 281; *Hazlitt v. Templeman* (1866), 13 L. T. 593; *Grace v. Newman* (1875), L. R. 19 Eq. 623.

(b) (1847), 10 Jur. 421.

(c) *Nicol v. Stockdale* (1820), 3 Swans. 687; *Petty v. Taylor*, (1897) 1 Ch. 465.

(d) *Neilson v. Horniman* (1909), 25 T. L. R. 685.

(e) *Morocco Bound v. Harris*, (1895) 1 Ch. 534.

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is by means of an injunction, but this remedy is not open to an architect suing for infringement of a work of architecture, if the infringing building, has been actually commenced (*f*). An injunction may be either final—that is, one granted at the trial of the action—or interlocutory—that is, one granted prior to the trial and only until that trial, or further order. In order to obtain an interlocutory injunction, which is usually granted upon evidence by affidavit only, the plaintiff must show that the case is of some urgency, that he has a clear colour of title (*g*), and that the granting of the injunction will not cause irreparable damage to the defendant if it should turn out at the trial that he was in the right (*h*).

Delay in taking proceedings.

Delay, unless explained, is generally fatal to an application for an interlocutory injunction (*i*), but the tendency of modern decisions is not to refuse an injunction at the hearing of the action merely on account of delay in instituting proceedings (*k*), subject to the three year limitation prescribed by sect. 10 of the Act of 1911. Under certain circumstances delay might be held to amount to a tacit permission to reproduce the work (*l*).

Actual damage need not be proved.

If the plaintiff proves that his copyright has been infringed, the Court will grant an injunction without proof of actual damage (*m*), but he must show that there is a probability of damage (*n*), and that the defendant is likely to continue his infringement, and that this is not simply trivial (*o*). Moreover, an injunction will not be granted to restrain infringements of future numbers of a periodical, although the defendants have systematically copied from numbers already published (*p*).

Where portion only of the work is piratical.

Where only part of a work has been copied, and the part which has been copied from the plaintiff's work can be separated from that which has not been copied, an injunction will be granted only against the objectionable part or parts (*q*); but even where

(*f*) Sect. 9.

(*g*) *Universities of Oxford and Cambridge v. Richardson* (1802), 6 Ves. 689; *Platt v. Button* (1813), 19 Ves. 447.

(*h*) *Spottiswoode v. Clarke* (1846), 2 Phillips, 154.

(*i*) *Southey v. Sherwood* (1817), 2 Mer. 435; *Mawman v. Tegg* (1826), 2 Russ. 385, 393; *Lewis v. Chapman* (1840), 3 Beav. 132.

(*k*) *Hogg v. Scott* (1874), L. R. 18 Eq. 444; *Morris v. Ashbee* (1868), L. R. 7 Eq. 34.

(*l*) *Rundell v. Murray* (1821), Jac. 311; *Saunders v. Smith* (1838), 3 My. & Cr. 711.

(*m*) *Smith v. Johnson* (1863), 33 L. J. Ch. 137.

(*n*) *Borthwick v. Evening Post* (1888), 37 Ch. D. 449.

(*o*) *Whittingham v. Wooler* (1817), 2 Swans. 428; *Baily v. Taylor* (1829), 1 Russ. & My. 73; *Cox v. Land and Water* (1869), L. R. 9 Eq. 324.

(*p*) *Cate v. Devon Newspaper Co.* (1889), 40 Ch. D. 500, 507; but see *Bradbury v. Sharp*, W. N. (1891) 143.

(*q*) *Jarrold v. Houlston* (1857), 3 K. & J. 708; *Lamb v. Evans*, (1892) 3 Ch. 462.

a very large proportion of a work of a piratical nature is unquestionably original, if the parts which have been copied cannot be separated from those which are original without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequences of so doing, for an injunction will be issued against the whole.

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

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To what extent the injunction is to go.

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

(r) 4 Burr. 2326.

(s) *Vide Cary v. Longman* (1801), 1 East, 360; *Trusler v. Murray* (1781), 1 East, 363.

(t) (1826), 2 Russ. 385, 391.

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belongs to me; and if the parts of the work cannot be separated, and if by that means the injunction, which restrained the publication of my literary matter, prevents also the publication of his own literary matter, he has only himself to blame.”

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

Similarity of appearance.

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

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

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

The true criterion in such cases must be the effect upon the public, whether the similarity of the one publication to the other is so great as to mislead the public—is such as that an intending purchaser of the one might be misled into purchasing the other (*a*). And where such a similarity does not exist the Court will not interfere. Thus where there was a well-known comic paper called “Punch,” and another called “Judy,” and the defendant issued a publication with the title “Punch and Judy,” the Court held that though the defendant would not be at liberty to use either “Punch” or “Judy” singly as a title, yet there was no reason why he should

(*u*) *Lewis v. Fullerton* (1839), 2 Beav. 6; *Kelly v. Morris* (1866), L. R. 1 Eq. 697.

(*x*) *Spottiswoode v. Clarke* (1846), 2 Phil. 154; *Chappell v. Davidson* (1855), 2 K. & J. 123.

(*y*) *Metzler v. Wood* (1878), 8 Ch. D. 609.

(*z*) *Mack v. Petter* (1872), L. R. 14 Eq. 431.

(*a*) *Reddaway v. Banham*, (1896) A. C. 199; *Parsons v. Gillespie*, (1898) A. C. 239. As to the cases in which an injunction will be granted against copying the title of a work, see *ante*, p. 66.

not use the two combined, for in such combination the title was not such as to deceive persons of ordinary intelligence. The Vice-Chancellor considered that the defendants clearly had no right to use a name which was calculated to mislead or deceive the public in purchasing, and he intimated that if he had thought on the whole that their journal was calculated to mislead persons of ordinary intelligence (for those were the persons he had to consider) he would have granted the injunction. " 'Punch,' " said he, " is well known both in name and appearance. And its price is three-pence. Could any one be misled into buying this other paper instead, which has the words 'Punch and Judy' printed on it in distinct letters, with a different frontispiece and its price a penny? I am clearly of opinion that the mass of mankind would not be so misled " (b).

The next remedy is damages (c). The measure of damages under sect. 6 (1) will be the loss which the proprietor of the copyright has suffered by reason of the diminution of the sales of his work, or the loss of profit which he might otherwise have made. The fact that the pirated work may have injured the reputation of and vulgarised the original is also a fact that may be taken into consideration in assessing the amount of damages (d), and generally the damages may be said to be at large. In *Byrne v. Statist Company* (e), where a newspaper reproduced the plaintiff's translation of a public speech as a newspaper advertisement, the judge assessed the damages at £150, but gave no indication as to how he arrived at that figure.

There is, however, another section of the Act upon which the plaintiff may base his claim for damages. By sect. 7 it is provided that " all infringing copies (f) of any work in which copyright subsists, or of any *substantial* part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof."

The plaintiff can frame his action either under this section or under sect. 6, but his statement of claim should show clearly

(b) *Bradbury v. Beeton* (1869), 18 W. R. 33; *Borthwick v. Evening Post* (1888), 37 Ch. D. 449.

(c) No "penalties" are imposed as was done under the repealed Acts.

(d) *Hanfstaengl v. Smith*, (1905) 1 Ch. 519.

(e) (1914) 1 K. B. 622.

(f) By sect. 35 (1), "infringing, when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made or imported in contravention of the provisions of this Act."

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under which section he intends to proceed (*g*). Under this section the measure of damages is that "the defendant is to account for every copy of his book sold as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he would have received from the sale of so many additional copies" (*h*). In *Muddock v. Blackwood* (*i*), the defendant sold twice. On the first occasion he sold 1,010 copies at a total price of £38 19s. 9d., and at a profit of £8 10s. 4d.; on the second occasion he sold twenty-nine copies at a profit of £1 4s. 2d. Mr. Justice Kekewich assessed the damages at forty guineas.

Portion only
pirated.

Where only a portion of a work is piratical the plaintiff is, nevertheless, entitled to delivery of the whole (*k*), unless the piratical portion can be conveniently separated from the original parts (*l*), or unless the pirated portion is "unsubstantial."

Right to an
account.

Another remedy is an account of profits, which is an equitable remedy incidental to the right to an injunction (*m*), but a plaintiff cannot obtain both an account of profits and an inquiry as to damages (*n*). The principles upon which such an account is granted were thus stated by Wigram, V.-C., in *Colburn v. Simms* (*o*). "It is true," he said, "that the Court does not, by an account, accurately measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The Court, by the account, as the nearest approximation which it can make to justice, takes from the wrongdoer all the profits he has made by his piracy, and gives them to the party who has been wronged. In doing this the Court may often give the injured party more, in fact, than he is entitled to, for *non constat* that a single additional copy of the more expensive book would have been sold, if the injury by the

(*g*) *Muddock v. Blackwood*, (1898) 1 Ch. 58. There is a common law right to the delivery up of pirated copies, but only for destruction, not for the benefit of the owner of the copyright: *Hole v. Bradbury* (1879), 12 Ch. D. 886; *Warne & Co. v. Seebohm* (1888), 39 Ch. D. 73, 82. The remedy under sect. 7 will, therefore, generally be preferred.

(*h*) *Per James, L. J., Pike v. Nicholas* (1870), L. R. 5 Ch. 260.

(*i*) *Ubi sup.*

(*k*) *Isaacs v. Fiddeman* (1880), 49 L. J. Ch. 412; *Boosey v. Whight* (No. 2) (1899), 81 L. T. 265; cf. *Mawman v. Tegg* (1826), 2 Russ. 385, 391; *Stevens v. Wildy* (1850), 19 L. J. Ch. 190.

(*l*) *Warne & Co. v. Seebohm* (1888), 39 Ch. D. 73; *Leslie v. Young*, (1894) A. C. 333.

(*m*) *Hogg v. Kirby* (1803), 8 Ves. 215; *Bailey v. Taylor* (1829), 1 Russ. & My. 73; *Sherriff v. Coates* (1830), 1 R. & M. 159; *Kelly v. Hooper* (1840), 1 Y. & C. C. C. 140.

(*n*) *De Vitre v. Betts* (1873), L. R. 6 H. L. 319.

(*o*) (1843), 2 Ha. 543, 560; see *Pike v. Nicholas* (1870), L. R. 5 Ch. 255.

sale of the cheaper book had not been committed. The Court of Equity, however, does not give anything beyond the account."

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A plaintiff is entitled to discovery for the purposes of the account. The defendant must give full particulars, upon oath, of the number of copies printed and sold, and the cost of publication and distribution, verified by the production of all proper vouchers and receipts (*p*). An account will be refused if it is clear that there are no profits (*q*). In such a case the plaintiff may elect to claim damages and an inquiry as to the same (*r*).

Discovery for purposes of account.

Sect. 14 of the Act prohibits from being imported into the United Kingdom all copies "made out of the United Kingdom" (*s*) of any work in which copyright subsists, which if made in the United Kingdom would infringe copyright, and as to which the owner of the copyright gives notice in writing, by himself or his agent, to the Commissioners of Customs and Excise, that he is desirous that such copies shall not be imported into the United Kingdom. If the owner of the copyright gives such notice, then the copies will be included in the table of prohibitions and restrictions contained in sect. 42 of the Customs Consolidation Act, 1876 (*t*), and that section is to apply accordingly. Under that section the copies are liable to be forfeited and destroyed or otherwise disposed of as the Commissioners of Customs may direct. The Commissioners are authorised to make regulations, either general or special, respecting the detention and forfeiture of copies and the conditions to be fulfilled before such detention and forfeiture, and by such regulations to determine the information, notices, and security to be given, and the evidence requisite, for any of the purposes of sect. 14 of the Copyright Act, and the mode of verification of such evidence (*u*). The regulations made by the Commissioners by virtue of this power provide (*x*) that the notice is to be given by the copyright owner in one of the forms set out in the Schedule to the regulations, or as near thereto as circumstances permit (*y*), and be accompanied by a statutory

Seizure of imported copies.

(*p*) *Stevens v. Bett* (1873), 12 W. R. 572.

(*q*) *Lee v. Alston* (1789), 1 Ves. Jun. 78; *Colburn v. Simms* (1843), 2 Ha. 560; *Powell v. Aikin* (1857), 4 K. & J. 343.

(*r*) *Mawman v. Tegg* (1826), 2 Russ. 385, 400.

(*s*) These words were probably inserted so as to enable the owner of a copyright who has sold his foreign rights to prevent the importation into this country of copies lawfully manufactured abroad, but they also seem to prevent the Customs authorities from seizing piratical copies made in England and exported to a foreign country upon their being re-imported into this country.

(*t*) 39 & 40 Vict. c. 36.

(*u*) Sect. 14 (3).

(*x*) Appendix E., *post*.

(*y*) Rule 1.

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declaration in the form set out in the same Schedule (*z*). Before any article which appears, or is alleged, to be a copy of the copyright work is detained, the person who gave the notice must, if required, give such further information and evidence, verified, if so required, by statutory declaration, as the Customs authorities think necessary, to satisfy them that the article in question is liable to detention and forfeiture (*a*), and must also deposit a sum of money sufficient to cover any expense which may be incurred in the examination of the goods detained (*b*). The Commissioners may require an undertaking to indemnify them against expenses and damages incurred by reason of their detention and forfeiture of the article (*c*). The Customs Consolidation Act, 1876, applies to the colonies, except that by sect. 151 it is provided that the Customs Acts (which by the interpretation clause, sect. 284, means and includes that and all or any other Acts or Act relating to the Customs) shall not extend to "any such possession as shall by local Act or ordinance have provided or may hereafter, with the sanction and approbation of her Majesty and her successors, make entire provision for the management and regulation of the Customs of any such possession, or make in like manner express provisions in lieu, or variation, of any of the clauses of the said Act for the purposes of such possessions" (*d*). The Isle of Man is not, for the purposes of sect. 14 of the Copyright Act, to be considered as part of the United Kingdom (*e*), but the section is, with the necessary modifications, to apply to the importation into a British possession to which the Act extends (*f*) of copies of works made out of that possession.

What
piratical
works may
be seized.

It is not clear whether any works other than those which substantially reproduce the whole of the original work from which it was copied or derived can be seized by the Customs authorities under this section. The section only authorises the seizure of "copies" of the original work, and does not use the expression "infringing copies" which is defined by sect. 35 (1). Obviously, the Customs authorities are not in a position to determine nice points of copyright law, and it is not intended that they should have power to summarily seize any works, except those that are flagrant piracies. In other cases, the proprietor of the copyright

(*z*) Rule 4.

(*a*) Rule 5.

(*b*) Rule 6.

(*c*) Rule 7.

(*d*) *Black v. Imperial Book Co.* (1903), 5 Ont. L. R. 184.

(*e*) Sect. 14 (6).

(*f*) See sect. 25, and chapter "Colonial Copyright," Part IV., Chapter II., *post*.

must pursue his other remedies. In fact, the great protection given by sect. 14 is against the flooding of the English markets with the cheap foreign reprints, which are frequently issued with the licence of the proprietor of the copyright upon the understanding that these reprints are not to compete with him in the home market. Such reprints are, of course, liable to be seized if imported into England, for they would infringe the copyright "if made in the United Kingdom."

We must now consider that curious section—sect. 8—which is as follows:—

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Innocent
infringers
(sect. 8).

"Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware, and had no reasonable ground for suspecting, that copyright subsisted in the work" (g).

This section was, doubtless, inserted in the Act because of the removal of all formalities, such as registration, which were sometimes requisite, under the old law, for the acquisition or protection of copyright, and which gave some public warning of the existence of copyright. Judging from its marginal note, the section is intended to afford protection to innocent infringers, but it is framed in such language that it is difficult to imagine a case in which it can be invoked in aid. The section must be specifically pleaded, and the burden is upon the defendant to prove that "at the date of the infringement he was not aware, and had no reasonable ground for suspecting, that copyright subsisted in the work."

Limited
application
of section.

We have seen that inasmuch as copyright is a proprietary right, it is usually no defence to prove that the defendant acted innocently (h). Nor is it, under sect. 8, sufficient to prove mere innocence and absence of carelessness; the innocence that must be proved is ignorance that "copyright subsisted in the work," *i.e.*, the work which has, in fact, been pirated. This point is well illustrated by the recent case of *Byrne v. Statist Co.* (i). There the plaintiff was employed by the proprietors of a newspaper to translate and summarise in his spare time a speech of the

Byrne v.
Statist Co.

(g) Compare with the similar sect. 33 of the Patents Act, 1907 (7 Edw. VII. c. 29).

(h) *Mansell v. Valley Printing Co.*, (1908) 2 Ch. 441, *ante*, p. 135.

(i) (1914) 1 K. B. 622; but see *Savory v. World of Golf* (1914), 83 L. J. Ch. 824.

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Governor of the State of Bahia, Brazil, reported in a foreign language, for the purpose of publication as an advertisement in their paper. The summarized translation was duly published in this way with the words "translated from the Portuguese language by F. D. Byrne" at the end. The defendants saw this advertisement, obtained permission from the Governor to publish it as an advertisement in their papers, for which they were duly paid, and they reproduced the plaintiff's translation *verbatim*. In an action for infringement of copyright, the defendants pleaded sect. 8 of the Copyright Act, but without success. In dealing with this plea, Mr. Justice Bailhache remarked as follows: "The defendant suggested that they had no reasonable ground to suspect that there was any copyright in the advertisement at all; but the advertisement contained upon its face an intimation that it was translated by the plaintiff. The defendants' witnesses admitted that that was an unusual and unprecedented fact, but stated that it was one to which they, as men of experience, attached no importance. In that I think they were wrong, and I find as a fact that there was reasonable ground to suspect that there was copyright in the plaintiff's translation. The position of the defendants in fact was not so much that they did not suspect copyright, as that they supposed the copyright was in the Governor of Bahia, whose instructions for its reproduction they had obtained. This merely amounts to saying that they supposed themselves to have the authority of the owner of the copyright, a very different thing from alleging and proving that they did not suspect that any copyright existed. It is this latter state of mind that sect. 8 requires to be proved, and sect. 8 is no protection to a person who, knowing or suspecting that copyright exists, makes a mistake as to the owner of the copyright, and under that mistake obtains authority to publish from a person who is not in fact the owner." The plaintiff was awarded £150 damages.

The section thus affords no defence in a class of case that not infrequently arises. A photograph is submitted to a newspaper for publication. The proprietors of the newspaper accordingly publish the same and pay for it, upon receiving an assurance that the copyright belongs to the person who submitted the photograph to them, and they only become aware of the fact that they have been misinformed when a claim is made for damages for infringement of copyright. Clearly, the newspaper proprietors cannot urge that they did not suspect that copyright existed, but were only deceived as to the person in whom the copyright was vested, and so they have no defence upon the ground of ignorance.

In what cases, then, can the section apply? What "reasonable ground" can a direct copyist have for not suspecting the work he copies to be the subject of copyright? It is submitted that the proper attitude of mind of a copyist towards a work that he copies is that copyright in the latter subsists, unless he has evidence to the contrary. The only grounds for not suspecting copyright appear to be either (a) that the period of copyright protection has run out, or (b) that he thinks that the work is of such a character that it ought not to be a subject of copyright. If a copyist were to ascertain that the author of the original work was born 130 years ago, or that the work was published 100 years ago, but, after due inquiry, he could not discover the date of the author's death, he might, perhaps, have reasonable grounds for thinking the copyright had run out. Or, again, if a work, bearing no author's or publisher's name, is pronounced by experts to be the work of A. who died sixty years ago, whereas it, in fact, is the work of B. who died only forty years ago, this, perhaps, is another case in which the section might be successfully pleaded. But it is submitted that no person has a right to assume, without inquiry, that a work published anonymously is not the subject of copyright. And if it is hard to imagine a case in which the section will be of any avail to a copyist at first hand, it is still harder to imagine a case in which a person deriving title under the original pirate could plead the section. We have seen that the section does not apply if the defendant publishes a work under a wrong impression as to who is the proprietor of the copyright. Take another case that may arise. A publisher publishes a work of X. which, unknown to the publisher, contains large extracts from the work of Y. Y. is a living person well known to the publisher. He cannot, it is thought, plead successfully that he did not suspect copyright to subsist in Y.'s work; all he could urge is that he did not suspect that X. had copied from Y.'s work, and that, apparently, would not bring him within the section. Finally, if the defendant pleads that he did not think the pirated work was of a character which ought to be entitled to copyright protection, upon the Court holding the contrary, the defendant may have some difficulty in convincing the Court that he had no "reasonable grounds" for anticipating the Court's decision. Of course, it might be different if the defendant's belief was based upon a decision of the Courts which was subsequently overruled.

It has been suggested that under no circumstances could sect. 8 be a defence to an action based upon sect. 7, which declares that

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To what cases section might apply.

Can sect. 8 be pleaded in answer to a

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claim for
delivery of
infringing
copies?

infringing copies are to be deemed the property of the owner of the copyright, because an action of detinue or trover would not be an action "in respect of the infringement of the copyright." It is submitted, however, that this is a narrow construction to put upon the section. Of course, no person, however innocent at the time he procured a stock of works which infringe another's copyright, could lawfully continue to dispose of his stock after notice that the same were piracies; but if he were to be liable to pay in damages for any portion of the stock which he had disposed of prior to receiving such notice, sect. 8 would become practically nugatory. It is thought that it is putting no undue strain upon the language to say that an action for recovering damages in trover under sect. 7 is one taken "in respect of" the infringement of the copyright, for the circumstances will be such that no such action would lie, unless there had been an infringement of copyright. In other words, the infringement of the copyright is the ground and basis of the action (*j*).

Matters of
procedure.

An action for infringement is commenced by writ. Under the Literary Copyright Act, 1842, it was necessary that the plaintiff should have registered his title at Stationers' Hall prior to issuing his writ (*k*). There is no necessity for any registration under the Act of 1911, but it has been held that, notwithstanding the fact that works which at the date when the Copyright Act, 1911, came into force (*l*) were entitled to copyright became entitled to a similar right under the new Act (*m*), nevertheless, no action can be brought under that Act in respect of an infringement committed prior to the date when the same came into force, unless the plaintiff was registered at Stationers' Hall (*n*).

Invasions of copyright by several persons cannot be restrained in one action, the right of an author against different booksellers selling the same spurious edition of his work not being joint, but a distinct right against each (*o*).

Where a joint proprietorship exists, either party may sue; and

(*j*) This view seems to receive some support from sub-sects. (2) and (3) of sect. 6, the former providing that costs "in any proceedings in respect of the infringement of copyright" are to be in the discretion of the Court, the latter providing that there is to be a presumption that the plaintiff is the owner of the copyright in a work "in any action for infringement of copyright." See also sect. 10.

(*k*) *Warne v. Lawrence* (1886), 54 L. T. 371.

(*l*) *I.e.*, 1st July, 1912.

(*m*) Sect. 24; see *post*, chapter "Existing Works."

(*n*) *Evans v. Morris*, (1913) W. N. 58; *contra*, if the infringement took place after the commencement of the Act, *Savory v. World of Golf, Ltd.* (1914), 83 L. J. Ch. 824.

(*o*) *Dilly v. Doig* (1790), 2 Ves. 486.

where a plaintiff has an assignment from some only of several part-owners, he is entitled to sue to prevent a stranger from interfering with his rights (*p*).

It is not essential that the statement of claim or affidavit filed in support of an application for an interlocutory injunction should specify the parts of the work stated to have been pirated; though no copyright is claimed in all the identical passages, a general allegation that the defendant's work contains pirated passages, and a verification by affidavit of those passages, are sufficient. The Vice-Chancellor, in *Sweet v. Maugham* (*q*), said: "It has always been considered sufficient to allege, generally, that the defendant's work contains several passages which have been pirated from the plaintiff's work. Then, when the injunction has been moved for, the two works have been brought into Court, and the counsel have pointed out to the Court the passages which they rely upon as showing the piracy." But if a plaintiff brings an action to protect a work, being only entitled to copyright in a small part of such work, he ought to tell the defendant in his claim what that part is, otherwise costs unnecessarily incurred must be borne by the plaintiff (*r*).

There are certain presumptions in favour of a plaintiff suing for infringement of copyright. Sub-sect. (3) of sect. 6 provides that "in any action for infringement of copyright" (*s*) in any work the work shall be presumed to be a work in which copyright subsists, and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff. The presumption is an absolute one if the issue is not raised. If these matters are put in issue, then further presumptions may arise, namely: (a) if a name purporting to be that of the author of the work is "printed or otherwise indicated thereon in the usual manner," the person whose name is so printed or indicated is, unless the contrary is proved, to be presumed to be the author of the work; and (b) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon "in the usual manner," then this

(*p*) *Lauri v. Renad*, (1892) 3 Ch. 402.

(*q*) (1840), 11 Sim. 51; *Hotten v. Arthur* (1863), 1 H. & M. 603.

(*r*) *Page v. Wisden* (1869), 17 W. R. 483; and generally a defendant can obtain an order for particulars.

(*s*) As to whether an action of detinue or trover under sect. 7 is "an action for infringement of copyright," see *ante*, p. 205.

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latter person is, unless the contrary is proved, to be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of the copyright therein (t).

The language of this sub-section should be noticed. If the name of the author of the work is indicated "thereon" (u) in the "usual manner," then the presumption, until the contrary is proved by the defendant, will be that the person so indicated is the "author" of the work, not that he is the owner of the copyright. The presumption will probably be most useful in an action brought by an assignee of the copyright. He will not be compelled to strictly prove the authorship, but, of course, he will have to strictly prove a title derived from the person named as author. If, on the other hand, no one is named as author on the work, or the name is not the author's true name or the name by which he is commonly known, then the presumption is that the person who is named as publisher or proprietor of the work is, for the purposes of the proceedings, the owner of the copyright. If, therefore, the action be brought by a person other than such publisher or proprietor of the work, such person will have to be prepared to displace the presumption against him, and prove that he, and not the publisher, is the owner of the copyright (x). The object of this presumption is to enable an anonymous author to preserve his anonymity in any legal proceedings he may take to protect his copyright. For the purposes of the sub-section, it does not appear to be necessary that the name of the author or publisher, as the case may be, shall appear on all copies.

Posthumous works.

Under sect. 17 (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, is *prima facie* proof of the copyright being with the owner of the manuscript.

Defence.

The defendant to an action for infringement of copyright must, if he desires to dispute the authorship, or the plaintiff's title to the copyright in the work, specifically raise the point on his pleadings (y); but he is not required, as he was under the Literary

(t) See Article 15 of Revised Convention of Berne (Appendix B.).

(u) Presumably this will not be construed literally. It is thought that the presumption will arise if the author's name is indicated, say, upon the mount of a photograph.

(x) The object, no doubt, is to enable a pseudonymous or anonymous author to preserve the secret of his identity.

(y) Sect. 6 (3).

Copyright Act, 1842 (z), to state in his defence the person he alleges to be the author or the proprietor of the copyright, but in a proper case the defendant might be ordered to answer interrogatories on the point. If, again, the defendant desires to plead his innocence, under sect. 8 he must specifically allege in his defence that he was not aware of the existence of the copyright in the work. If the action be in the County Court, the putting of the title of the plaintiff in issue and the plea of ignorance are both, it is thought, special defences, of which notice must be given to the plaintiff (a).

The costs of all parties in any proceedings in respect of the infringement of copyright are in the "absolute discretion" of the Court (b). It is thought probable that an action for the recovery of pirated copies is an action "in respect of the infringement of copyright" (c). In any case, the sub-section does not, probably, make the law as to costs any different in a copyright case from what it is in other cases. Under the Rules of the Supreme Court costs are generally in the discretion of the Court, but the discretion is a judicial discretion, and although the general rule is that there is no appeal simply upon a question of costs, such an appeal will lie if the judge has deprived a successful litigant of his costs upon other than judicial grounds. The same rule, it is thought, applies to a copyright case, notwithstanding that the costs are said to be in the "absolute" discretion of the Court (d).

A person whose copyright has been infringed is not bound to rest satisfied with the promise of the defendant not to commit any further infringement, but he has a right to have an injunction, and is entitled to the costs of such injunction (e). It is not sufficient to entitle the defendant to escape being ordered to pay the plaintiff's costs of obtaining an injunction that he has before issue of the writ offered the plaintiff all that he was entitled to; but, if, having made such an offer prior to action brought, the defendant were later to repeat the offer, enlarging it by including the costs of the action up to date, the costs of persisting in his action might perhaps be cast upon the plaintiff. This, it has been said, is the

(z) 5 & 6 Vict. c. 45, s. 16.

(a) County Court Rule X.

(b) Sect. 6 (2).

(c) Sect. 6 (2), *ante*, p. 205.

(d) The same expression as to costs is to be found in the Copyright (Musical Compositions) Act, 1888 (51 & 52 Vict. c. 17), s. 2, now repealed. Previously to that Act a successful plaintiff in an action for publicly performing a musical composition was entitled as of right to his costs: *Reeve v. Gibson*, (1891) 1 Q. B. 652; *Roberts v. Bignell* (1887), 3 T. L. R. 552.

(e) *Geary v. Norton* (1846), 1 De G. & Sm. 9; *Savory v. World of Golf, Ltd.*, 83 L. J. Ch. 824.

CAP. IX.

only way in which, where a wrong has been done, the defendant can escape from the liability of having the infringed rights asserted in Court, and a proper order obtained (*f*).

Moreover, cases of infringement of copyright should be heard in open Court, and, therefore, even if the defendant admits liability and consents to the requisite order being made in Chambers, the plaintiff is entitled to the costs of a motion for judgment in Court (*g*).

In *Cooper v. Whittingham* (*h*), Jessel, J., thought that where a plaintiff came to enforce a legal right and there had been no misconduct on his part the Court had no discretion, and could not take away his right to costs, and Chitty, J., took the same view in *Upman v. Forester* (*i*). But in *Walter v. Steinkopff* (*k*), Mr. Justice North said that he could not understand that view, it was in the teeth of the General Orders and Act of Parliament, which say the judge has a discretion which he is to exercise, and in the case of *The American Tobacco Co. v. Guest* (*l*), Stirling, J. was of the same opinion. Mr. Justice North, considering that in the case in question the defendants had been hardly dealt with by being pulled up all at once without notice for doing what they had been doing for twelve years past, decided that the defendants should pay all the costs of the action down to a certain day, and also such further costs as would have been properly incurred by the plaintiffs in proceeding upon a motion unopposed by the defendants to make the interlocutory order perpetual, leaving all other costs to be borne by the parties who incurred them. But the mere fact that the damages are trifling is not a sufficient reason for depriving the plaintiff of his costs (*m*). If the defendant is successful he may, nevertheless, be deprived of his costs if the Court thinks that he has conducted his case improperly, or his conduct prior to action has been, in the opinion of the Court, unfair (*n*).

Period for
bringing
actions.

No action "in respect of infringement of copyright" is to be commenced after the expiration of three years next after the infringement (*o*). It is not easy to say whether this limitation applies to an action for conversion or detinue under sect. 7. The Courts, it is thought, would not be unwilling to stretch the

(*f*) Per Neville, J., *Savory v. World of Golf*, *supra*.

(*g*) *Smith and Jonks, Ltd. v. Service, Reeve & Co.*, (1914) W. N. 283.

(*h*) (1880), 15 Ch. D. 501.

(*i*) (1883), 24 Ch. D. 231.

(*k*) (1892) 3 Ch. 489.

(*l*) (1892) 1 Ch. 630.

(*m*) *Hanfstaengl v. Smith*, (1905) 1 Ch. 519.

(*n*) *Cobbett v. Woodward* (1872), L. R. 14 Eq. 407; *Pike v. Nicholas* (1869), L. R. 5 Ch. 251; *Kelly's Directories v. Gavin*, (1901) 1 Ch. 374; cf. *Liverpool Brokers v. Commercial Press*, (1897) 2 Q. B. 1.

(*o*) Sect. 10.

language a little, and hold that such an action was brought "in respect of infringement of copyright" (*p*), but a further difficulty arises from the fact that the period of limitation is to run from the date of "the infringement." An infringement occurs by reason of the improper reproduction of a work or the knowingly dealing with the work by sale, distribution, exhibition, or importation (*q*); the mere possession of an infringing copy gives no right of action. An action against a person who simply has an infringing copy in his possession would not lie until a demand had been made requiring the possessor to hand over the copy to the owner of the copyright (*r*). Nor would the refusal to comply with such demand constitute an "infringement" of copyright, and it is, therefore, possible that in the case of an action under sect. 7 the ordinary period of limitation will apply, namely, six years from the date of the conversion or refusal to deliver the infringing article (*s*). It may be, however, that the true construction of sect. 10 is that wherever there has been an infringement of copyright the proprietor of the copyright is to lose all remedies whatsoever after three years, and that, inasmuch as before an "infringing copy" can exist, there must have been an infringement of copyright, though not necessarily committed by the person who has possession of the infringing copy at the time of action, no action of detinue or conversion can be brought except within three years after the infringing copy was made. Of course, if, after knowledge that the copies in his possession were piracies, the possessor were to sell or distribute or exhibit the copies for the purpose of trade, this would under sect. 2 (2) constitute an entirely new offence (*t*), and the period of limitation would commence to run afresh. If this suggested construction of sect. 10 were to prevail, it would, to some extent, remove the difficulty which arises from the fact that, whereas sect. 2 (2) contemplates a person being only liable for dealing with infringing copies with knowledge that they are infringements, the provisions of sect. 7 seem calculated to deprive him of much of the benefit he might derive from his innocence (*u*); for in that case a person who sold an infringing copy innocently could only be sued within three years from the making of the work, but, if he did so with knowledge, within three years from the sale.

(*p*) See *ante*, p. 205.

(*q*) Sect. 2.

(*r*) *Miller v. Dell*, (1891) 1 Q. B. 468.

(*s*) *Miller v. Dell*, *supra*.

(*t*) Sect. 2 (2).

(*u*) See *ante*, p. 166.

CHAPTER X.

SUMMARY REMEDIES FOR INFRINGEMENT OF COPYRIGHT.

Sect. 11 of
the Act.

IN addition to his civil remedies, sect. 11 of the Copyright Act, 1911, now confers upon the proprietor of copyright the right in some cases to take criminal proceedings in respect of an infringement. Under the old law criminal proceedings were only possible in respect of the infringement of the copyright in musical works, under the Musical (Summary Proceedings) Copyright Act, 1902 (*a*), as amended by the Musical Copyright Act, 1906 (*b*). The section of the Bill dealing with criminal proceedings was considerably modified in Committee of the House of Commons. In the form in which it was originally introduced it extended to owners of copyright in all works the same criminal remedies as were, under the Acts above referred to, given to the owners of copyright in musical works. The section, however, as originally drafted, met with so much opposition, that finally it was abandoned, and whilst the two Musical Copyright Acts above referred to remained unrepealed with regard to musical works, the present section, giving modified criminal remedies in respect of infringement of other works, was agreed to (*c*). The section is as follows:—

- “ (1) If any person knowingly—
- (a) makes for sale or hire any infringing copy of a work in which copyright subsists; or
 - (b) sell or lets for hire, or by way of trade exposes or offers for sale or hire any infringing copy of any such work; or
 - (c) distributes infringing copies of any such work either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or
 - (d) by way of trade exhibits in public any infringing copy of any such work; or
 - (e) imports for sale or hire into the United Kingdom any infringing copy of any such work (*d*):

(*a*) 2 Edw. VII. c. 15, *post*, p. 214.

(*b*) 6 Edw. VII. c. 36.

(*c*) The summary remedies do not apply to infringement of copyright in architectural works: sect. 9 (2).

(*d*) See and compare sect. 2 (2) of the Act,

he shall be guilty of an offence under this Act and be liable on summary conviction to a fine not exceeding forty shillings for every copy dealt with in contravention of this section, but not exceeding fifty pounds in respect of the same transaction; or, in the case of a second or subsequent offence, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months.

“(2) If any person knowingly makes or has in his possession any plate for the purpose of making infringing copies of any work in which copyright subsists, or knowingly and for his private profit causes any such work to be performed in public without the consent of the owner of the copyright, he shall be guilty of an offence under this Act, and be liable on summary conviction to a fine not exceeding fifty pounds, or, in the case of a second or subsequent offence, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months.

“(3) The Court before which any such proceedings are taken may, whether the alleged offender is convicted or not, order that all copies of the work or all plates in the possession of the alleged offender, which appear to it to be infringing copies or plates for the purpose of making infringing copies, be destroyed or delivered up to the owner of the copyright or otherwise dealt with as the Court may think fit.

“(4) Nothing in this section shall, as respects musical works, affect the provisions of the Musical (Summary Proceedings) Copyright Act, 1902, or the Musical Copyright Act, 1906.”

A person can only be convicted under this section if he acts knowingly. The persons liable to be convicted may be divided into four classes: (i.) makers of “infringing copies”; (ii.) distributors of “infringing copies”; (iii.) persons having in their possession any plate (*e*) for the purpose of making “infringing copies”; (iv.) persons causing “any work in which copyright subsists” to be publicly performed.

Who may be convicted

An “infringing copy” is defined by the Act. “Infringing,” when applied to a copy of a work in which copyright subsists, means “any copy, including any colourable imitation, made or imported in contravention of the provisions of this Act” (*f*). A

The meaning of “infringing copy.”

(*e*) In a case of *R. v. Baldoli* (*Times*, 27th Nov., 1913), the defendant was convicted of having in his possession a cinematograph film for the purpose of making an infringing copy.

(*f*) Sect. 35 (1).

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person who produces or reproduces a work, "or any substantial part thereof" (*g*), and a person who sells, distributes, exhibits, or imports for sale a work which to his knowledge "infringes copyright" (*g*), is liable to a civil action; but the criminal remedies are not available unless the subject-matter of the charge is an "infringing copy," which includes any copy which is a "colourable imitation" of the original, but, apparently, not necessarily every work in respect of which civil proceedings might be taken. It is evidently not the policy of the Act to require the police courts to decide intricate questions as to infringement of copyright, and it is only in the grosser cases that the criminal procedure can be invoked. Again, in the case of infringement by public performance, the "work in which copyright subsists" must be performed, and, as a statute which creates a criminal offence must always be strictly construed, the words of the Act would seem to suggest that no criminal proceedings can be taken in respect of the public performance of only a "substantial part" of the work. If this be so, it gives an unfortunate loophole to the pirate, and it will probably not tax the ingenuity of small touring companies to make such alterations or omissions in a play as will enable them to escape conviction under this section. On the other hand, "performance" includes "any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument." Thus, the case of a cinematograph performance is covered.

Musical
(Summary
Proceedings)
Copyright
Act, 1902.

In the case of pirated music the criminal remedies are somewhat wider. The Musical (Summary Proceedings) Copyright Act, 1902, was passed for the greater protection of the owners of copyright in musical compositions who, at that date, were suffering considerable injury at the hands of street hawkers who were in the habit of selling in the streets pirated copies of songs and music for a few pence.

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

(*g*) Sects. 1 (2), 2 (1); cf. also, sect. 7.

delivered up to the owner of the copyright if he makes application for that delivery.

Sect. 2 authorises a constable to seize without warrant pirated copies of musical works when they are being hawked, carried about, sold, or offered for sale, on the request in writing of the apparent owner of the copyright or of his agent thereto authorised in writing, and at the risk of such owner. On seizure of such copies, they are to be conveyed by the constable before a Court of summary jurisdiction, and on proof that they are infringements of copyright, they are to be forfeited or destroyed or otherwise dealt with as the Court may think fit.

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

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

Failure of Act.

(*h*) *Ex parte Francis* (No. 1), (1903) 1 K. B. 275.

Car. X. the music is being sold at a private house (i). The practice of the magistrates as to the proof of copyright required from the proprietor varied in different Courts.

It was further held that a perforated roll was not a "pirated copy" of a musical work (k), a decision that seems to be equally applicable to sect. 11 of the Act of 1911.

Musical
Copyright
Act, 1906.

In consequence of the failure of the Act of 1902, the Musical Copyright Act, 1906 (l), was passed, which provides that any person who prints, reproduces, or sells, or exposes, offers, or has in his possession for sale any pirated copies of any musical work, or has in his possession any plates for the purpose of printing or reproducing pirated copies of any musical work, shall (unless he proves that he acted innocently) be guilty of an offence punishable on summary conviction, and shall be liable to a fine not exceeding five pounds, and on a second or subsequent conviction to imprisonment with or without hard labour for a term not exceeding two months or to a fine not exceeding ten pounds.

If, however, the defendant has not been previously convicted of an offence under the Act, and proves that the copies of the musical work in respect of which the offence was committed had printed on the title page thereof a name and address purporting to be that of the printer or publisher, he is not to be liable to any penalty unless it is proved that the copies were to his knowledge pirated copies (m). Any constable may take into custody without warrant any person who in any street or public place sells or exposes, offers, or has in his possession for sale any pirated copies of any such musical work as may be specified in any general written authority addressed to the chief officer of police, and signed by the apparent owner of the copyright in such work or his agent thereto authorised in writing, requesting the arrest, at the risk of such owner, of all persons found committing offences under this section in respect to such work, or who offers for sale any pirated copies of any such specified musical work by personal canvass or by personally delivering advertisements or circulars (n). A copy of every such written authority is to be open to inspection at all reasonable hours by any person without payment of any fee, and any person may take copies of or make extracts from any such authority (o).

(i) *Ex parte Francis* (No. 2) (1903), 88 L. T. 806. There is no right to grant a search warrant under sect. 11 of the Act of 1911.

(k) *Mabe v. Connor*. K. B. 515.

(l) 6 Edw. VII. c.

Full text of this Act, Appendix A.

(m) Sect. 1 (1).

Sect. 1 (2).

(o) Sect. 1 (3).

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A search warrant may be granted by a Court of summary jurisdiction if satisfied that there is reasonable ground for suspecting that an offence against the Act is being committed, and to seize any copies of any musical work or any plates in respect of which he has reasonable ground for suspecting that an offence against the Act is being committed. Any copies or plates so seized are to be brought before the Court, and if proved to be pirated copies or plates intended to be used for the printing or reproduction of pirated copies, are to be forfeited and destroyed, or otherwise dealt with as the Court thinks fit (*p*). The Act contains definitions of "pirated copies," "musical work" (*q*) and plates (*r*).

Search
warrants.

Upon summary conviction (*s*), whether under the Musical Copyright Act, 1906, or the Copyright Act, 1911, an appeal lies in England or Ireland to a Court of Quarter Sessions, and in Scotland under the Summary Jurisdiction (Scotland) Acts (*t*). Seven days' notice of appeal must be given, and the appeal is to a Court of Quarter Sessions held not less than fifteen days after the date of conviction (*u*).

Appeal.

Apart from the summary remedies given by the Copyright Acts, it may sometimes be possible to prosecute infringers for a conspiracy at common law. To create this offence two or more persons must have conspired together to deprive the proprietor of the copyright of his property, *e.g.*, by printing for sale piratical copies of a copyright work (*x*).

Conspiracy
to infringe
copyright.

In dealing with the summary remedies for infringement of copyright, sect. 7 of the Fine Arts Copyright Act, 1862 (*y*), may be referred to. By that section (which is not repealed by the Copyright Act, 1911) it is made an offence if any person shall do any of the following acts:—

Fraudulent
alteration of
works of art.

1st. If he shall fraudulently sign or otherwise affix, or cause to be signed or otherwise affixed, to any painting, drawing, or photograph, or the negative thereof, any name, initials, or monogram (*z*).

2nd. If he shall fraudulently sell, publish, exhibit, or dispose

(*p*) Sect. 2.

(*q*) The definition is different from that in the Act of 1902, the definition being "a musical work in which there is a subsisting copyright."

(*r*) Sect. 3.

(*s*) But not upon acquittal: *R. v. London JJ.* (1890), 25 Q. B. D. 557.

(*t*) Musical Copyright Act, 1906, s. 1 (4); Copyright Act, 1911, s. 12.

(*u*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31.

(*x*) *R. v. Willetts* (1906), 70 J. P. 127; *R. v. Bokenham*, *Times*, 22nd July, 1910.

(*y*) 25 & 26 Vict. c. 68, s. 7, Appendix A.

(*z*) This was inserted by reason of the decision in *R. v. Close* (1858), 27 L. J. M. C. 54.

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of, or offer for sale, exhibition or distribution, any painting, &c. having thereon the name, initials, or monogram of a person who did not execute such work.

3rd. If he shall fraudulently utter or dispose of any copy or colourable imitation of any painting, drawing, or photograph, or negative of a photograph, whether there shall be subsisting copyright therein or not, as having been executed by the author of the original work from which such copy or imitation shall have been made.

4th. If, where the author of any painting, drawing, or photograph, or negative of a photograph, shall have sold such work, any person shall afterwards make any alteration by addition or otherwise during the life of the author, without his consent, or shall knowingly sell or publish such work, or any copies thereof so altered, or of any part thereof, as or for the unaltered work of such author.

Every offender under this section is liable upon conviction to forfeit to the person aggrieved a sum not exceeding £10, or not exceeding double the full price at which all such copies or altered works shall have been sold or offered for sale; and they are to be forfeited to the person, or the assignee or legal representatives of the person whose name, initials, or monogram shall have been fraudulently used; provided such person shall have been living at or within twenty years next before the time when the offence may have been committed (a).

It would seem that if the double price of the copies be less than £10, yet that amount may still be recovered, and that if the double value exceed £10, then any sum up to such double price may be recovered by the person aggrieved, as an inducement to him to proceed, he having to give up the spurious work to the true artist or his representatives, and receive from the person who has defrauded him the price he has paid and as much more.

The penalties imposed as a punishment for a criminal offence.

Under these penal sections it has been determined that a person sentenced to pay a penalty cannot, by executing a deed of arrangement with his creditors, escape from the imprisonment consequent on a failure to pay (b). Mr. Graves, a publisher of engravings, became the proprietor of the copyright in Frith's "Railway Station," and other paintings, and the designs thereof, and also of the copyright in the engravings of such pictures. Photographic copies of these engravings were then fraudulently made, and sold for about one-twentieth of the price at which the copies of Mr.

(a) There is, however, no power to grant a search warrant.

(b) *Ex parte Graves* (1868), L. R. 3 Ch. 642.

Graves's prints were sold. Such photographic copies were exact reproductions of the engravings and of a large size. Upon the 16th of May, 1868, a man named William Banks Prince was convicted by a magistrate at Lambeth of having sold no less than nineteen of the fraudulent photographic copies in question. He was adjudged to pay a penalty of £5 in respect of each of the copies sold; and in default of payment the magistrate sentenced Prince to fourteen days' imprisonment in respect of each of the nineteen offences he had committed by selling the photographic copies. While the magistrate was giving his judgment Prince executed a deed of composition with his creditors, which contained a release from them. That deed was assented to by certain creditors of Prince, and then registered in due form. Not having paid the penalties in which he was convicted, he was taken into custody upon a magistrate's warrant, and imprisoned pursuant to his sentences. Thereupon he applied to the Bankruptcy Court for his discharge from custody, upon the ground that the penalties in which he had been convicted were *debts*, from the payment of which he had been released by the deed of composition executed between him and his creditors. The registrar held that Prince was entitled to his discharge.

From this decision Mr. Graves appealed to the Lords Justices, upon the ground that penalties recovered under the Fine Arts Copyright Act, 1862, were in the nature of a punishment, and consequently were not released by the composition deed which had been executed between Prince and his creditors. On the contrary, it was argued for the respondent that, inasmuch as under the Fine Arts Copyright Act the penalties were payable to Mr. Graves, they amounted in the aggregate to nothing more than a debt, which would have been provable under bankruptcy, and was therefore released by the deed. But Lord Justice Page Wood held that what Prince had done in selling the photographic copies was throughout the Copyright Act treated as an offence, as a *fraudulent* act, for which a punishment was to be inflicted; and that the debtor was not entitled to his discharge from custody unless the penalties were paid.

An offence is committed under the first three clauses of sect. 7 of the Fine Arts Copyright Act, 1862, only if the act complained of is done with fraudulent intent, but this is not so under the fourth clause. Under that clause it is no offence to make the alteration, but only to sell, publish, or offer for sale the work or any copies of it after alteration. This must be done "knowingly," but not necessarily "fraudulently," and it is no defence that the

Whether alteration must be fraudulent.

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copyright in the picture is vested in the person making the alterations.

*Carlton
Illustrators v.
Coleman.*

These points were decided in the case of *Carlton Illustrators v. Coleman* (c). There the plaintiff was an artist who was the author of a fine line drawing made for the purpose of being used as an advertisement in newspapers and periodicals by the defendants, and the copyright was vested in them. The defendants produced and published, without the consent of the plaintiff, on public hoardings throughout the country in the form of large coloured posters a reproduction of the plaintiff's drawing, and for this purpose they caused various alterations to be made in the original drawing by someone other than the plaintiff, leaving the plaintiff's signature on such posters. Mr. Justice Channell held that an offence had been committed under the fourth clause of sect. 7 of the Act of 1862, although no suggestion of fraud was made. In dealing with the question of what would be an "alteration" of the work within the clause, the learned judge pointed out that there might be some alterations which would not come within the clause. He did not think that an alteration in the artist's signature, for instance, would have been within that clause, for that would have been an alteration immaterial with reference to the object for which the clause was passed. "To come within the enactment," he said, "an alteration must be a material alteration, having regard to the object with which the enactment was passed; and that which would be material in that sense would be some alteration which might affect the credit and reputation of the artist. To my mind, that is what is prohibited. I do not think it would be necessary to find in any particular case the alteration had affected the character and reputation of the artist; it is sufficient if the alteration is of such a character that it might affect his character and reputation. Applying that principle, I think that this case is brought within the clause" (d). He then dealt with the question whether a change in the colouring of a picture would be such an "alteration" as to be an offence under the clause, and expressed the opinion that that must depend upon the facts of each case. He thought that if the drawing was coloured originally, the putting of different colours would obviously be an alteration; but that the mere addition of colour to a drawing which originally had none would not necessarily be an alteration, although in the majority of cases it probably would be so (e).

(c) (1911) 1 K. B. 771.

(d) (1911) 1 K. B. at p. 780.

(e) At p. 780.

The object of sect. 7 of the Fine Arts Copyright Act being to protect the character and reputation of the author or maker of a painting, drawing, photograph, or negative of a photograph, the penalties are recoverable by such maker and not by the assignee of the copyright, or, *semble*, by the employer of the artist, even though the artist was under such a contract of service with him that, under sect. 5 (1) (b) of the Copyright Act, 1911, the copyright would vest in the employer in the first instance (f).

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Penalties recoverable only by the artist ;

Although the penalties are recoverable summarily, the artist may, if he prefers to do so, bring a civil action for their recovery and for an injunction to restrain future breaches of the clause (g).

and may be recovered in a civil action.

(f) *Carlton Illustrators v. Coleman, supra.*

(g) 25 & 26 Vict. c. 68, s. 8; *Carlton Illustrators v. Coleman, supra.*

CHAPTER XI.

DELIVERY OF COPIES OF BOOKS TO LIBRARIES.

Deposit of
copies of
books must
be made.

THE Copyright Act, 1911, has, in obedience to Article 4 of the Revised Convention of Berne, which provides that the enjoyment and exercise of the rights conferred by the Convention shall not be subject to the performance of any formality, abolished all necessity for registration of copyright, but has substantially re-enacted sects. 6 to 9 of the Copyright Act, 1842 (*a*), relating to the deposit of published books at the British Museum and other libraries (*b*). A strong protest was made by the publishing trade during the passage of the Act of 1911 through Parliament with a view to getting these provisions, which were alleged to be an undue tax upon the trade, modified in favour of the publishers, but these efforts failed, and, in fact, the old law is slightly extended by the Act, inasmuch as the National Library of Wales is now added to the list of libraries which can, under certain circumstances, demand delivery of a copy of a published book.

The libraries
entitled to the
privilege.

Sect. 15 (1) requires the publisher of every book published (*c*) in the United Kingdom to deliver, at his own expense, one copy of the book, within one month after publication, to the trustees of the British Museum, who are to give a receipt for the same. Copies are likewise to be delivered for the benefit of the Bodleian Library, Oxford, the University Library, Cambridge, the Library of the Faculty of Advocates at Edinburgh, the Library of Trinity College, Dublin, and, subject to certain restrictions, the National Library of Wales, at any time within a month after a written demand made within twelve months after publication or within one month after publication if demand is made before publication. In the case of an encyclopædia, newspaper, review, magazine, or work published in a series of numbers or parts the written demand may include all numbers or parts of the work which may be subsequently published (*d*).

Books to be
delivered to

As regards the National Library of Wales, the Board of Trade

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

(*b*) Copyright Act, 1911, s. 15.

(*c*) As to the meaning of "publication," see sect. 1 (3), and *ante*, n. 37.

(*d*) Sub-sect. (2).

has power to make regulations specifying classes of books whereof copies need not be delivered to that library. Accordingly the Board has issued regulations whereby copies cannot be demanded of books of which (i.) the number of copies in the published edition does not exceed 300; or (ii.) the number of copies in the published edition does not exceed 400, and the published price of each volume exceeds £5; or (iii.) the number of copies in the published edition does not exceed 600, and the published price of each volume exceeds £10; but none of these exemptions applies to books written wholly or mainly in Welsh or any other Celtic language, or relating wholly or mainly to the antiquities, language, literature, philology, history, religion, arts, crafts, or industries of the Welsh or other Celtic people, or relating wholly or mainly to the natural history of Wales (*e*).

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National
Library of
Wales.

For the purposes of sect. 15, the expression "book" includes every part or division of a book, pamphlet, sheet of letterpress, sheet of music, map, plan, chart or table separately published, but does not include any second or subsequent edition of a book, unless such edition contains additions or alterations either in the letterpress or in the maps, prints, or other engravings belonging thereto (*f*).

Meaning of
"book."

The copy to be delivered to the British Museum must be one of the best copies published (*g*), but the copy for each of the other libraries is to be one of the copies of which the largest number is printed for sale (*h*).

What copies
are to be
delivered.

Sect. 15 does not make delivery of the copies a condition of copyright, the only effect of non-compliance with the requirements of the section is to expose the publisher, upon whom, and not upon the author, the duty is imposed of delivering the requisite copies of the work, to a fine not exceeding £5 and the value of the book upon summary conviction (*i*). That is to say, he is liable to a separate fine for each library in respect of which default is made.

Effect of
failure to
deliver copies.

No copies of books first published in a foreign country in respect of which an Order in Council has been made under sect. 29 need be delivered, unless the Order in Council otherwise directs (*k*); but it would seem that sect. 15 relates to any other book published in the United Kingdom, even though it may have previously been published in another country and is consequently not entitled to copyright in this country.

Foreign books
published in
England.

(*e*) The National Library of Wales (Delivery of Books) Regulations, 1912, Appendix E., *post*.

(*f*) Sect. 15 (5).

(*h*) Sect. 15 (4).

(*g*) Sect. 15 (3).

(*i*) Sect. 15 (6).

(*k*) Sect. 29 (1), proviso (iii).

PART III.

APPLICATION OF COPYRIGHT LAW TO
SPECIAL WORKS OR UNDER SPECIAL
CIRCUMSTANCES.

CHAPTER I.

NEWSPAPERS, ENCYCLOPÆDIAS AND OTHER COLLECTIVE WORKS.

Definition of
"collective
work."

A "COLLECTIVE WORK" is defined by sect. 35 (1) of the Copyright Act, 1911, as meaning "(a) an encyclopædia, dictionary, year book, or similar work; (b) a newspaper, review, magazine, or similar periodical; and (c) any work written in distinct parts by different authors, or in which works, or parts of works, of different authors are incorporated." A collective work is, therefore, to be distinguished from "a work of joint authorship," which means "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" (a), and will be considered in the next Chapter.

Where the
expression is
used.

Although the Act thus gives a definition of a "collective work," there are only two sections of the Act in which the expression occurs, namely, in sect. 5 (2), the proviso to which is not to apply to an assignment of the copyright in a collective work or a licence to publish a work, or part of a work, as part of a collective work (b), and sect. 24 (1) (a) (ii), which gives the benefit of the extended term of copyright granted by the Act of 1911 to works which were the subject of copyright at the date of the commencement of the Act to the proprietor of a collective work (c). The expression is, nevertheless, a useful one to indicate a class of works which differ in principle from ordinary literary, dramatic or artistic works.

(a) Sect. 16 (3).

(b) *Ante*, p. 128.

(c) *Post*, Chapter VII., "Existing Works,"

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In the case of a collective work there appear to be two distinct copyrights, namely, (1) in the collective work, considered as a whole; and (2) in the distinct works of the various contributors to the collective work. The "author" of the collective work, as a whole, will be the person who edits the work or arranges the various contributions, whether he does or does not himself contribute any distinct portion of the work (*d*), and consequently the copyright in the collective work vests in him, unless he is under a contract of service with the proprietor or publisher of the work (*e*). On the other hand, each separate contributor is the author of his distinct contribution, and, unless he is under a similar contract with the proprietor or publisher of the work, the copyright in his distinct contribution vests in him, and any licence or assignment of his copyright must, if it is to vest the legal right to the copyright, be given or made in writing (*f*).

Distinct copyrights in collective works.

If the author is in the employment of some other person under a contract of service or apprenticeship, and his contribution to the collective work is made in the course of his employment, then, in the absence of any agreement to the contrary, his employer will be the first owner of the copyright; but if the contribution is to a newspaper, magazine or similar periodical the employer will not, in the absence of agreement, obtain the full copyright in his employé's contribution, for there will be deemed to be reserved to the author a right to restrain the publication of the work otherwise than as a part of a newspaper, magazine, or similar periodical (*g*).

Where the author is under a contract of service.

But there is authority for saying that, even if there is no contract of service, the Court ought generally to draw the inference that, if an author is employed by the proprietor of an encyclopædia or similar work to contribute articles to that work and is to be paid for his work, it is the intention of the parties that the copyright shall belong to the employer. The cases to this effect are *Sweet v. Benning* (*h*), *Lamb v. Evans* (*i*), and *Lawrence and Bullen v. Aflalo* (*k*), all decided under sect. 18 of the Literary Copyright Act, 1842, the effect of which was to vest in the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts the copyright in articles contributed to the composite work if those articles were

Contract that copyright shall belong to proprietor of collective work may be implied.

(*d*) *Barfield v. Nicholson* (1824), 2 Sim. & St. 1.

(*e*) Sect. 5 (1).

(*f*) Sect. 5 (2), in which case an assignment for the full term of copyright may be made, see *ante*, p. 128.

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

(*h*) (1855), 16 C. B. 459.

(*i*) (1893) 1 Ch. 218.

(*k*) (1904) A. C. 17; and see *Chantrey v. Dey* (1912), 28 T. L. R. 499.

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paid for and were contributed "on the terms that the copyright therein shall belong to such proprietor."

Lawrence and Bullen v. Aflalo.

It will be sufficient to set out the facts in *Lawrence and Bullen v. Aflalo*. There the respondent Aflalo was employed by the appellants, a firm of publishers, to edit an encyclopædia on sport, and it was a term of the agreement that the former was to be remunerated for his editorial services by a lump sum, for which he was to contribute certain articles without further fee. The respondent Cooke was also employed by the appellants to contribute certain articles to the encyclopædia at so much per thousand words. No express agreement was made as to copyright. The respondents duly contributed their articles, and the encyclopædia was published. Afterwards the appellants published a book called "The Young Sportsman," containing copies of articles written by the respondents for the encyclopædia, and the respondents sought to restrain them from doing so. Mr. Justice Joyce held that the circumstances were not such as to warrant the inference that the copyright was to belong to the publishers, and granted an injunction to restrain the publishers from publishing the articles in separate form (*l*). Upon appeal, this decision was affirmed by Romer and Stirling, L. J.J., dissentiente Vaughan Williams, L. J. (*m*), but the House of Lords reversed the decisions of both Joyce, J., and the Court of Appeal, holding that, upon the facts, the copyright was vested in the proprietors of the encyclopædia (*n*). The House of Lords considered that the question in whom the copyright was vested depended on an inference of fact, and not of law, to be drawn by a reasonable man, from the nature of the contract and all the circumstances. From this point of view the House considered it was not reasonable to suppose that the appellants had paid their money for the right to publish the articles in their encyclopædia, at the same time leaving it open to the respondents to publish their articles the next day in separate form. The House considered that the case was covered by the earlier decisions of *Sweet v. Benning* and *Lamb v. Evans* (*o*) to the same effect.

Quere, whether Lawrence v. Aflalo is still law.

It is, upon the whole, submitted that the Act of 1911 has altered the inference to be drawn in cases where the facts are similar to those in *Lawrence and Bullen v. Aflalo*. It is clear that the case is overruled so far as it decided that the *legal* right to the copy-

(*l*) (1902) 1 Ch. 264.

(*m*) (1903) 1 Ch. 318.

(*n*) (1904) A. C. 17.

(*o*) But see *Bishop of Hereford v. Griffin* (1848), 16 Sim. 190; *Walter v. Howe* (1881), 17 Ch. D. 708, where, however, *Sweet v. Benning* was not cited.

right vested in the proprietors of the encyclopædia, for the respondents were not under a contract of service with the proprietor (*p*), and it is only in such a case that, under the Act of 1911, the copyright could vest in the proprietor in the first instance. But if there is an agreement on the part of the contributor that the copyright in his contribution is to belong to the proprietor, an assignment of the copyright could be compelled, and in the meantime the proprietor would have an equitable title thereto (*q*). But it is submitted that when the Act of 1911 provides that where an author is in the employment of some other person under a contract of service or apprenticeship, and the work is made in the course of his employment by that person, the legal right to the copyright is, in the absence of agreement to the contrary, to vest in the employer, it ought not to be held that the equitable right to the copyright in a work contributed by a paid contributor, not under a contract of service, vests in the employer, unless there is something more than mere employment and payment from which a contract to that effect can be inferred. Otherwise the contributor to a newspaper, magazine, or similar periodical, not under a contract of service, would be worse off than one who was under a contract of service, for the latter is deemed to have reserved to him the right to restrain the publication of the work otherwise than as part of a newspaper, magazine, or similar periodical, whereas no such reservation would, presumably, be implied in favour of the former.

The reservation to the contributor to a newspaper, magazine, or similar periodical of a right to restrain the publication of the work otherwise than as part of a newspaper, magazine, or similar periodical, was inserted in the Bill when it was passing through the committee stage in the House of Lords and is of somewhat doubtful construction and limited application. It will be noticed that it does not apply to all collective works, but only to newspapers, magazines, and similar periodicals, and that the contribution must be an "article," an expression which seems to refer only to contributions of a literary character, and not to illustrations. It is not clear that the author would have any right to sue anybody except the proprietor of the newspaper or magazine for publishing the article separately. The proviso does not, indeed, expressly limit the right in this way, but as the right is to be deemed to be "reserved" to the contributor, it may be urged that

The right to prevent publication otherwise than in a newspaper, &c.

(*p*) See *ante*, p. 117, as to the meaning of a "contract of service."

(*q*) *Ante*, p. 122, 195.

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it is of a contractual nature only (*r*), and not one vesting any portion of the copyright in the author, and the view suggested, perhaps, receives confirmation from the fact that the only remedy given to the author is an injunction, not damages. The right conferred upon the author is, again, a right to restrain the publication of the article otherwise than as part of "a," not "the," newspaper, magazine, or similar periodical. The employer, therefore, is apparently at liberty to republish the article not merely in a reprint of the work to which it was originally contributed, but in any newspaper, magazine, or similar magazine whatsoever. Finally, the section does not reserve to the author any right to republish the article in separate form: neither he nor his employer can do this, except by mutual arrangement.

When contributors are under contracts of service.

If the contributor is under a "contract of service" with the proprietor of the collective work and the contribution is made in the course of his employment, the proprietor will be the first owner of the copyright (*s*). The meaning of a contract of service has been already discussed (*t*). Persons on the regular staff of a periodical will, no doubt, usually be under contracts of service if their engagements are practically exclusive, but the mere fact that anyone is employed to supply contributions to a periodical at a fixed salary does not necessarily involve a contract of service. In the case of *Re Beeton & Co.* (*u*), questions arose as to whether certain contributors to a weekly periodical belonging to a company which was in process of liquidation were "clerks or servants" of the company within the meaning of sect. 209 of the Companies (Consolidation) Act, 1910 (*x*), so as to be entitled to preferential payment of the arrears of salary due to them. A. was a director of the company and was also appointed "dress editress" at a fixed salary per annum. Her duties occupied practically the whole of her time and she did no similar work for any rival paper. B. was also employed by the company at a fixed salary per annum to supply "fashion drawings" for the periodical and the company had a first call on her services, and her work occupied most of her time, but occasionally she did work for other publishers. C. was employed at a fixed salary per annum to supply weekly articles and other information for the periodical,

(*r*) The similar right under sect. 18 of the Literary Copyright Act, 1842, was held to be of a contractual nature: *Mayhew v. Maxwell* (1860), 1 J. & H. 312.

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

(*t*) *Ante*, p. 117.

(*u*) (1913) 2 Ch. 279.

(*x*) 8 Edw. VII. c. 69.

but she also wrote for other publishers. The Court held that A. was a "clerk or servant" of the company, but that B. and C. were not.

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Of course, even though a person be on the regular staff of a paper and under a contract of service he will retain the copyright in work done by him in his spare time and outside the scope of his employment (*y*).

In cases where the copyright in a collective work is vested in one person, but the several contributors have retained the copyright in their separate contributions, difficult questions may arise as to the person who can sue for infringement. For instance, if A.'s article is pirated from a collective work, the copyright in which is in B., can A., or B., or both, sue the infringer? It has sometimes been said that there cannot be two copyrights in the same work, but in a case in which three newspapers combined to employ a person to collect information to be published in each of their papers, it was held that the infringer was liable to an action by each of the newspapers (*z*). That the proprietor of the collective work can sue for infringement, if a single article has been pirated, was decided in *Henderson v. Maxwell* (*a*). It would seem, however, that in that case the copyright in the separate article also was vested in the proprietor of the periodical, although as he had only registered the first number of the periodical and not his copyright in the separate article (registration being, under the Literary Copyright Act, 1842, necessary before action could be brought (*b*)) he was compelled to rely upon the act of the defendant in abstracting a single article as being an infringement of the copyright in the collective work. And under the Act of 1911 it is clearly an infringement of copyright to reproduce "any substantial part" of a work (*c*). It would, therefore, seem to follow that a person who unlawfully copies a single article from a collective work may be exposed to two actions, one at the suit of the proprietor of the copyright in the collective work, and the other at the suit of the proprietor of the copyright in the separate article (*d*).

Who can sue for piracy of any particular article?

(*y*) *Byrne v. Statist Co.*, (1914) 1 K. B. 622.

(*z*) *Trade Auxiliary v. Middlesbrough, &c. Association* (1889), 40 Ch. D. 425; and cf. *Lamb v. Evans*, (1893) 1 Ch. 218.

(*a*) (1877), 4 Ch. D. 163.

(*b*) *Ante*, p. 16. The registration of the first number of the periodical was, under sect. 19, sufficient to protect his copyright in the entire periodical.

(*c*) Sect. 1 (2).

(*d*) There are, however, practical difficulties—*e.g.*, sect. 7 provides that infringing copies are to be deemed the property of the owner of the copyright, who may take proceedings for the recovery of the possession thereof. This right cannot be exercised by both proprietors.

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Copyright in
a newspaper.

Whether copyright could exist at all in the case of newspapers was doubted by Lord Chelmsford (*e*), but there can be no doubt that newspapers are "literary works" and as such entitled to copyright (*f*). There cannot, however, be any prospective copyright in a newspaper (*g*).

Copyright in
news.

There can be no copyright in news as such, but only in the literary form given to news (*h*). The Courts have, nevertheless, in more than one case protected news agencies from having information obtained by them disseminated in breach of faith (*i*). There is no "custom" justifying one newspaper in copying from another (*k*).

Larger pro-
tection to
newspapers
given by the
Act than by
the Berne
Convention.

The English law gives a larger protection to newspaper articles than the Revised Convention of Berne requires, for under the Copyright Act they enjoy complete protection although there may be no notice expressly forbidding the copying thereof. Article IX. of the Convention authorises any *newspaper* to copy from another newspaper any matter other than serial stories and tales, unless the reproduction thereof is expressly forbidden and provided the source be acknowledged. Having regard to this liberty, which, of course, does not justify any such copying by one British newspaper from another British newspaper, express notices forbidding reproduction are sometimes to be found appended to articles in British newspapers, the object being to prevent their being copied by foreign newspapers.

Property in
letters, &c.
sent to
newspapers.

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

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

(*e*) *Platt v. Walter* (1867), 17 L. T. 159.

(*f*) *Cox v. Land and Water* (1869), L. R. 9 Eq. 324; *Walter v. Steinkopff*, (1892) 3 Ch. 489; *Johnson v. Newnes*, (1894) 3 Ch. 633; *Walter v. Lane*, (1900) A. C. 539.

(*g*) *Platt v. Walter*, *supra*. As to the right to the title of a newspaper, see *Licensed Victuallers' Newspaper v. Bingham* (1888), 38 Ch. D. 139; *Borthwick v. The Evening Post* (1888), 37 Ch. D. 449; and *ante*, p. 66.

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

(*i*) *Exchange Telegraph Co. v. Gregory*, (1896) 1 Q. B. 147; *Exchange Telegraph Co. v. Central News*, (1897) 2 Ch. 48; *ante*, p. 35.

(*k*) *Walter v. Steinkopff*, *supra*.

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

undertook to return unaccepted communications the case would be different.

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Difficulties sometimes arise by reason of alterations made in the matter communicated by correspondents and others to newspapers. The rule may be taken to be as follows: Where the author's name appears, any alterations of a nature which may affect the credit or the literary reputation of the author would be illegal, and an injunction might be obtained to restrain the publication (*m*). Of course, if the communication, though signed, contained any matter of an objectionable or offensive description this might be omitted, but the insertion of new matter which would have the effect of distorting the writer's meaning would not be permissible.

Alterations in communications made to newspapers.

As to unsigned communications, the right of the editor to alter seems to be unlimited. The author here can suffer no injury in reputation, the "custom of the trade" in this respect is well known and must be deemed to be known to the author, and the alterations may be so substantial as to make the editor the "author" of the paragraph (*n*).

Certain privileges are accorded to newspapers by the Copyright Act in dealing with the works of other persons. It is no infringement of the copyright in those works to deal with them fairly for the purposes of a review or "newspaper summary" (*o*). A newspaper may also publish a report of a lecture (*p*) delivered in public, unless the report is prohibited by 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; and even if there be such a prohibition, a "summary" of any lecture may be published (*q*); and if the "address" be of a political nature a full report may be published (*r*).

Special privileges of newspapers.

A modern feature of newspaper production is the publication of pictures and photographs illustrating the topics of the day, and various agencies exist for supplying the press with such illustrations. The practice is for these agencies to submit prints of photographs to the illustrated papers, upon the understanding

Pictures submitted by press photographers.

(*m*) *Archbold v. Sweet* (1832), 5 C. & P. 219; but see *Lee v. Gibbings* (1892), 9 T. L. R. 773.

(*n*) *Springfield v. Thame* (1903), 89 L. T. 242.

(*o*) Sect. 2 (1) (i); see *ante*, p. 144.

(*p*) A "lecture" includes an address, speech or sermon: sect. 35 (1).

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

(*r*) Sect. 20.

CAP. I.

that these papers shall be at liberty to use such of these prints as they desire, but there is no obligation upon the paper to use all or any of the prints. If they publish any, then an agreed fee is payable for each picture used. The legal effect of this arrangement is, that in the absence of any evidence to the contrary, the agency makes an offer to the paper to permit them to use the pictures submitted for publication in the paper, upon payment of the agreed sum. Like all offers, however, made without consideration, this offer is liable to be revoked by notice, and therefore the proprietor of the paper cannot insist upon a right to publish pictures which have been submitted to them by the agency, after the agency has given notice of the withdrawal of their permission, and this notwithstanding that the paper has used any picture previously to the revocation of the permission and has the necessary block for printing the same in its possession (s).

Advertisements.

In the case of *Lamb v. Evans* (t), Mr. Justice Chitty held that there might be copyright in the headings under which advertisements were classified, but not in the advertisements themselves. The Court of Appeal in the same case doubted whether the learned judge had not been too cautious, and thought there might be copyright in the arrangement of a sheet of advertisements (u).

Nom de plume.

Although there cannot be any copyright in a *nom de plume* in a case where the plaintiff had been in the habit of contributing articles to a newspaper under a *nom de plume* which she had invented, the Court held that as against the proprietor of the paper the plaintiff was entitled to the exclusive right to print, publish, and use her *nom de plume* after her connection with the publication had ceased upon the ground that the newspaper, by continuing to publish articles under the same *nom de plume*, were likely to deceive the public into the belief that the articles were contributed by the plaintiff (x).

(s) *Bowden v. Amalgamated Pictorials, Ltd.*, (1911) 1 Ch. 386.

(t) (1892) 3 Ch. 462.

(u) (1893) 1 Ch. 218; see *ante*, p. 59.

(x) *Landa v. Greenberg* (1908), 24 T. L. R. 441; and see generally as to the right to a name or title, *ante*, p. 66.

CHAPTER II.

WORKS OF JOINT AUTHORSHIP.

A COLLABORATION—or, to use the expression employed in the Copyright Act, “a work of joint authorship”—must be distinguished from a collective work. For the purposes of the Copyright Act, 1911, a work of joint authorship means “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.” If the contributions are capable of being distinguished in the completed work, then that work is a collective work (*a*). All the collaborators must answer the description of “authors,” and, therefore, if one person is merely the medium for transmitting to paper or canvas the original work of another, that is neither a joint work nor a collective work (*b*).

What is a collaboration?

There was no definite decision as to the term of copyright in a joint work under the old law, but probably a literary work was entitled to protection during the life of the longest liver of the co-authors and for a period of seven years from his death or for a period of forty-two years, whichever period was the longer (*c*). The complicated provisions of the new Act upon the subject of joint authorship do not appear to have been very carefully thought out, and some difficult problems may arise for determination. Sect. 16 (1) of that Act now provides that, in the case of a work of joint authorship, copyright is to subsist during the life of the author who first dies and for a term of fifty years after his death or during the life of the author who dies last, whichever period is the longer. In other words, the work will be entitled to copyright so long as any of the co-authors is still living, but the protection will cease immediately upon the death of the longest liver of the authors, if—as, of course, in the great majority of cases he is unlikely to do—he outlives the author who died first by something

Term of copyright in joint works.

(*a*) See *ante*, p. 224.

(*b*) *Ante*, p. 108 *et seq.*

(*c*) *Nottage v. Jackson* (1888), 11 Q. B. D. 627, 637.

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more than fifty years. If the period which elapses between the death of the author who died first and the author who died last amounts to less than fifty years, then the *post mortem* period of fifty years runs from the death of the author who died first. Thus, if a joint work were published in 1912, and the first of the authors were to die in 1915, and the last in 1965, or at any later date, copyright would cease immediately upon the death of such last of the authors, but if the last of the authors were to die at any date prior to 1965, the copyright would cease in 1965.

Some of the authors not satisfying the conditions necessary for obtaining copyright.

The Act next provides for the case where some one or more of the joint authors fails to satisfy the conditions conferring copyright laid down by the Act (*d*). In such a case the work is to be treated, for the purposes of the Act, as if the other author or authors had been the sole author or authors, except that the term of copyright is to be the same as it would have been if all the authors had satisfied such conditions as aforesaid. This provision appears to have only a very restricted operation, because there are only two conditions laid down by the Act for the acquisition of copyright, namely: (1) that in the case of published works, they must be first published within such parts of His Majesty's dominions as the Act extends to, and (2) in the case of unpublished works, the author was at the date of the making of the work either a British subject or resident within such parts of His Majesty's dominions as aforesaid (*e*). It is fairly obvious that, as regards the first condition, if one of the authors complies with it, all must do so, and therefore the provisions now referred to can only operate in the case of unpublished works, and it is probably rare to find an artistic work which could be a "joint work" within the meaning of the Act (*f*).

Unpublished joint work of foreigner and British subject.

Suppose that A. and B. jointly produce a work and that the same is not published, A. being a British subject, and B. a foreigner not resident, at the time when the work was made, in any part of the King's dominions to which the Act extends, nor entitled to protection under the international provisions of the Act (*g*). In such a case B. would not be entitled to any protection if he were the sole author (*h*), and consequently A. is to be treated, for the purposes of the Act, as if he were the sole author, except

(*d*) Sect. 16 (2).

(*e*) Sect. 1 (1), subject, however, to sect. 23.

(*f*) Is the work of an artist and an engraver in producing an engraving a "joint work"? Presumably, if a new edition of A.'s work is produced by B. it is not a joint work, for the work of the two authors could be distinguished by a comparison between the old and new editions.

(*g*) Sect. 29.

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

that the term of protection is to be the same as though both authors had been British subjects at the time the work was made (*i*).

Although, "for the purposes of this Act," A. is to be deemed to be the sole author, it does not, of course, follow that B. in the circumstances we are now supposing has no rights as against A. A. is no doubt considered to be the legal owner of the entire copyright, and he—and he alone—could bring an action for infringement, but he may have contractual obligations towards B., and, in the absence of agreement to the contrary, he would probably be regarded as trustee of the copyright for himself and B. in equal shares.

As regards the term of copyright in the case supposed, the fact of B. being a foreigner cannot make any difference to that term of copyright, provided the work be published at a time when he and A. are both living; nor in the case of a photograph, where the period of protection is a gross period of fifty years (*k*). If the work be published, then, from the date of publication, both A. and B. satisfy the conditions laid down by the Act for conferring copyright, provided first publication takes place in a part of the King's dominions to which the Act extends (*l*). The ordinary principle will then apply, and the work will fall into the public domain either fifty years after the death of the author who dies first or upon the death of the author who dies last, whichever shall be the later date (*m*).

If, on the other hand, the work is not published at all, or is only published after the death of either A. or B. or both, then the term of copyright will depend upon whether the work is either a literary, dramatic, or musical work, or an engraving, or is an artistic work other than an engraving. In the case of an artistic work other than an engraving, sect. 17—shortly to be considered—has no application. The copyright period runs from the date of the making of the work, and is, in all cases, the same as if the work had been published at that date (*n*). In the case supposed, A.—the British subject—is to be deemed the sole author of the artistic work, but the term of copyright is to be the same as though both authors had been British subjects, that is to say, the term is to be neither longer, nor shorter. Consequently, if A. survives B. for less than fifty years, the copyright runs out fifty years after B.'s death, just as though A. and B. had both been British subjects. Similarly, if B., the foreigner, should happen

(*i*) Sect. 16 (2).

(*m*) Sect. 16 (1).

(*k*) Sect. 21.

(*n*) See *ante*, p. 25.

(*l*) Sect. 1.

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to outlive A., the British subject, by more than fifty years, the work will remain protected during the residue of B.'s life, and his rights enforceable by A.'s personal representatives.

Posthumous
joint works.

Before considering the period of protection in the case of a literary, dramatic, or musical work, or an engraving, made jointly by a foreigner and a British subject, but which is not published until after the death of one of the authors, it will be necessary to consider the general effect of sect. 17 (1) relating to posthumous works.

It is provided by this section that, in the case of a joint literary, dramatic or musical work, or an engraving, in which copyright subsists, 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 until publication, or performance, or delivery in public, whichever first may happen, and for a term of fifty years thereafter. This section, therefore, has no application except when the joint work was unpublished at the date of the death of the author who dies last: if the work is published after the death of one author, but whilst his co-author is living, the term of copyright must, apparently, be measured strictly by sect. 16, that is to say, it runs out fifty years after the death of the author who dies first or upon the death of the author who dies last, whichever date is the later. This may have somewhat curious consequences. Thus, if the first author were to die in 1915, and the work were published in 1920 by the co-author, who died in 1921, the copyright would run out in 1965; whereas if the second author had died in 1920, whilst the work was in the press, the copyright would not run out until 1970; or—to take an extreme case—if the second author delayed publication until 1964, and died the year after, the work would fall into the public domain immediately upon his death; in other words, would receive protection for one year only!

Applying, then, sect. 17 to the case where one of the joint authors is a foreigner, it will be remembered that although the work is to be considered as the work of the British subject alone, this is not to have any effect upon the term of protection. The British subject neither gains advantage or suffers disadvantage, in respect of the period during which the work will be entitled to copyright, from the fact that his co-author was a foreigner. Thus, to follow the example given above of an author dying in 1915, and his work being published by his co-author in 1920, we have

seen that if both authors were British subjects, the copyright would run out in 1965. If the work were the joint work of a foreigner and a British subject, and the latter were the one to die in 1915, copyright is still to expire in 1965, notwithstanding that, if the work had been, strictly, the work of the British subject alone, the copyright would have continued until 1970.

It will be remembered that by sect. 3 (1) of the Act it is provided that in the case of the work of a single author published in his lifetime, the period of *post mortem* copyright shall be divided into two periods; during the first period of twenty-five years the work being entitled to unrestricted protection, but during the last twenty-five years anybody being at liberty to reproduce the work upon payment of a royalty (o), and, further, it is provided by sect. 5 (2) that this latter modified copyright is to be incapable of assignment by an author except by will (p). It remains to be considered how these provisions apply to joint works. There is no mention of joint authorship in sect. 3, and, therefore, it seems open to contend that its proviso does not apply to joint works at all. Sect. 16, again, does not in so many words refer, as sect. 17 does, to this proviso, but it contains a general provision that "references in this Act to the period after the expiration of any specified number of years from the death of the author shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first or after the death of the author who dies last, whichever period may be the shorter." This provision is not, perhaps, a model of clear draftsmanship, but in applying it to the proviso to sect. 3 (1) its effect would appear to be, that the period of absolute copyright ends either at the expiration of twenty-five years from the death of the author who dies first or immediately upon the death of the author who dies last, whichever date happens to be the later. In this way it is secured—as is only fair—that so long as any of the joint authors is still living the copyright is absolute, but that, if the period between the death of the author who dies first and the author who dies last is more than twenty-five years, the period (if any) during which anybody is at liberty to reproduce the work upon a royalty basis commences immediately upon the death of the latter author. The length of the period of modified copyright will thus depend upon circumstances, and there may, conceivably, be no such period. For example, A. and B. are joint authors of a work published

Application
of period of
modified
copyright to
joint works.

(o) *Ante*, p. 103.

(p) *Ante*, p. 128.

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in 1915, and A. dies in 1920. If B. dies in or after 1970, the copyright runs out upon A.'s death, and there is no period of modified copyright. If B. dies in or prior to 1945, the period of modified copyright will commence in 1945, and run until 1970, when the copyright will expire. If B. dies at any date between 1945 and 1970, the period of modified copyright will commence immediately after, but not before, B.'s death, and will run until 1970, when the copyright will expire. If the work, being a literary, dramatic or musical work, or an engraving, is not published until after the death of both A. and B., the period of modified copyright commences twenty-five years after publication (*q*). The period of modified copyright is unassignable except by will (*r*).

Compulsory licences.

With regard to the power to grant compulsory licences to republish literary, dramatic, or musical works which is given under certain circumstances by sect. 4 (*s*) after the death of an author, it is provided that the section shall not apply to joint works until after the death of the author who dies last (*t*).

Rights of co-authors *inter se*.

Co-authors hold the copyright as tenants in common rather than as joint tenants (*u*), and, presumably, in the absence of agreement to the contrary, in equal shares. Upon the death of one co-author, therefore, his interest does not pass to his co-authors, but to his personal representatives as part of his estate. One of several authors cannot, therefore, grant a licence to publish which will be binding upon the others (*x*); but, on the other hand, one of the joint authors can sue in respect of an infringement and obtain an injunction and his share of damages (*y*) without joining the other authors as plaintiffs.

Where co-authors do not all satisfy the provisions of the Act.

Some difficulty seems to arise if one or more of the joint authors fail to satisfy the conditions conferring copyright laid down by the Act. In that case, as we have seen, the work is to be treated as though the author who does satisfy such conditions was the

(*q*) Sect. 17 (1).

(*r*) Sect. 5 (2), *ante*, p. 128.

(*s*) See *ante*, p. 101.

(*t*) Sect. 16 (1).

(*u*) *Lauri v. Renad*, (1892) 3 Ch. 402. It is true that the authority of this decision is diminished by the fact that Mr. Justice Kekewich considered that *Powell v. Head* (1879), 12 Ch. D. 686, was conclusive on the point, whereas no such point was involved in that decision, for the persons there held to be tenants in common were each assignees of a moiety of the copyright from the author. It is, nevertheless, submitted that it is reasonably clear that the statement in the text is correct. See, however, *Marzials v. Gibbons* (1874), L. R. 9 Ch. 58.

(*x*) *Powell v. Head*, *supra*.

(*y*) *Quære*, whether he could not recover the full amount of damages, subject to a liability to account to his co-authors.

sole author. The latter, consequently, may not only sue for infringement, but, apparently, may grant licences to publish without the necessity of obtaining the consent of his co-author (z). If, however, the work is first published in any part of the King's dominions to which the Act extends, all the authors become legally entitled to the copyright (a). What, then, is the position, supposing the author who, prior to publication, was considered as the sole author granted a licence to publish, contrary to the wishes of his co-author? It is thought that the publisher is not exposed to an action for infringement at the instance of the latter, but that he can rely upon the licence obtained from the author who, at the time when the licence was given, had the legal right to grant it. It is, however, provided by sect. 35 (2) that, for the purposes of the Act (other than those relating to infringements of copyright), a work is not to be deemed to be published or performed in public if published or performed in public without the consent or acquiescence of "the author," his executors, administrators, or assigns. In a case of joint authorship it seems probable that the consent of the author who satisfies the conditions of the Act will be sufficient to make the work a published work within the meaning of the statute, and that the other author's only remedy will be in damages against his co-author. It is more difficult to say whether this will be so if all the authors satisfy the requirements of the Act (b). Inasmuch as a licence to publish must *primâ facie* be given by all co-owners, it would appear that one co-owner cannot commit his co-owners as to place or time of first publication.

It is provided by sub-sect. (4) of sect. 16 of the Act that where a married woman and her husband are joint authors of a work, the interest of the married woman shall be her separate property. Presumably, this sub-section was inserted in order to make it clear that the whole of this copyright is not to belong to the husband under his common law right to the personal property of his wife. It is a little curious, therefore, to find that there is no similar provision for the case where a married woman is a co-author with a person other than her husband.

Husband
and wife
co-authors.

(z) *Lauri v. Renad, supra*; *Powell v. Head, supra*; *Trade Auxiliary Co. v. Middlesbrough* (1898), 40 Ch. D. 425.

(a) *Ante*, p. 234.

(b) *Macmillan v. Dent*, (1907) 1 Ch. 107.

CHAPTER III.

WORKS OF ARCHITECTURE.

The claim of architects to protection.

ARCHITECTS have, for many years past, claimed for their works similar protection to that accorded to works of sculpture. The justice of this claim was recognised in some foreign countries, notably in France and Belgium, and more recently in Germany, even prior to the revision of the Berne Convention after the conference of the Powers at Berlin in the year 1908, but, prior to that revision, no party to the Berne Convention was compelled to accord copyright protection to architectural works themselves, as distinguished from architectural plans and sketches. Now, under the Revised Convention works of architecture are included amongst the subjects to which all countries, parties to that Convention, are bound to grant protection (a).

Opposition to these claims.

The committee appointed by the British Government in the year 1909 to consider what alterations in the English law were necessary or advisable in order that England should come into line with the other countries who were parties to the Revised Convention of Berne, only by a majority reported in favour of the inclusion of works of architecture amongst the subjects of copyright. Further opposition to the claims of architects was met during the passage of the Copyright Bill through Parliament. The architects, however, triumphed to this extent, that "architectural works of art" are now definitely included amongst the works to be protected under the Copyright Act, although the remedies for the infringement of the copyright in those works are considerably less drastic than those inserted in the Bill, as originally laid before Parliament.

Grounds of objection.

The main objections urged against giving copyright to architectural works have been the difficulty in distinguishing between a work of such an artistic character as to merit protection, from one having no such artistic character, and the proper remedies to be granted against an infringer. To the former objection it

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

has been replied that the difficulty is no greater than that met with in the case of any other artistic work, and is one which the Courts of the foreign countries which have hitherto granted protection to architectural works have not found to be insuperable (*b*). The second objection has been met by the Act only giving limited remedies for infringement of copyright in such works. The fear, again, has sometimes been expressed that the inclusion of works of architecture amongst the works entitled to copyright would lead to a flood of litigation. Such fear is probably unfounded, and at the time of writing no case of an architect complaining of infringement has come before the Courts. It must be remembered that the burden of proof will lie upon any architect who brings an action for infringement to show that his work is original, and that the alleged infringing edifice must have been copied from his, but architects feel that it is a considerable gain to their profession that the principle has at length been acknowledged, that one architect has no right to servilely copy a building designed by another, and that the mere fact that an action for infringement is possible will be some protection to them against the piracies of which they have complained in the past (*c*).

An architect's plans and sketches were, even prior to the Act of 1911, protected as "drawings" under the Fine Arts Copyright Act, 1862 (*d*), but upon a "sale" of the plans the copyright ceased unless it was expressly reserved (*e*). It was therefore urged that all that architects could reasonably require was that more effective protection should be given to their plans, inasmuch as a building could seldom be copied without plans being first made. The answer to this contention, however, is that it has always been assumed that a building—that is to say, a constructed edifice—is not an infringement of the copyright in a drawn plan, and that although an architect, seeing his building imitated, may well suspect that his plans have been copied, the burden of proof would lie upon him, and it might be very difficult for him to prove that this had in fact been done. Moreover, it has been held (*f*) that if a person employs an architect to design a building, upon the latter being paid his remuneration the plans, in the absence of contrary

Plans and sketches.

(*b*) Two decisions of foreign Courts will be found set out in an Appendix to the published evidence taken before the British Copyright Committee in 1909 (Blue Book, Cd. 5051).

(*c*) In an Appendix to the Blue Book referred to above (pp. 174, 175), a list of twenty-three alleged flagrant piracies is given.

(*d*) 25 & 26 Vict. c. 68.

(*e*) *Ante*, p. 20.

(*f*) *Gibbon v. Pease*, (1905) 1 K. B. 810; *Ebdy v. McGowan*, cited in Hudson on Building Contracts, Vol. II., p. 8.

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agreement, become the property of his client. Such client might then use the same plans for erecting another similar building without infringing any copyright in the plans. Further, it is probably not without the range of possibility for an architect, by merely viewing another building and by making a series of photographs, to copy the distinctive features of that building without ever having access to the plans from which it was erected.

Sketches and plans under the new Act.

The Act of 1911 has, of course, not deprived the architect of his copyright in his plans and sketches, but it is a little curious that apparently his plans are protected as "literary works," and his sketches as "artistic works." This results from the definition of "literary works" contained in the Act, which includes amongst literary works "maps, charts, plans, tables and compilations," whereas an "artistic work" includes a "drawing" (*g*). This seeming anomaly is not of great importance, but it may have the effect of giving a longer term of copyright to the plans than to the sketches, for sect. 17, relating to posthumous works, does not apply to artistic works other than engravings, so that, notwithstanding that the architect's sketches are unpublished at his death, the copyright will run out fifty years later, although his plans, being literary works, are protected under the section above referred to until publication and for fifty years thereafter (*h*).

Ownership of plans does not give right to copy them.

The Act does not alter the rule as to the *primâ facie* ownership of an architect's plans, but the rule that these generally become the property of the client does not mean more than that the sheets of paper, with the plans drawn upon them, belong to the client; it does not imply that the copyright in the plans passes to the client. This would only be so if the architect assigned the copyright in writing (*i*), or he were under a contract of service with his client (*k*). The client therefore may not make copies of the plans, except for the purposes of private study (*l*). On the other hand, if the architect has parted with the copyright in his building, he may "use" his plans and sketches if, as is believed to be generally the case, the plans remain in his possession, provided he does not imitate the main design (*m*).

Definition of architectural work of art.

Turning now to the specific provisions of the Act relating to works of architecture, we find that architectural works of art are

(*g*) Sect. 35 (*i*).

(*h*) *Ante*, p. 101. See also sect. 2 (1) (*iv*). It may be remarked, however, that the Literary Copyright Act, 1842, also included "maps, charts or plans" amongst the subjects of copyright, yet it was generally considered that an architect's plans fell under the Fine Arts Copyright Act, 1862, and it is possible that "maps, charts, plans, tables and compilations" in sect. 35 of the Act of 1911 do not include architects' plans.

(*i*) Sect. 5 (2).

(*l*) Sect. 2 (1).

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

(*m*) Sect. 2 (1) (*ii*).

included amongst "artistic works," and that such a work is defined as meaning "any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure, provided that the protection given by this Act shall be confined to the artistic character and design, and shall not extend to processes or methods of construction" (n). The work must also be "original" (o), but, as we have seen (p), this does not imply more than that the work is the personal effort of the architect.

Protection is—unfortunately, in our opinion—limited to works "having an artistic character or design." One of the differences between works of architecture and other works of art lies in the fact that the former are, primarily, utilitarian in character, whilst the latter are, primarily, artistic. It is submitted that, notwithstanding that the buildings must have an artistic character or design, the Courts will not constitute themselves judges of artistic style. The object of the provision in question is, it is submitted, to prevent an architect from claiming protection against imitation of something which he has erected in a certain way, with a view to obtaining a purely utilitarian object. For instance, if he has made a chimney of a certain shape or height with a view to prevent its smoking, his chimney would not be entitled to copyright; he must seek protection for his invention, if he can, under the patent laws. On the other hand, it is submitted that the fact that a building is plain does not necessarily disentitle it to protection—its very beauty may arise from its simplicity—although it will doubtless be more difficult to prove infringement of copyright in a plain building than in one showing marked originality. An architect who has erected a façade showing six windows and a door clearly could not complain of another building showing the like number of windows and doors, for each architect may have drawn from common sources; but if his plain building has been servilely copied down to the smallest detail, there seems no good reason for depriving him of the right to complain. Slight differences between buildings of no marked originality will prevent them from being held to be copies of each other, which would not be the case if the buildings were of an original character.

The work to be protected must be a "building or structure or a model for the same." No general definition of the words "building or structure" can be given (q), although it has been

Artistic character or design.

Building or structure.

(n) Sect. 35 (1).

(o) Sect. 1.

(p) *Ante*, p. 49.

(q) *Per Byles, J., Stevens v. Gourley* (1859), 7 C. B. N. S. 99.

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said that *primâ facie* a "building" means "a block of brick or stone work covered in by a roof" (*r*). But the words must be construed reasonably, having regard to the object of the statute (*s*). Upon this principle, it is thought that the building or structure must be of such a character as is usually erected upon the ground from plans with elevations, but that, if it be of such a character, it will be entitled to protection not only as a whole, but in every architectural detail. For instance, a chimney-piece might, it is thought, be entitled to copyright, subject to this, that the detail must not be capable of being registered as a design under the Designs Act, 1907 (*t*), and intended to be used as a model or pattern to be multiplied by some industrial process (*u*).

First owner
of copyright.

The copyright in an architectural work will vest, in the first instance, in the person who has been the author of the plans (*x*). Such person—and not the builder—is clearly the "author" of the architectural work. It will not be usual for an architect to be under a "contract of service or apprenticeship" (*y*) with the client who employs him to design a building, and the latter must remember that if his building is copied, it will be the architect, and not himself, who will have the right to complain; unless he has obtained an assignment of the copyright in writing from the architect (*z*). So, the client will have no right to build other buildings from the plans which, as we have seen, will generally be his property, whilst the architect, unless he has expressly or impliedly agreed to the contrary (*a*), will be at liberty to repeat the building.

"Publication."

It would seem that an architectural work of art will rarely be a published work. "Publication," for the purposes of the Act, means "the issue of copies of the work to the public," and "photographs and engravings" of architectural works are not to be deemed publication. It is submitted that not even the repetition of a building down to the smallest detail would be a "publication" within the meaning of the Act, for that could hardly be

(*r*) *Mor v. Williams*, (1892) 1 Q. B. 264. See also *Waite's Exors. v. Inland Revenue Commrs.*, (1914) 3 K. B. 196.

(*s*) *Per Lindley, L. J., Lavy v. London County Council*, (1895) 2 Q. B. 577, 582. It is submitted, therefore, that cases decided under other Acts, *e.g.*, the London Building Acts, have little or no application. As to the erections that have been held to be "buildings or structures" under the London Building Act, see 2 Halsbury's Laws of England, p. 175.

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

(*u*) Sect. 22, see *ante*, p. 95 *et seq.*

(*x*) Sect. 5 (1).

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

(*z*) See Chapter "Assignment of Copyright," *ante*, p. 120.

(*a*) Probably an implied agreement not to repeat the building might be readily implied.

regarded as an issue of copies "to the public" (*b*). "Engravings" include etchings, lithographs, woodcuts, prints, and other similar works (*c*), but do not include paintings and drawings. If a painting or drawing can be correctly called a "copy" of a building or structure (*d*), it would seem that the only way in which the architect could publish his work would be by issuing paintings or drawings to the public (*e*).

It consequently follows that, apart from international regulations, a foreign architect does not obtain copyright in buildings erected according to his designs in England, unless he were—as, no doubt, he usually would be—resident within a part of the King's dominions to which the Copyright Act extends during a substantial portion of the period during which the buildings were being constructed (*f*). On the other hand, it follows from the fact that construction is not publication, that a British architect could claim protection in England against piracy of a building which has been erected from his designs in a foreign country (*g*).

Foreign architects.

The fact of non-publication of an architect's work does not, however, make any difference to the term of copyright. The period of protection will in any case be during the life of the author and fifty years after his death, for sect. 17 of the Act, relating to posthumous works, does not apply to an architectural work.

Term of copyright.

Nor is the date when the copyright commences a matter of great moment, but the question may be material if it should ever be necessary to decide the question whether an architectural work was or was not entitled to protection at the date when the Copyright Act first came into force, that is, the 1st July, 1912. The protection given to architectural works is an entirely new right conferred for the first time by the Act of 1911, and that Act has no retrospective operation, sect. 24 only applying to works which were entitled to some copyright protection immediately before the commencement of the Act (*h*). Supposing, then, a building or structure were in the course of erection on the 1st July, 1912, but were not completed until after that date; is that building or structure entitled to protection under the Act? The answer probably is that that portion of the building which was erected after

Commencement of copyright.

(*b*) Sect. 1 (3). For the same reason the building will not be a publication of the plans.

(*c*) Sect. 35 (1).

(*d*) As to which see *ante*, p. 191.

(*e*) Paintings do not infringe the copyright in the structure (sect. 2 (1) (iii)).

(*f*) Sects. 1 (1) and 35 (4).

(*g*) Sect. 1 (1) (b).

(*h*) See *post*, Chapter VII.

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the date in question is so entitled, but not that portion which was erected prior to that date. Copyright, in fact, probably attaches to each portion of a building as the same is completed.

Infringe-
ment.

It is quite impossible to say how the Courts will apply the general principles as to infringement of copyright (*i*) to architectural works, but it is to be noticed that paintings, drawings, engravings and photographs, unless they are in the nature of architectural drawings or plans, are not infringements of the copyright in such works (*k*). In fact, the infringement must be another building or structure.

Remedies
for in-
fringement.

As regards the remedies for infringement, it is provided (*l*) that where the construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work has been commenced (*m*), the owner of the copyright is not to be entitled to obtain an injunction or interdict either to restrain the construction of such building or structure or to order its demolition; further, that the other provisions of the Act which provide that an infringing copy of a work is to be deemed to be the property of the owner of the copyright, or impose summary penalties, are not to apply in like cases. If, therefore, the infringing building has been either finished or commenced, the only remedy of the owner of the copyright will be an action for damages (*n*).

(*i*) *Ante*, Part II., Chapter VIII.

(*k*) Sect. 2 (1) (iii).

(*l*) Sect. 9.

(*m*) The actual building must have been commenced. The section would not apply if only the plans had been got out.

(*n*) *Ante*, Chapter IX. Part II.; and as to an innocent infringer, see *ante*, p. 203.

CHAPTER IV.

CINEMATOGRAPHS.

THE principle of the cinematograph is well known. It consists of a series of photographs projected upon a screen in such rapid succession as to give the illusion of motion. Similar illusion might, doubtless, be produced by a series of drawings, but, for practical purposes, at present, photography may be treated as the exclusive means for obtaining the necessary pictures.

The methods of cinematography.

A film may be regarded as an original work or a derivative work or a combination of the two. The producer of the film may adopt one of several courses:—

Courses open to the maker of a film.

1. He may photograph a single incident or series of consecutive incidents actually occurring in life—*e.g.*, the race for the Derby.

2. He may photograph a series of disconnected incidents and combine them in such a way as to make them appear as though they had happened consecutively—*e.g.*, by photographing incidents in the life of an individual which actually happened on different days, but which, upon the cinematograph, are made to appear as though no interval of time had elapsed between the various incidents.

3. He may re-enact, by his own actors, in front of the camera selected incidents as he may conceive them to have in fact happened—*e.g.*, a life of Mary Queen of Scots or Queen Victoria.

4. He may dramatize the novel of another and perform his work in front of the camera, arranging the scenery and engaging the performers.

5. He may make a film from a dramatic piece as it is actually being played in a theatre at the time, or procure the piece to be acted in order to make a film.

6. He may himself be the author of the novel or drama to be reproduced on the cinematograph, or he may employ another to write him a plot.

It is obvious, therefore, that the maker of the film is liable, in doing so, to infringe the rights of various other persons, but that,

How affected by the copyright laws.