

settled that piracy may be committed by taking a few pages from a copyrighted book; to hold that the substance of the whole may be lawfully appropriated, if published in the form of an abridgment, is as absurd as it is inconsistent and unjust. An unauthorized abridgment of a work entitled to protection must, therefore, be regarded as piratical.¹

TRANSLATIONS.

Statutory Provision for Reserving Right of Translation and Dramatization. — Section 4952 of the Revised Statutes of the United States provides that “authors may reserve the right to dramatize or translate their own works.” The manner of doing this is not prescribed or indicated. A notice to that effect, printed on the title-page or that following, would doubtless be enough. When the right of translation has thus been reserved by the author, it will be a clear violation of the statute for any person without authority to translate the book; and, when the right of dramatization is reserved, it is equally clear that all

¹ It has been shown that Justices Story and Clifford regarded an unauthorized abridgment as piratical, when its effect is to damage the author of the original; and that the views expressed by Mr. Justice McLean in *Story’s Executors v. Holcombe* are in entire accord with the conclusion reached in the text.

Mr. Chancellor Kent, criticising the doctrine recognized *obiter* in *Dodsley v. Kinnersley*, said: “This latitudinary right of abridgment is liable to abuse and to trench upon the copyright of the author.” 2 Com. 382, note *e*. After questioning the soundness of the views expressed by Lord Hardwicke in *Gyles v. Wilcox*, Lord Campbell says: “I confess I do not understand why an abridgment tending to injure the reputation and to lessen the profits of the author should not be an invasion of his property.” 6 Lives of the Chancellors (10 vols, London, 5th ed.), 202, 203, note *e*.

In *Tinsley v. Lacy*, Vice-Chancellor Wood, afterward Lord Hatherley, said: “The authorities by which fair

abridgments have been sanctioned have no application. The court has gone far enough in that direction; and it is difficult to acquiesce in the reason sometimes given, that the compiler of an abridgment is a benefactor to mankind by assisting in the diffusion of knowledge.” 1 Hem. & M. 754.

“In the United States and in England, any man may make an abridgment of the work of another; that is, any man has a right to cut the ears of my corn, provided he leaves the stalks uncut; to drink my wine, provided he leaves me the casks.” Lieber, 2 Political Ethics (Woolsey’s ed., Phila., 1875), 122.

Unsuccessful attempts have been made to extend the current fallacious theory concerning abridgments to a diminutive photograph of a painting, and to reprints reduced in size of maps and illustrations. *Gambart v. Ball*, 14 C. B. n. s. 306; *Bradbury v. Hotten*, Law Rep. 8 Exch. 1; *Farmer v. Calvert Lithographing, Engraving, & Map-Publishing Co.*, 5 Am. L. T. R. 168.

unauthorized persons are barred from dramatizing the work, either for publication in print or for representation on the stage. But because the statute gives to every author the privilege of reserving the right to dramatize and to translate his work, it does not follow that such right does not exist in the absence of express reservation. If the right is in harmony with the general purpose of the statute, and is properly within the grant made by Congress, it cannot be destroyed without language which is express or whose meaning is clearly implied to that effect. The provision in question simply directs how the right of translation and dramatization may be put beyond doubt and dispute. It neither creates nor destroys that right. The existence and limitations of the right are to be determined by a judicial construction of the entire statute in accordance with established principles.

Nor are the author's rights in his work, in the absence of an express reservation, affected by the question whether he has or has not himself dramatized or translated it. If he has made a dramatization or translation, and secured a copyright for it, this copyright will protect the production for which it was granted; but it cannot prevent any person from making a like use of the original. Whether the unlicensed translation or dramatization of the original is piratical must be determined by the nature and extent of the property in the original.

Unlicensed Translation in Absence of Reservation. — The inquiry now arises, whether, in the absence of any special reservation, the unauthorized translation of a book is a violation of the copyright in it. This question has been adjudicated in but the one case of *Stowe v. Thomas*. It was raised, but not decided, more than a century and a half ago, in *Burnett v. Chetwood*. In several other cases may be found *dicta* on the general subject of piracy in the case of translations. Let us see what light is thrown on the subject by the decisions.

English Authorities. — The first case relating to translations arose in 1720, when Lord-Chancellor Macclesfield granted an injunction against an English translation of Thomas Burnett's *Archæologia Philosophica*, — a work which had been published in Latin, and copyrighted by the author. The unauthorized publication of the book in English was enjoined, on the ground that

it "contained strange notions, intended by the author to be concealed from the vulgar, in the Latin Language; in which language it could not do much harm." The decision, therefore, did not turn on the question of the general rights of the translator; but the Lord Chancellor remarked *obiter*, that "a translation might not be the same with the reprinting the original, on account that the translator has bestowed his care and pains upon it, and so not within the prohibition of the act."¹

In *Wyatt v. Barnard*, decided in 1814, it appeared that the complainant had copyrighted a periodical containing, besides selections and original articles, translations made expressly for him from foreign works not protected by copyright in England. Such selections and translations had been copied by the defendant, without authority, in a rival periodical. This was a clear case of piracy. In granting the injunction, Lord Eldon properly held that, "with respect to the translations, if original, whether made by the plaintiff or given to him, they could not be distinguished from other works."² This language clearly refers to the kind of translations before the court, and has no reference to those of copyrighted works which are not mentioned in the report of the case. This decision, therefore, though often cited, has no bearing on the question under consideration.

One aspect of the subject of piracy by translation was considered in *Murray v. Bogue*. The plaintiff complained that his *Handbook for Travellers in Switzerland* had been infringed by a guidebook issued by the defendant, under the title of *Switzerland and Savoy*. The latter publication had been made up from various sources, and in part was an abridged translation of Bædeker's German work, which appears not to have been copyrighted in England. It was claimed, however, on this point, that Bædeker's book was a translation of Murray's, and that its retranslation into English by Bogue was a violation of Murray's copyright. The law applicable in such a case was correctly laid down by Vice-Chancellor Kindersley, who said: "If Bædeker's were a translation of Murray's into German, and then the defendant had retranslated Bædeker's

¹ *Burnett v. Chetwood*, 2 Meriv. 441.

² 3 Ves. & B. 77.

into English, even if he did not know that Bædeker's was taken from Murray, I could not allow the plaintiff's book to be thus indirectly pirated." ¹ But it was found that Bædeker's was substantially an original work, and not a reproduction in German of Murray's; and therefore its translation into English could not infringe the copyright in Murray's book.

Excepting *Wood v. Chart*,² which was governed by the provisions of the International Copyright Statute, the above are the only reported English cases in which the question relating to piracy in the case of translations has been raised. Two of these had sole reference to the translations of productions which were not protected by copyright in England; while the first was decided on grounds of public morals. They have therefore no direct bearing on the question whether a protected work is infringed by the publication of an unlicensed translation.

In *Millar v. Taylor*, decided in 1769, and *Prince Albert v. Strange*, in 1849, are found *dicta* relating to translations. But the issue was in no wise before the court; and the remarks were made by the judges merely for purposes of illustration.³

¹ 1 Drew. 367.

² Law Rep. 10 Eq. 193.

³ In *Millar v. Taylor*. Lord Mansfield maintained that the King's claim to the translation of the Bible was based not on prerogative, but on principles of property, and said: "If any man should turn the Psalms, or the writings of Solomon or Job into verse, the King could not stop the printing or sale of such a work: it is the author's work." 4 Burr. 2405. That is good law; for such works are common property, and may be translated by any person. In the same case, Mr. Justice Willes said: "Certainly *bona fide* imitations, translations, and abridgments are different; and, in respect of the property, may be considered as new works." Ibid. 2310. And Mr. Justice Aston remarked that after publication "the right of the copy still remains in the author; and that no more passes to the public, from the free-will and consent of the author, than an unlimited use of every advantage that the

purchaser can reap from the doctrine and sentiments which the work contains. He may improve upon it, imitate it, translate it, oppose its sentiments; but he buys no right to publish the identical work." Ibid. 2348.

To the same effect is the *dictum* of Vice-Chancellor Bruce in *Prince Albert v. Strange*. He was of opinion that the author's common-law rights in a manuscript work might be invaded by the publication of a translation, abridgment, or summary of the original; and remarked that a published work "may be liable to be translated, abridged, analyzed, exhibited in morsels, complemented, and otherwise treated in a manner that" a manuscript production is not. 2 De G. & Sm. 693.

The language of the three judges last quoted is too sweeping, and cannot be reconciled with the restrictions that have been drawn around piracy in more recent cases.

American Authorities. — There are but two American decisions relating expressly to the subject under consideration. In deciding *Emerson v. Davies*, in 1834, Mr. Justice Story said: “A man has a right to a copyright in a translation upon which he has bestowed his time and labor. To be sure, another man has an equal right to translate the original work, and to publish his translation; but then it must be his own translation by his own skill and labor, and not the mere use and publication of the translation already made by another.”¹ This is a mere *obiter dictum*; for the subject of translations was entirely foreign to the issue before the court. As applied to originals not protected by copyright, the doctrine is sound. There is nothing to indicate that Judge Story intended the language to have a more extensive meaning. There is ground for believing that he referred to the translations of works that were common property.²

Unlicensed Translation Held to be Lawful. — In *Stowe v. Thomas*, decided in 1853, the Circuit Court of the United States held directly and unequivocally that an unauthorized translation of a copyrighted work is no infringement of the original, nor of a prior translation made and copyrighted by the author of the original in the same language as the translation complained of.³ The book in controversy was *Uncle Tom’s Cabin*. Besides copyrighting the English original, Mrs. Stowe had caused it to be translated into German, and had secured a copyright for the translation. Afterward, the defendant made a translation into German, when Mrs. Stowe promptly complained of piracy. Mr. Justice Grier decided that she was not entitled to the protection sought, and used this language: “By the publication of her book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. *Uncle Tom* and *Topsy* are as much *publici juris* as *Don Quixote* and *Sancho Panza*. All her conceptions and inventions may be used and abused by imitators, playwrights, and poetasters.

¹ 3 Story, 780.

² In support of his statement, Judge Story cited *Wyatt v. Barnard*, which goes only to the extent of recognizing

copyright in translations of works not protected by statute.

³ 2 Wall. Jr. 547; s. c. 2 Am. Law Reg. 210.

They are no longer her own: those who have purchased her book may clothe them in English doggerel, in German or Chinese prose. Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished; and all that now remains is the copyright of her book, — the exclusive right to print, reprint, and vend it; and those only can be called infringers of her rights, or pirates of her property, who are guilty of printing, publishing, importing, or vending without her license ‘*copies of her book.*’ In tropical, but not very precise, phraseology, a translation may be called a transcript or copy of her thoughts or conceptions; but in no correct sense can it be called a copy of her book.”¹

THE DOCTRINE MAINTAINED THAT AN UNAUTHORIZED TRANSLATION IS PIRATICAL.

It has now been shown that the question, whether the publication of an unauthorized translation of a protected work is a violation of the copyright therein, has been decided in but one case. All the other English and American decisions lend only *dicta* to the solution of this problem. Is the law laid down in *Stowe v. Thomas* right or wrong? To determine this question, we must first consider the nature of a translation, and its relation to the original work.

The object of copyright legislation is to encourage learning by securing to authors protection for the substantial fruits of their labor. The statute gives to every author the exclusive right to print and sell a book which he has produced, and prohibits any person without authority from publishing a “copy” of such book. If the language of the statute were properly construed to mean that only the publication of a *verbatim* copy of the whole of the book is unlawful, the protection intended for literary property would be swept away, and the act of the legislature practically annulled. The courts, therefore, have declared that the word book applies even to a few lines printed on a single sheet, and that it embraces not only the whole, but every part, of a literary production. An equally

¹ 2 Am. Law Reg. 231. The language of this passage is somewhat different in 2 Wall. Jr. 568; but the meaning is the same in both reports.

comprehensive meaning has been given to the word copy. The definition that a copy is a literal transcript of the language of the original finds no place in the jurisprudence with which we are concerned. Literary property, as has been shown, is not in the language alone; but in the matter of which language is merely a means of communication.¹ It is in the substance, and not in the form alone. That which constitutes the essence and value of a literary composition, which represents the results of the author's labor and learning, may be capable of expression in more than one form of language different from that of the original. A book may be copied by reproducing the substance of the whole or of a part, as well as by transcribing its language. In an abridgment the substance, but not the language, of the original is reproduced; yet this is an appropriation of literary property.

The author's rights, then, can be secured only by protecting, not merely the form of his production, but also its substance. Hence, the principle has been judicially recognized, and may be regarded as established, that the unauthorized appropriation of the substance, in whole or in part, of a copyrighted literary composition, to the injury of its owner, is piracy.

For the purposes of this discussion, a translation may be defined as the reproduction of a literary composition in a language foreign to that of the original. It is not a mere transcript of language; but so clearly is it a copy of a literary production in its essential attributes that the best translation is that which, without creating or destroying, most perfectly reproduces, the original in a foreign language. The translator may be regarded as the author of the new language or form of expression into which the original is rendered. In this sense, an authorized translation, or a translation of an original which is common property, is treated by the law as a new and distinct production, entitled to copyright.² But otherwise the translator creates nothing. He takes the entire creation of another, and simply clothes it in a new dress. Whether

¹ See *ante*, p. 97.

780; *Shook v. Rankin*, 6 Biss. 477;

² *Wyatt v. Barnard*, 3 Ves. & B. 77; *Rooney v. Kelly*, 14 Ir. Law Rep.

Shook v. Rankin, 3 Cent. Law Jour. 210.

n. s. 158; *Emerson v. Davies*, 3 Story,

it be reproduced in German, French, or Chinese language, in the characters of stenography, in the raised letters of the blind, or in whatever hieroglyphics, the original creation preserves its identity. The means of communication alone is changed. Was Mrs. Stowe's remarkable creation in any wise different when expressed in German language? This was simply a means of communication to the German reader; but the production was in no other essential respect different. The plot, the characters, the dialogue, the lessons, were the same to the German as to the American mind. Both saw the same Uncle Tom, the same Eva, the same Topsy. The scenes of slave-life were identical to both. To both, the moral of the fiction appealed with equal force. Are the productions of Homer, Dante, Goethe, Cervantes, Molière, Shakespeare, any less the creations of those great minds in translation than in the original? Such works are the fruits of rare genius; they may be translated by a linguist. The name of the author is for ever identified with his production; that of the translator is often unknown to fame.

The translator, then, simply transfers a literary production from one language to another. The translation is not in substance a new work. It is a reproduction in a new form of an existing one. The functions of a translator are here not disparaged, but defined. To translate from one language to another often requires learning, judgment, and industry. Some of the most valuable contributions to literature are translations. On the roll of translators are many immortal names. By this means, the wealth of ancient learning and of foreign tongues has been opened to millions of readers who would otherwise have been without this source of instruction and enjoyment. Rightly, therefore, does the law encourage this kind of intellectual labor, by protecting translations when no rights of property are thereby invaded. But a translation, whatever be its merit or the fame of the translator, cannot be produced independently of the work translated, any more than an engraving or photograph of a painting can be made independently of the original. The body and substance of the translation are the body and substance of another work.

It is a settled principle, that to take a material part of a work without the consent of the owner, except for a "fair use," is a violation of the right secured by the statute. It has been shown that a translation cannot be made without appropriating the entire substance of a literary composition. This brings us to the test by which the question of piracy in the case of a translation is determined. Has the translator any authority to take the production which he renders into another language? Can he show a good title to the original? On this simple point turns the whole question of infringement. If the original is not protected by copyright, the law makes it common property, and gives to every one the right to translate it. But the translator of a copyrighted work must show a title derived from the author of the original. If the translation has been made with authority, it will be free from the wrong of piracy. But an unauthorized translation of a work entitled to protection is an invasion of the copyright in the original, as clearly as is the unlicensed publication of a literal copy of the original.

A translation bears to the work translated a relation strikingly analogous to that which exists between a musical composition originally composed for voices or the orchestra, and an arrangement of it for the piano. In each case, the translator or arranger, by his own labor and skill, reproduces in a new and useful form a work of which he is not the author. The difference between the translation and its original is not greater than that between the arrangement and its original. The law governing arrangements of music has been clearly and soundly expounded. Any number of persons may arrange, for the piano-forte or any other instrument, an unprotected musical composition, and each will be entitled to copyright in his own arrangement; but no person, without the consent of the owner, can make such use of a copyrighted work without committing piracy.¹ Translations are governed by the same principle. If an unauthorized arrangement of a copyrighted musical composition is piratical, an unlicensed translation of a copyrighted literary composition must be. If the latter is not piratical, the former cannot be. The law has been construed rightly by

¹ See *ante*, pp. 410-411.

the courts in the case of arrangements, and wrongly in the case of translations.

Stowe v. Thomas Criticised. — The doctrine that an unlicensed translation of a protected work is no invasion of the copyright in the original, as was held in *Stowe v. Thomas*, is contrary to justice, recognized principles, and the copyright statutes of the United States as judicially construed. It proceeds on the ground that literary property is solely in the combination or arrangement of words; that language alone is protected by the statute; and that the word copy, as used in the act, means a literal transcript of the words, and not a reproduction of the substance or the contents of a work. All of these assumptions are wrong. "A copy of a book," said the court, in *Stowe v. Thomas*, "must, therefore, be a transcript of the *language* in which the conceptions of the author are clothed; of something printed and embodied in a tangible shape. The same conceptions clothed in another language cannot constitute the same composition; nor can it be called a transcript or copy of the same book."¹ This interpretation of the word copy, as used in the law of copyright, is opposed by the entire current of decisions in which the meaning of the word has been considered with reference to piracy. It is settled that a publication need not be a literal copy or "transcript of the language" of another, in order to be piratical. A substantial reproduction of the whole or of a material part of a work is a copy within the meaning of the law. In some cases, the difference between the language of the two works in controversy has been so great as to make it exceedingly doubtful whether one had been taken from the other; but, when this fact has been ascertained, the legal question of piracy has been determined accordingly. An arrangement for the piano of an opera is by no means a transcript or literal copy of the original score. But, as has been said, the unauthorized arrangement of a copyrighted musical composition has been judicially declared to be a piratical copy of the original. So there may be a wide difference in form between a dramatization and the novel dramatized. But the courts have not hesitated to declare that the unlicensed publi-

¹ 2 Am. Law Reg. 229; 2 Wall. Jr. 565.

cation of the dramatization is an infringement of the copyright in the novel.¹

If it were lawful for any one without authority to translate a copyrighted work, a translation would be, in the language of Lord Ellenborough, "a recipe for completely breaking down literary property."² For not only does a published translation tend to supersede the original, and thereby lessen its sale; not only does it serve as a substitute for the translation which the rightful author has made, as in Mrs. Stowe's case, or is entitled to make,—but if the unauthorized translation does not infringe the copyright in the original, nor in the author's translation, as was held in *Stowe v. Thomas*, a retranslation of either the authorized or the unauthorized translation into the original language would be no infringement of any copyright in the work. So that in Mrs. Stowe's case any person might have retranslated into English either of the German translations of *Uncle Tom's Cabin*, without infringing the copyright in such translations or in the original work. In this way, any number of editions and copies of that great work of fiction might have been issued against the protest of the author entitled to protection, and one of the most valuable of American copyrights made worthless. If this is law, there is no protection for literary property; for any copyrighted work may be republished without authority through the medium of a translation. Such a theory is wrong in principle, and was rightly condemned in *Murray v. Bogue*.³ It is contrary to the statute, which has been wisely construed to extend protection, not merely to the words, but the substance, of a literary production.⁴

¹ *Tinsley v. Lacy*, 1 Hem. & M. 747. See also *Reade v. Lacy*, 1 Johns. & H. 524.

² *Roworth v. Wilkes*, 1 Camp. 98.

³ 1 Drew. 367.

⁴ Of the reported copyright decisions of England and America, there is none which is more clearly wrong, unjust, and absurd than that in *Stowe v. Thomas*. The law has been expounded repeatedly and emphatically to the effect, that the object of copyright legislation is to protect the substantial fruits of genius, learning, and

honest labor, and that he is guilty of piracy who without authority takes to a material extent the substance of a work entitled to protection. In this case, the question of piracy turned wholly on two simple issues: 1, whether there had been a material appropriation of the results of Mrs. Stowe's labors; 2, whether such appropriation had been with her consent. On the second point, there was no dispute. On the first, the counsel for the defendant boastfully asserted: "We have confessedly taken not a part, but

DRAMATIZATIONS.

It has already been shown that the statute of the United States provides that authors may reserve the right to dramatize their works; but that this provision does not affect the question whether, in the absence of such reservation, a work protected by the statute may be dramatized by any person without the consent of the author.¹ The 5 & 6 Vict. c. 45, is silent on this point.

Publication of Unlicensed Dramatization not Lawful. — Whether the author has or has not expressly reserved the right to dramatize it, the publication in print of an unauthorized dramatization of a copyrighted work is a clear case of piracy.² For then a material part of a work entitled to protection is taken without license, and printed in violation of the statute and against principles judicially established. That extensive changes are made by the skill of the dramatist, that the original work may thus be brought into a changed and improved form, is immaterial. The test is, whether a material part, *verbatim* or in substance, of a work entitled to protection, is published without the consent of the owner of the copyright.

Unauthorized Dramatization for Performance. — **Law as Expounded in England.** — The question now arises, whether it is

the whole. We concede and we boast that we have taken every syllable, comma, and i dot of the original. The question cannot be how much we have taken, for we have taken all; nor how much we have added, for we have added nothing; but only *how* we have taken, and what we have done with it?" 2 Wall. Jr. 560. The court seems to have taken the same view of the law, and solemnly declared that the publication of an unlicensed literal translation of one of the most remarkable works of the imagination produced in this century is no invasion of the author's property, because it is not a "copy." If this is the proper construction of the statute, the copyright law of the United States is worse than useless, worse than a mockery. It is a fraud, by declaring that authors shall

have protection, when there is no protection. But, fortunately, such is not the intention of the legislature, nor the effect of the statute. As wisely construed by the courts, the meaning of the word copy in the section of the act relating to infringement cannot be restricted to a literal transcript of language, but applies equally to a reproduction of the substance of a work.

If the above language is strong, there is justification for it. For a wrong decision followed as a precedent, without examination into its soundness, may remain firmly established in our jurisprudence for a century.

¹ See *ante*, pp. 445-446.

² *Tinsley v. Lacy*, 1 Hem. & M. 747. See also *Reade v. Lacy*, 1 Johns. & H. 524.

piratical to dramatize, for public representation, without authority, a copyrighted work in which the author has not expressly reserved to himself the right of dramatization. This subject has been judicially considered in England, but not in the United States.

The essential facts in *Reade v. Conquest* were these: Charles Reade had written the drama *Gold*, and registered it as a dramatic piece, thereby securing the exclusive right of representing it on the stage. He had also registered it as a book, and published it in print. Afterward, he put the drama into the form of a novel, which contained substantially the same plot, incidents, characters, and dialogue as were in the play. The novel was copyrighted as a book, and published with the title, *It is Never too Late to Mend*. While both novel and drama were thus under the protection of the statute, the defendant publicly represented a play named *It is Never too Late to Mend*, which was a dramatization of Reade's novel. The person who dramatized the novel had not at the time of doing so seen the drama *Gold*, and was unaware of its existence; but there was naturally and necessarily a substantial identity between the plays *Never too Late to Mend*, and *Gold*. The court held that the unlicensed performance of the dramatization was not a violation of any right in the novel;¹ but that, in dramatizing the novel, the defendant had indirectly copied *Gold*, and thereby infringed the playwright in that drama.²

Substantially the same questions were raised in *Toole v. Young*.³ It appeared that John Hollingshead had published in 1863, in the magazine called *Good Words*, a story entitled *Not Above his Business*, which he had written in dramatic form, that it might, with slight alterations, be performed on the stage. Soon after, the author adapted the piece for representation, and called the play *Shop*, which was substantially the same as the published story. In 1865, the play was bought from the author by the comedian Toole; and, when the action was brought, it had not been published or acted. In 1870, Grattan dramatized the story, which had appeared in *Good Words*, and afterward sold the play to the defendant, by whom

¹ 9 C. B. N. s. 755.

² 11 Id. 479.

³ Law Rep. 9 Q. B. 523.

it was repeatedly performed on the stage, under the name of *Glory*. It was admitted that the plays were substantially the same, and that the defendant's had been obtained from the story, and not from the plaintiff's *Shop*. The judgment of the court was that no rights, either in the work dramatized or in the plaintiff's play, had been invaded by the defendant's dramatization; that, by first publishing his composition as a book, an author forfeits the exclusive right to dramatize and to represent it on the stage; and, though he should afterward dramatize his own published composition, he cannot thereby bar others from exercising the same privilege.¹

If the law was correctly interpreted in these cases, the unauthorized dramatization of a work for public performance is not an infringement of the author's rights in that work, nor in a dramatization of it made by the author after the publication of the original. But, when the author's dramatization has preceded the publication of the novel, the latter cannot be dramatized, except by authority, without violating the author's rights in his play.² If this is a sound exposition of the English law, it must be adopted also in the United States. The statutes of the two countries are substantially the same on this point, and hence should be construed alike.

The Law as Construed in England Criticised. — The law as it has been judicially declared has now been given. It remains to consider whether it has been soundly interpreted. The American courts are yet untrammelled by precedents on this point; they are not bound to follow the English decisions, unless those decisions are grounded on sound principles.

The two doctrines affirmed in *Reade v. Conquest*, and recognized in *Toole v. Young*, that an unauthorized dramatization

¹ See also *Tinsley v. Lacy*, 1 Hem. & M. 747.

² In *Reade v. Conquest*, 9 C. B. N. S. 759, Erle, C. J., said: "Perhaps the only way in which the author of a novel can protect himself from this sort of infringement is by dramatizing it himself." In *Tinsley v. Lacy*, 1 Hem. & M. 751, Vice-Chancellor Wood remarked *obiter*, that "the only way in which an author can prevent other

persons from reciting, or representing as a dramatic performance, the whole or any portion of a work of his composition, is himself to publish his work in the form of a drama, and bring himself within the scope of dramatic copyright." But, according to the authority of *Toole v. Young*, an author cannot protect his novel from unlicensed dramatization by dramatizing it after its publication.

of a novel for public performance is not a violation of any right in the novel, but that it is an infringement of the play-right in a dramatization made by the author before the publication of the novel, are wholly inconsistent with each other; and, if the former is sound, the latter is antagonistic to a fundamental principle of the law of copyright.

Copyright protects only the thing copyrighted against unlicensed copying. Any number of persons may publish precisely the same thing, provided no one copies the protected work of another. Whatever may be the likeness between two works, each author is entitled to protection for his own production, and is barred only from copying that of the other. The owner of a protected drama cannot prevent another from printing or performing a play essentially or identically the same, provided the latter has not been copied from the former. Two or more persons may translate, adapt, or dramatize any work which is common property; and, notwithstanding the likeness between any two versions, neither will infringe the other, provided each is the result of independent labor. Hence the playwright in a drama bars every person without authority from copying that play; but it prevents no one from producing a play substantially the same from any common materials.¹ Now, it is clear that, if the law does not protect a novel from unauthorized dramatization, the novel to this extent becomes common property. As far as dramatization for public performance is concerned, it is in precisely the same position as a novel which is not protected by copyright. This principle is in no wise affected by the question whether the author has or has not dramatized the novel, or whether his own dramatization has preceded or followed the publication of the novel. If an unauthorized dramatization does not violate any right of property in the work itself, it cannot infringe the author's rights in a drama which is formed from, or one which is the basis of, the published work. For the charge of pirating the authorized dramatization is fully met when it appears that the play complained of was obtained from a source open to all; and the novel is common property for this purpose, if the law does not protect it from unlicensed dramatization. In this

¹ See *ante*, pp. 205-208, 399-400.

case, the author can have no better title to dramatize it than has any other person ; and he has no more right to monopolize his own work for this purpose than the work of another author. In other words, the author stands in this respect in the same relation to his own as to any other published novel, and his relation to his own is the same as that of all other persons to it.

The distinction drawn by the judges in *Toole v. Young* between the facts in that case and those in *Reade v. Conquest*, to the effect that in the latter case Reade's play had been written and copyrighted before the novel was published, while in *Toole v. Young* the publication of the plaintiff's story had preceded its conversion into a play, has no foundation in reason or principle. Its plausibility only tends to mislead. The doctrine affirmed in *Reade v. Conquest* was based on the ground that dramatizing the novel, though no violation of the property in that work, was an indirect copying of Reade's drama, and therefore an invasion of his rights therein. If this view of the law is sound, then the defendant in *Toole v. Young* was not less guilty of piracy, since in appropriating the plaintiff's story he had indirectly copied his drama ; and it was not less a case of indirect and piratical copying because the plaintiff had published his story before adapting it for representation. The fallacy of this theory becomes apparent when it is considered, that in every case when two similar works are produced from common materials, as two adaptations of a common novel, the later one might thus be considered to be an indirect copy of the earlier one. Such a doctrine is antagonistic to a fundamental principle of the law of copyright. The dramatization complained of in *Reade v. Conquest* was produced by independent labor, from what the court had declared to be a common source. It could not, therefore, be piratical on the ground that it was an indirect copy.¹

¹ See *ante*, p. 399. The court acted on the same erroneous theory in *Reade v. Lacy*, 1 Johns. & H. 524, where the plaintiff complained of the publication of a dramatization of his novel *Never too Late to Mend*. Vice-Chancellor Wood refused to grant an injunction on the ground of piracy of the novel, until the plaintiff's right should be established at law ; but restrained the publication of the dramatization, as being an invasion of the copyright in the plaintiff's drama, *Gold*. The defendant's dramatization was clearly an infringement of the copyright in the plaintiff's novel ; and this doctrine was

In *Reade v. Conquest*, the court laid great stress on the fact that the person who dramatized the novel was not the author of the resulting play, and therefore had no right to represent it while playwright existed in the drama of which Reade was the author.¹ This argument would apply with equal force if Reade had published only the novel, and not the play; for in that case the dramatist could not be considered the author of the play, which he had simply adapted from the novel. Moreover, the same theory would have reversed the judgment in *Toole v. Young*. Here the person who had prepared the play complained of had no better title to authorship than had the defendant in *Reade v. Conquest*. A dramatist is manifestly not the author of what he takes from the work of another. He is the author of the changes which he makes. But the controlling question of piracy in this, as in all cases, is not whether one person has by his own labor and skill made changes and improvements in the work of another, not whether he has reproduced it in a new and useful form, but whether he had the right so to use the original.

On the question whether an unauthorized dramatization of a novel is an infringement of the playwright in a dramatization made by the author, the authority of *Toole v. Young* is in direct conflict with that of *Reade v. Conquest*. The controlling facts were alike in both cases. Both were governed by the same principles. The two judgments could not be different without one being wrong.

WHEN AN UNLICENSED DRAMATIZATION FOR PERFORMANCE IS PIRATICAL.

It remains to consider the true principles which govern the question whether any right secured by the statute in a published work is violated by an unauthorized dramatization of that work for public performance. The determination of this

afterward declared in *Tinsley v. Lacy*, 1 Hem. & M. 747. When the court in *Reade v. Lacy* refused an injunction on this ground, it could not consistently or properly grant one on the ground that the copyright in the drama

had been violated. For, if the dramatization of the novel was not a violation of the copyright in the novel, it could not infringe the copyright in the drama.

¹ 11 C. B. N. S. 492.

question depends entirely on the fact whether the work dramatized is a dramatic composition within the meaning of the law. All productions protected by the statute may be divided into those which are and those which are not dramatic compositions. In the latter, copyright alone vests. It gives to the owner the exclusive right to print and to sell copies ; but it does not prevent any person from making any public oral use of the work. But, in a dramatic composition, two distinct rights are secured ; viz., copyright and playright. The statute expressly confers the exclusive right of publishing, and the sole liberty of representing it in public ; and expressly prohibits any person without license from either printing or performing it. In the case of a published work, these two rights vest simultaneously, and on the same conditions ; and whether one or both attach to any production depends solely on the fact whether the production is, within the meaning of the law, a dramatic composition. When any copyrighted work is found to be a dramatic composition, it is protected not only by copyright, but also by playright. The copyright, as in the case of any composition, is not infringed by any public oral use of the work ; but substantially the same production, or a material part of it, cannot be copied and represented on the stage, except by authority, without violating the playright. In this case, piracy is determined by the same principles that govern when a material part of a copyrighted book is printed without authority.

If, then, any work of fiction can be considered a dramatic composition within the meaning of the law, it is clear that the public performance of an unlicensed dramatization of it will amount to piracy ; if it is not a dramatic composition, any person is at liberty to dramatize it for public performance.

The only difficulty surrounding the question under consideration proceeds from the doubt as to what judicial construction will or should be given to the words dramatic piece in the English and dramatic composition in the American statute. I have endeavored elsewhere to show that dramatic compositions must be taken in law to embrace a wider range of productions than what are nominally dramas, or what are written expressly for stage representation ; that a work of fiction, if it has the essential qualities of a drama, is entitled to protection

as a dramatic composition, although not expressly designed for the stage, and although changes in its form may be necessary to adapt it for that purpose.¹ That this view is in accordance with right and justice will scarcely admit of two opinions. An author is entitled to all the fruits of his genius or his industry, to his share of all the profits arising from any public use whatever of his production. Protection adequate to secure these results should be expressly provided by the legislature, and not left to the conflicting opinions of the courts. But we have to consider the law as it has been made, and not as it should have been made.

While the statute must be interpreted, not arbitrarily, but in accordance with recognized principles of construction, it should be construed in case of doubt as to its meaning with that liberality which tends to realize the primary object of the legislature. In granting the right of publicly performing dramatic compositions, the intention of the legislature may fairly and properly be taken to have been to secure, in the full enjoyment of the fruits of his literary labor, every author whose production is useful and valuable for dramatic purposes. Assuming this to be the true object of the statute, that object will in many cases clearly be defeated if works of fiction are exposed to unlicensed dramatization. Of course, every work of fiction is not a dramatic composition. Some are wholly descriptive, and incapable of dramatic representation. But a novel which can be dramatized and adapted for acting must be dramatic in character, and have all the essential qualities of a drama. Such works are often of the highest value for dramatic purposes; and by changes, in many cases slight, they may be transformed into acting plays. No argument would seem to be necessary to show that the law intended to secure the advantages arising from this use of any production to him who is entitled to them, and to whose genius the creation of the work is due. Without underrating the skill of the dramatist, it is manifest that the life and essence of a dramatized work are due to the author of the original, and not to him who adapts it for the stage. The interesting plot, the dramatic situations, the well-drawn characters, the brilliant dialogue, are

¹ See Chap. XIV.

is simply transferred, often with little variation, from the original production to the play. The dramatist invents nothing, creates nothing. He simply arranges the parts, or changes the form, of that which already exists. A work of fiction is often the fruit of genius. A stage-manager can dramatize it. Uncle Tom's Cabin was the most successful American novel of this century. Its success as a drama was scarcely less remarkable. In both forms it was substantially the same, and was the creation of one mind. It is clear, then, that in a large sense the dramatist has no claim to the authorship of what he has simply adapted for representation; and that, in making this use of a work of which he is not the author, he avails himself of the fruits of genius and industry which are not his own, and takes to himself profits which belong to another.

It is true that, in adapting a literary composition for the stage, the dramatist contributes his own labor and skill, which are often of much value, and for the results of which he may justly claim protection when he has not thereby invaded the lawful rights of another. Any one is free to dramatize a work not protected by copyright, or a copyrighted publication with the consent of the owner. In such case, the dramatist takes property which he has a right to use, and becomes entitled to protection for the changes and improvements which he makes. He may thus acquire the exclusive right of publishing his own version in print, and the sole liberty of performing it in public. But it is conceded that he cannot publish an unlicensed dramatization of a copyrighted work without infringing the copyright in the original.¹ On the same principle, he cannot publicly represent the dramatization without violating the author's right to this use of his production.

No changes made in what is conceded to be a dramatic composition will give to any person the right to perform it without the author's consent.² It may be so faulty in construction that radical and extensive changes are necessary to prepare it for the stage. A drama in name and structure, it must be dramatized, so to speak, before it can be successfully performed. It is clear that, however extensive may be the required altera-

¹ See *ante*, p. 456.

523; *Shelley v. Ross*, *Ibid.* 521, note;

² *Levy v. Rutley*, *Law Rep.* 6 C. P. *Daly v. Palmer*, 6 *Blatchf.* 256.

tions, no one can lawfully take this liberty with a copyrighted drama without the author's consent. The principle is not different in the case of a work of fiction which may not be in name, but is in substance, a dramatic composition. In other words, the changes necessary to prepare an undisputed drama for performance are sometimes not less extensive or less radical than are required to adapt a novel for the stage. To make this unlicensed use of a copyrighted drama is piracy. Is it less so when the original is a work of fiction? So, a drama, besides the main plot and characters, may contain a subordinate, or "side," series of incidents, which are entirely independent of the principal action, and may in themselves constitute a complete farce or play. In other words, the work may contain a drama within a drama. To separate one from the other, and represent it on the stage as an independent play without license, would be a clear case of piracy. In what respect is it different in principle to evolve a play from a novel? If the latter contains a drama, or the essence of a drama, it is a dramatic composition; and the author is entitled to the sole liberty of taking out such drama and representing it on the stage.

The judgment both in *Reade v. Conquest* and in *Toole v. Young* turned solely on the point whether the story in question was a dramatic piece within the meaning of the law. This principle was the key to the decision in each case; and in each it was entirely overlooked or disregarded by the court. If the novel was a dramatic composition, there vested in it both copyright and playwright. The former right was violated by the printing, and the latter by the representation, of an unlicensed dramatization. It was immaterial whether or not substantially the same production had been published also as a drama by the author, or whether or not the original had been dramatized by him. Was, then, *Reade's* novel, *Never too Late to Mend*, or *Hollingshead's* story, *Not Above his Business*, a dramatic piece? When it is considered that the former was simply a drama reproduced as a novel, and that the latter had been written in dramatic form with a view to its representation on the stage, there would seem to be little doubt that both were dramatic pieces within the meaning of the law, which had been

construed to embrace even a simple song, and, in the language of Chief Justice Denman, "any piece which could be called dramatic in its widest sense; any piece which, on being presented by any performer to an audience, would produce the emotions which are the purpose of a regular drama, and which constitute the entertainment of the audience."¹

If the performance of an unauthorized dramatization is an infringement of the right secured in a novel, it is a violation of the playright in an authorized dramatization of the novel. This fact has little practical importance, when the same person, as in Reade's case, is the owner of both the novel and the dramatization; but it removes an apparent difficulty in a case like that of *Toole v. Young*, when the owner of the dramatization and the owner of the work dramatized are different persons. In such case, it might be contended that the owner of the play is not the proper person to maintain an action for the unlawful dramatization of the novel. This may be an apparent, but is not a real, objection. To dramatize a novel for public performance is no infringement of the copyright in the novel. Such a dramatization can be unlawful only on the ground that it is a violation of the owner's exclusive right to the public representation of the work. I have maintained that the author has this right before he has dramatized his novel, and that he has it afterward. But the right, whether lodged in the novel or in the dramatization, is one and the same; and it is equally violated whether the novel or the dramatization is made the means of its invasion. When the author has himself dramatized the novel, and made an absolute assignment of the play, he has parted with, and the buyer has acquired, the exclusive right of representing that work; and this, as said above, embraces the entire right of representation, whether lodged in the novel or in the dramatization. Having thus divested himself of this right, the author is barred from making, or authorizing another to make, a second dramatization of his novel. And any unauthorized adaptation of the novel for public performance is a violation of the right to represent what is contained in the novel. This right is vested in the buyer of

¹ *Russell v. Smith*, 12 Q. B. 236. See also *Clark v. Bishop*, 25 L. T. N. S. 908.

the authorized dramatization ; and hence he is the proper person to maintain an action for its violation, whether the novel or the dramatization is made the means of such violation. The same is true when the author has made an absolute assignment of the right to dramatize his work and the dramatizing is done by the buyer. But of course the case is different when the author has not absolutely parted with the right of representation, but has merely licensed another to use the dramatization. In such case, the ownership of the right of representation continues in the author.

CHAPTER X.

REMEDIES IN LAW FOR THE INFRINGEMENT OF COPYRIGHT.

GREAT BRITAIN. — BOOKS.

THE 8 Anne, c. 19, provided that the printer, publisher, importer, or seller of a pirated book should forfeit every copy or sheet to the owner of the copyright, by whom it was to be destroyed, and should further be liable to a penalty of one penny for every copy or sheet found in his possession, — one half to go to the queen, and the other half to any person who should sue for it.¹ But there was a proviso which allowed any person to import or sell “any books in Greek, Latin, or any other foreign language, printed beyond the seas.”² This provision, as far as it permitted the importation of books first printed in Great Britain and reprinted abroad, was annulled in 1739, by the 12 Geo. II. c. 36, which, in the case of the importing of such works, provided for a forfeiture of the copies which were to be destroyed, and imposed a heavy penalty, to be sued for by any person, and to be divided between the king and the person suing. This act, which was to remain in force for a limited time, was continued by several succeeding statutes.³ Until 1801, there was no statute giving to the owner of the copyright an action for damages sustained by the piracy of his book. But such action would lie on the principle that, when a statute secures a right and makes no specific provision for its protection, the common-law remedy is available. In 1801, however, the 41 Geo. III. c. 107, gave to the owner of the copyright a special action on the case for damages, increased the penalties to threepence for each pirated copy, and provided for the for-

¹ s. 1.² s. 7.³ 20 Geo. II. c. 47; 27 Geo. II. c. 18; 33 Geo. II. c. 16.

feiture of copies.¹ It also re-enacted penalties and forfeitures in the case of the importation of books first published in Great Britain and reprinted abroad.²

Remedies Provided by Existing Statute. — From 1801 to 1842, the law continued substantially the same with respect to the penalties and forfeitures imposed on the offender, and the remedies given to the owner of the copyright. But by the 5 & 6 Vict. c. 45, passed in the latter year, an important change was made. From the reign of Anne till that of Victoria, the forfeitures and penalties were intended as a punishment of the offender, rather than a direct benefit to the owner of the copyright; since any person might sue for the penalties, and the forfeited copies were required to be destroyed. By the statute of Victoria, the penalties, except in the case of the importation of books originally published in England and reprinted abroad, are abolished. The action for damages is continued;³ and piratical copies of a book are declared to be the property of the author, who is empowered to recover them, or damages for their detention.⁴ The provisions of this statute apply to all literary productions, musical compositions, maps, charts, and plans.⁵

Action for Damages against Unlawful Printing, Importing, or Selling. — By section 15, it is enacted, “that if any person shall, in any part of the British dominions, after the passing of this act, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or, knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession, for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright.”

This section prohibits the unauthorized printing of a copy-

¹ s. 1.

² s. 7.

⁵ See definition of book in s. 2. As to maps, charts, and plans being within this statute, see *ante*, p. 174.

³ s. 15.

⁴ s. 23.

righted book, "in any part of the British dominions," and the importation or sale of "any such book so having been unlawfully printed." The words, "so having been unlawfully printed," in the connection in which they are here used, naturally and correctly refer to copies printed in the British dominions without the written consent of the author; since the printing in a foreign country of an English copyrighted book is not unlawful.¹ Hence, a strict construction of the section would limit its application to books unlawfully printed in the British dominions, and the prohibition would not extend to the importing or selling of piratical copies printed in a foreign country. But, by books "unlawfully printed," Parliament doubtless meant those printed "without the consent in writing of the proprietor" of the copyright; which, of course, would apply to books printed in a foreign country, as well as those printed in Great Britain.² Every preceding act properly prohibited printing or importing without the written consent of the author, and the sale of copies which had been so printed or imported.³ Thus, provision was expressly and clearly made against the importation and sale of piratical copies printed abroad. There is little doubt that Parliament intended to continue this provision in the statute of Victoria, and that what is above pointed out is a defect which resulted from a careless change in the language copied from the preceding acts. The statute will probably be judicially construed according to this intent, rather than its literal reading.

The statutory remedy is given, not only against the person who actually sells piratical copies, but against any person who exposes such copies to sale or hire, or has them in his possession for sale or hire.

Knowledge of Piracy.— Neither the printer nor the importer

¹ "How can it be unlawful," asked Chief Justice Wilde, "to print a work abroad?" *Boozey v. Tolkien*, 5 C. B. 480.

² In *Novello v. Sudlow*, 12 C. B. 189, Talfourd, J., said: "The language, however, of the clause [s. 15, 5 & 6 Vict. c. 45] is not new; it is adopted from the corresponding section of 54 Geo. III. c. 156, s. 4, which it fol-

lows, except that, instead of repeating the words, 'without the consent in writing,' to each condition of infringement, it uses the words, 'so unlawfully printed,' &c., which perhaps were incorrectly adopted to avoid repetition."

³ 8 Anne c. 19, s. 1; 41 Geo. III. c. 107, s. 1; 54 Geo. III. c. 156, s. 4.

can successfully plead that he did not intentionally or knowingly violate the copyright of another; but the publisher or the seller is not liable, unless he knows that the book was unlawfully printed or imported.¹ If the publisher is also the printer or the importer, as is not unfrequently the case, ignorance of wrong will be no excuse for his unlawful printing or importing.

Forfeiture of Copies.—A further remedy against piracy is given by section 23, which provides that all copies of a book which shall have been printed or imported without the written consent of the owner of the copyright shall be deemed to be the property of such owner, who, after demand in writing, shall “be entitled to sue for and recover the same, or damages for the detention thereof, in any action of detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover.” The owner of the copyright is here entitled to claim as his property piratical copies from any person who either has them in his possession, or who has unlawfully converted them to his own use. He may sue for the recovery of the copies found in the possession of the wrong-doer, and for the value of those which have been unlawfully disposed of. In *Delf v. Delamotte*, the Court of Chancery ordered the defendant to deliver to the plaintiff all unsold copies, and to pay the net profits on those which had been sold. The plaintiff claimed the full value of the latter; but the court said that, if he wanted more than the net profits, he must seek his remedy in a court of law.²

¹ *Colburn v. Simms*, 2 Hare, 543, 557; *Leader v. Strange*, 2 Car. & Kir. 1010. See *ante*, pp. 401–404.

² 3 Jur. n. s. 933; s. c. 3 Kay & J. 581. “This point,” said Wood, V. C., “is new, and, I think, is now taken for the first time. On all the occasions hitherto in which a dispute of this sort has arisen, the proprietor of the copyright has never in any one reported case obtained more than the profits which the defendant has made by the sale of the piratical copies of the book. It may be that it has been intended to introduce as great an alteration in respect of the proceeds of the copies which have been sold as in the right of

property in the copies which have not been sold, and which by the present law are declared to be the property of the true proprietor of the copyright, and are handed over to him accordingly; whereas under the former law they were always destroyed, so that the injured author could never utilize them. On the whole, however, I do not see why a court of equity should give the plaintiff more than it has always given him leaving him to get what further damages he may at law, by an action of trover for the conversion.” 3 Jur. n. s. 933.

See also *Colburn v. Simms*, 2 Hare, 543, which was decided under the statutes in force before 5 & 6 Vict. c. 45.

Penalties against Unlawful Importing.—Section 17 prohibits the unauthorized importation, into any part of the British dominions, of any copyrighted book first published in the United Kingdom and reprinted in a foreign country; and declares that every such book which shall be so imported for sale or hire, or shall be sold, published, or exposed to sale, or let to hire, by any person knowing it to have been so imported, “shall be forfeited, and shall be seized by any officer of customs or excise, and the same shall be destroyed by such officer.” It further provides that the offender, being duly convicted, shall forfeit ten pounds for every offence, and double the value of every copy which he has unlawfully imported, published, sold, or exposed to sale; “five pounds to the use of such officer of customs or excise, and the remainder of the penalty to the use of the proprietor of the copyright.”

Under a similar provision in 12 Geo. II. c. 36, it was held that two penalties might be incurred on the same day, for two distinct sales.¹

¹ *Brooke v. Milliken*, 3 T. R. 509. I shall not attempt to explain the provisions of a statute which in one part (s. 23) provides that copies of a book piratically imported shall become the property of the owner of the copyright, and in another (s. 17) declares that such copies shall be seized and destroyed by any officer of customs or excise; which in one part (s. 23) enacts that the wrong-doer shall be liable to the owner of the copyright for the value of every unlawfully imported copy which he has sold, and in another (s. 17) says that he shall forfeit double the value of every such copy sold. The highly penal provisions of s. 17 not only cause confusion and uncertainty as to the meaning of the law, but they are unnecessary and out of place in a statute which otherwise amply provides for the protection of literary property against the importation of pirated copies.

I cannot regard the copying of this provision in the 5 & 6 Vict. c. 45, otherwise than as an instance of the looseness with which statutes are too often drawn. The provision was originally

enacted in 1739, and was designed not for the prevention or redress of piracy, but simply to increase the revenues and protect the industrial interests of the kingdom. This is manifest from the preamble of the statute, 12 Geo. II. c. 36, which recites that “the duties payable upon paper imported into this kingdom, to be made use of in printing, greatly exceed the duties payable upon the importation of printed books, whereby foreigners and others are encouraged to bring in great numbers of books originally printed and published in this kingdom and reprinted abroad, to the diminution of his Majesty’s revenue, and the discouragement of the trade and manufacture of this kingdom.” “The prevention thereof for the future,” was the avowed object of the act. It was to continue in force only for seven years, and was renewed for short periods by several other acts, which had no reference to literary property. 20 Geo. II. c. 47; 27 Geo. II. c. 18; 33 Geo. II. c. 16. The provision was inserted, for what reason is not apparent, in the copyright act 41 Geo. III. c. 107, s. 7, passed in 1801;

Common-Law Remedies Available under Statute.—It is a recognized principle of statutory construction that where a right, previously existing by the common law, is secured by a statute which provides no remedy for its protection, the common-law remedies are available; and where the statute prescribes penalties and forfeitures, but does not provide a remedy for damages, the common-law action for damages will lie.¹ This rule has been applied in the interpretation of the copyright statutes. The statute of Anne imposed penalties and forfeitures for the violation of copyright, but did not give an action for damages. Such action, it was held, was afforded by the

from which, doubtless because it was found in that act, it was copied in the existing statute of Victoria. While books piratically imported were by this provision made subject to forfeiture and to be destroyed by the customs officer, they were also by the copyright statutes in force before the 5 & 6 Vict. c. 45,—viz., 8 Anne, c. 19, s. 1; 41 Geo. III. c. 107, s. 1; and 56 Geo. III. c. 156, s. 4,—required to be forfeited to the owner of the copyright, to be by him destroyed. In either case, therefore, they were subject to destruction. But 5 & 6 Vict. c. 45, as has been seen, enacts in one section that they shall become the property of the owner of the copyright, and in another that they shall be destroyed by any officer of customs or excise.

The matter has been still further complicated by the Customs Laws. The latest Consolidation Act, 33 & 40 Vict. c. 36, passed in 1876, prohibits the importing of certain enumerated articles, and declares that they “shall be forfeited, and may be destroyed or otherwise disposed of as the commissioners of customs may direct.” s. 42. Among the things thus enumerated are “Books wherein the copyright shall be first subsisting, first composed, or written or printed, in the United Kingdom, and printed or reprinted in any other country, as to which the proprietor of such copyright or his agent shall have given to the commissioners of customs a notice in writing, duly declared, that such copyright subsists, such notice

also stating when such copyright will expire.”

Section 44 enacts that “The commissioners of customs shall cause to be made, and to be publicly exposed at the custom-houses in the several ports in the United Kingdom, lists of all books wherein the copyright shall be subsisting, and as to which the proprietor of such copyright, or his agent, shall have given notice in writing to the said commissioners that such copyright exists, stating in such notice when such copyright expires, accompanied by a declaration made and subscribed before a collector of customs or a justice of the peace, that the contents of such notice are true.”

Section 45 provides that persons complaining of the prohibition of books in the copyright lists may appeal to a judge in chambers.

Section 152 prohibits the importation into the British possessions abroad of foreign reprints of English copyright books; but provides that “nothing herein contained shall be taken to prevent her Majesty from exercising the powers vested in her by the 10 & 11 Vict. c. 95, intituled ‘An Act to amend the law relating to the protection in the colonies of works entitled to copyright in the United Kingdom,’ to suspend in certain cases such prohibition.”

¹ See Sedgwick, *Construction of Stat. & Const. Law* (2d ed., by Pomeroy), 75, 341, 342; Potter’s *Dwarris on Statutes*, 185, 219; Maxwell, *Interpretation of Statutes*, 368.

common law.¹ When the statutory are coextensive with the common-law remedies the question may arise, whether the former are exclusive or cumulative. But when the statutory remedies are not complete, nor adequate for the protection of the right conferred, the common-law remedies have been held to be in force. Thus, by section 15 of 5 & 6 Vict. c. 45, the printer is made liable to an action for damages, only when the printing is "for sale or exportation;" and the importer, only when copies are imported "for sale or hire." No remedy is given against any person who prints or imports for gratuitous distribution, or who gratuitously distributes copies printed or imported without authority. But, in *Novello v. Sudlow*, it was held that an action for damages would lie under the statute for the gratuitous distribution, among the members of a singing society, of lithographic copies of a musical composition.² So in *Rooney v. Kelly*, where the plaintiff declared that parts of his book had been pirated, it was contended for the defendant that section 15 of 5 & 6 Vict. c. 45, prohibited the publication only of a *book*, and that the plaintiff should have alleged that his entire work had been taken. But the Irish Queen's Bench, without approving this view of that section, expressed the opinion, that, "independently of the 15th section, the proprietor of the copyright in a book may maintain an action for the infringement of such copyright;" that, the right being secured by the statute, "it is clear that a common-law right of action would attach upon any invasion of such statutable right, even though it be invaded by the printing, publishing, &c., of only a *part*, but not the *entire*, of the proprietor's work, and though the remedy given by the 15th section did not extend to the case of such partial printing or publication," &c.³

When Common-Law Remedies not Available. — But the principle that the common law affords a remedy when one is not provided by the statute does not apply in the case of any right

¹ *Beckford v. Hood*, 7 T. R. 620; *Cadell v. Robertson*, 5 Pat. App. Cas. 493; *Roworth v. Wilkes*, 1 Camp. 94, 98; *Colburn v. Simms*, 2 Hare, 543, 559. See also *Thompson v. Symonds*, 5 T. R. 41; *Sheriff v. Coates*, 1 Russ. & My. 159, 167.

² 12 C. B. 177. See also *Alexander v. Mackenzie*, 9 Sc. Sess. Cas. 2d ser. 748; *Boozey v. Tolkien*, 5 C. B. 476.

³ 14 Ir. Law Rep. n. s. 158, 171, 172.

not secured by the statute. The copyright in a book secured by the 5 & 6 Vict. c. 45, is the exclusive right of printing or otherwise multiplying copies; and the penalties, forfeitures, and remedies provided by that statute are directed against the printing, importing, and selling of piratical copies. Hence, the unauthorized public reading, representation, or performance of any composition is not a violation of the copyright therein; and, in such case, the person injured is not entitled to the remedies provided for the infringement of copyright.¹ In the case of a dramatic or musical composition, such wrong is an invasion of playwright which is expressly secured by statute, and for which specific remedies are provided. The law on this subject is considered under the head of playwright.²

So the unauthorized public exhibition of a copy of an engraving was held not to be a violation of 17 Geo. III. c. 57.³ But in the case of paintings, drawings, and photographs, the statute expressly prohibits the exhibition of piratical copies.⁴ In the case of sculpture, models, and casts, the statute gives to the owner of any such article "the sole right and property" therein for fourteen years "from first putting forth or publishing the same."⁵ The right thus secured is not restricted to printing or the circulation of copies; but is coextensive with the common-law property, which embraces the exclusive right of publicly exhibiting the work. Hence, although the statute does not expressly provide a remedy against unlawful exhibition, the common-law remedy may be held to be available, on the principle that when a right is secured the legislature is presumed to have intended complete remedies for its protection.

Limitation of Actions. — Section 26 of 5 & 6 Vict. c. 45, prescribes that "all actions, suits, bills, indictments, or informations for any offence that shall be committed against this act, shall be brought, sued, and commenced within twelve calendar months next after such offence committed, or else the same

¹ *Coleman v. Wathen*, 5 T. R. 245; *Reade v. Conquest*, 9 C. B. n. s. 775; *Tinsley v. Lacy*, 1 Hem. & M. 747; *Clark v. Bishop*, 25 L. T. n. s. 908. See also *Murray v. Elliston*, 5 Barn. & Ald. 657; *Martin v. Wright*, *infra*.

² See Chap. XVI.

³ *Martin v. Wright*, 6 Sim. 297.

⁴ 25 & 26 Vict. c. 68, ss. 6, 7.

⁵ 54 Geo. III. c. 56, s. 1.

shall be void and of none effect ;” but provides that this limitation shall not apply to actions respecting copies of books required to be delivered to the British Museum and the four other libraries. The question has been raised, whether the limitation here prescribed applies only in the case of penalties and forfeitures, or extends also to actions for damages. The doubt relates to the sense in which the word offence is used. The language of section 26, above quoted, is copied *verbatim* from section 10 of 8 Anne, c. 19, except that the limitation is changed from three to twelve months. But the statute of Anne imposed penalties and forfeitures, without providing an action for damages ; hence, in an early Scotch case, it was held that the limitation clause of the act applied only to the penalties and forfeitures, and not to actions for damages or injunctions.¹ The same view of the statute of Victoria was taken in a more recent case by the Court of Session in Scotland.²

In *Hogg v. Scott*, it appeared that the defendant had published, in 1868, the first, and in the latter part of 1862, the second, edition of a book containing matter pirated from the plaintiff’s works. He also intended to publish a third edition. In August, 1873, the plaintiff applied for an injunction to restrain the defendant from further publishing or selling any copies of such piratical work. One of the defences set up was that the statutory limitation applied to all actions and suits, whether for the penalties or damages or injunctions, and hence that the plaintiff’s suit was barred by lapse of time. Vice-Chancellor Hall expressed the opinion, that the word offence was not used in section 26 in the same sense as in section 15, which gives an action on the case for damages ; that the limitation prescribed was intended to apply only in cases of penalties and forfeitures ; that it could not operate to destroy the property secured ; and that an action for damages, or a suit for an injunction, might be maintained, although more than a year had passed since the wrong was done. But, however this might be, he had no doubt that the defendant could not go on committing new wrongs or offences by continually publishing and selling the piratical work, in violation of the

¹ *Clark v. Bell*, 10 Mor. Dict. of Dec. Lit. Prop. App. p. 9.

² *Stewart v. Black*, 9 Sc. Sess. Cas. 2d ser. 1026.

plaintiff's right of property. granted.¹

¹ Law Rep. 18 Eq. 444. The Vice-Chancellor said:—

“I cannot allow the objection taken to the plaintiff's right to sue, because more than twelve months elapsed before he filed a bill in this court. By the 3d section of the statute, a property is created in an author's work which *prima facie* is to endure for a term certain, and that property will remain in the author or his representatives, as owners of it, till it be taken away from him or them. The argument that, if a case arises for a suit in respect of the author's right to his property, and the author does not commence his suit within twelve months, that therefore his property is gone, I do not agree with. I do not find that clearly expressed in the statute, and I cannot put such a construction upon the 26th section. The 15th section gives to an owner of copyright a special action on the case in respect of any piracy. The remedy so provided is apparently a cumulative one; but whether it be so or not is not very important. The remedy is given against the person who is called the ‘offender,’ and the act spoken of as the ‘offence’ is the printing for sale or exportation of any book in which there shall be subsisting copyright. Mr. Morgan, in his argument, contended that the court ought to put upon the word offence in the 26th section the same construction as it bears in the 15th section of the statute. If that were a reasonable construction, it might be adopted; but, looking at the other sections in the statute which refer to penalties, I do not think it would be reasonable. There is nothing to be found in them about any ‘offence’ in the sense contended for on the part of the defendant. If the book which has been improperly published by the defendant contains property belonging to the plaintiff, the owner of copyright, I do not see how it can be successfully contended that he is suing in respect of an offence in the sense urged on the part of the defendant. The plaintiff is

The injunction was therefore

suing in respect of his copyright; that is his property. The 26th section is no doubt not very happily framed; but I am of opinion that, on the true construction of that and the other sections of the statute, the ‘offence’ contemplated by it must be the doing, in contravention of its provisions, of something expressly prohibited by them.

“The real question is, What is the ‘offence’ intended by the statute? It is the printing for sale or exportation of any work or part of a work, by a person who is not the owner of the copyright of that work, and without the consent of the owner. The non-suing by the owner of the copyright in respect of a particular edition, or part of an edition, of the defendant's work, is one thing; and even if it could be said that so far the owner's remedy was barred by his own neglect, still I find nothing in the statute which states that the person who has already published the edition, or part of the edition, complained of, may go on doing so, and that, if he does, the owner has then no remedy for such further ‘offence.’ In reference to this question, I may add that the Scotch cases referred to by Mr. Fischer are not to be disregarded. They were, no doubt, decisions in reference to books published before the passing of the statute; still they seem to me to be quite consistent with good sense and the reasonable interpretation of the statute. The right of the owner of the copyright to his property in it is not to cease because one copy of the work, which without his sanction contains the piracies, has been sold and disposed of without any complaint on his part. He is not on that account to lose all his property in his copyright; therefore I hold, in accordance with the decisions referred to, and on the construction of the statute, that the plaintiff has not lost his right to sue.” Ibid. 450.

“The offence is committed every time a copy is sold.” James, V. C., *Jarrold v. Heywood*, 18 W. R. 281.

ENGRAVINGS AND PRINTS.

Penalties and Forfeitures. — For piracy of engravings and prints, penalties and forfeitures are prescribed by 8 Geo. II. c. 13, and an action for damages is given by 17 Geo. III. c. 57. The former act declares, that if any person shall engrave, etch, or work, or in any other manner copy and sell, “in the whole or in part, by varying, adding to, or diminishing from the main design,” or shall print or import for sale a print, without the written consent of the owner of the copyright signed in presence of two witnesses, or shall sell or expose to sale a print knowing it to have been so unlawfully printed or imported, such offender shall forfeit the plates and the prints to the owner, to be by him destroyed, and shall further pay five shillings for every print found in his custody; the penalty recovered to be equally divided between the king and the informer.¹

Action for Damages. — The 17 Geo. III. c. 57, provides that every person shall be liable to an action for damages who shall engrave, etch, or work, or in any other manner copy, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print or import for sale, or shall publish, sell, or otherwise dispose of any copy or copies of a print or prints “which hath or have been or shall be engraved, etched, or drawn or designed in any part of Great Britain, without the express consent of the proprietor or proprietors thereof first had and obtained in writing” signed in presence of two witnesses.²

When Seller is Liable. — The former statute imposes penalties and forfeitures on such seller only who sells or exposes to sale copies which he knows to have been unlawfully printed or imported. The meaning of 17 Geo. III. c. 57, is not satisfactorily clear on this point. There is little doubt that the seller is made liable to an action for damages although he is ignorant of the piracy; and the statute has been so construed.³ But

¹ s. 1.

² In *Moore v. Clarke*, the question was raised, but not decided, whether an action can be maintained under this statute without proof of actual damage. “Perhaps if the piracy were

established,” said Baron Parke, “the law would imply damage.” 9 Mees. & W. 694.

³ *West v. Francis*, 5 Barn. & Ald. 737; *Gambart v. Sumner*, 5 Hurl. & N. 5. See *ante*, p. 470.

the question has been raised, whether a seller is liable for the unauthorized sale of copies which have not been unlawfully printed or imported. In *Murray v. Heath*, it appeared that the plaintiff had employed the defendant to engrave plates from certain drawings. The drawings were the property of the plaintiff, and the plates had been prepared for his exclusive use; but he permitted the defendant to retain one hundred copies of the prints, on the express condition that he was not to sell them. Afterward, the defendant became bankrupt, and the copies passed to his assignees, who advertised them for sale. In the action for damages, wherein the assignees were codefendants, the defence was set up, that the copies had not been unlawfully printed or imported, and therefore their sale was not piracy. The court thought that "reading the statute 17 Geo. III. c. 57, alone, it would be very difficult to answer the argument urged on behalf of the plaintiff;" but construing that act in connection with the two statutes, 8 Geo. II. c. 13, and 7 Geo. III. c. 38, which it recited, it was held that the sale complained of, though a breach of contract, was not a violation of copyright.¹

¹ 1 Barn. & Ad. 804. It is not satisfactorily clear, from the opinions of the judges, on what ground this decision was based. Lord Tenterden, C. J., interrupting counsel, who had referred to the clause of 17 Geo. III. c. 57, directed against piracy, said: "Can the clause be understood to apply to prints taken from the original plate? The prints were not engraved without the consent of the proprietor." Ibid. 808. In delivering his opinion, the same judge, after referring to 8 Geo. II. c. 13, and 7 Geo. III. c. 38, continued: "The question therefore is, whether the act imputed to the defendant be one for which he would have been liable to the forfeiture imposed by either of the recited statutes. If it be not, he is not liable to the action on the case given by 17 Geo. III. c. 57. Now, both the recited statutes are manifestly confined to prints struck off from engravings pirated from other engravings. The present case, therefore, is not within either; for here the first engraver took

a certain number of impressions from a plate engraved by himself, but which he had contracted to engrave for the use of another." Ibid. 810.

"Taking the statute 17 Geo. III. c. 57," said Littleton, J., "in conjunction with the other statutes which it recites, and whereby a print-seller, or other person selling pirated prints, is made liable to forfeit the plates on which they are copied, to the proprietor of the originals, I think it is manifest that the last statute does not apply to the case of taking a print unlawfully from a lawful plate." Ibid. 811.

The 17 Geo. III. c. 57, taken in connection with the prior acts, may admit of the construction that a seller is not liable to an action for damages, unless the copies sold were unlawfully printed or imported. This is the only ground on which the above decision can be sustained. If the court intended to hold that the defendants were not guilty of piracy, because the copies had been printed from the original

Copying by Lithography, Photography, or other Processes Unlawful.—The 15 & 16 Vict. c. 12, s. 14, declares that the provisions of the several acts relating to copyright in prints, shall “include prints taken by lithography, or any other mechanical process by which prints or impressions of drawings are capable of being multiplied indefinitely.”

Although photography had not been discovered when the statutes for the protection of copyright in engravings were passed, these statutes have been construed to prohibit unlawful copying by that or any other process by which copies may be indefinitely multiplied.¹ The same construction has been given to the American statute.²

Copies Made by Hand.—The question was raised, but not decided, in *Gambart v. Ball*, whether the unauthorized copy of an engraving made by hand is a violation of the copyright secured by the statutes. Mr. Justice Willes expressed the opinion that

plates the principle is not sound. The governing question is, whether the printing is done with or without due authority. If the latter, it is clearly immaterial whether the copies are printed from the original or pirated plates. *Stevens v. Gladding*, 17 How. 447; *Prince Albert v. Strange*, 2 De G. & Sm. 652, on ap. 1 Mac. & G. 25.

Moreover, the court, as will be seen from the language of the Chief Justice above quoted, seems to have held that a person is not liable to an action under 17 Geo. III. c. 57, unless he is also liable to the penalties under the two preceding statutes. But this position is indefensible, and is opposed by *West v. Francis*, 5 Barn. & Ald. 737, and *Gambart v. Sumner*, 5 Hurl. & N. 5, wherein it was held that a seller ignorant of piracy is liable to an action under 17 Geo. III. c. 57, although he is not subject to the penalties under the earlier statutes, unless he sells prints knowing them to be piratical. And in *Graves v. Mercer*, 16 W. R. 790, it was held that an action for damages might be brought under 17 Geo. III. c. 57, without regard to the limitation of time prescribed by 8 Geo. II. c. 13.

¹ *Gambart v. Ball*, 14 C. B. n. s.

306; *Graves v. Ashford*, Law Rep. 2 C. P. 410. In the latter case, Kelly, C. B., said: “It is obvious that the legislature could not, in providing for the protection of works of art, describe a piracy by means of a process not then within the knowledge of mankind. But it by no means follows that, when words large enough to embrace it are used, the prohibition should not, as well as the protection, be extended to a subsequently discovered mode of reproducing and multiplying copies. It appears to us, therefore, that the argument derived from 15 & 16 Vict. c. 12 and 25 & 26 Vict. c. 68, altogether fails; and that the effect of all the acts, taken together, is, that any process, whether known at the time, or the result of subsequent invention or discovery, by which pictures or engravings may be imitated or copied, is within the mischief as well as within the express words which the legislature has used. And we cannot help thinking that a more limited construction would be contrary to the whole spirit of the legislation on the subject, and productive of great injustice.” *Ibid.* 420.

² See *post*, p. 492.

such copying is not within the statutory prohibition.¹ But this construction is not in harmony with the words or the spirit of the statute. Their object is to give full protection to the owner of the copyright, and they expressly prohibit unlicensed copying in any manner. When the property in an engraving is injured by the unauthorized sale of copies made by hand, there is no reason why such copies should not be held to be piratical, especially when it is considered that they are within the strict letter of the law. The principle is the same as in the case of a literary work, where it might be very easy to make and circulate many manuscript copies of a short composition. But except by authority this could not be done without violating the statute, which secures to the author the exclusive right of "printing or otherwise multiplying copies" of his production.

Substantial Identity Test of Piracy. — It is no defence of piracy that the unlicensed copy is larger or smaller than the original.² Nor need it be an exact copy. The question is whether the print complained of is substantially a copy of that entitled to protection.³

In an action under 8 Geo. II. c. 13, and 17 Geo. III. c. 57, it was held not to be piracy of an engraving of a painting to make a copy from the painting itself.⁴ But now copyright in paintings is secured by 25 & 26 Vict. c. 68. It has been held that an assignee may maintain an action for the piracy of an engraving, although the statute does not expressly give him that right;⁵ also, that it is necessary to allege where the piracy has been committed.⁶

¹ 14 C. B. n. s. 318.

² *Graves v. Ashford*, Law Rep. 2 C. P. 410; *Bradbury v. Hotten*, Law Rep. 8 Exch. 1. "Whether the photographic copy is of the same size as the original, or is enlarged or very much diminished, the statute has in terms provided for that. It is not the extent of the paper covered by the picture which conveys the pleasure to the mind. Thus, in the representation of *The Horse Fair*, we feel the same degree of pleasure in looking at the forms and attitudes of the beautiful animals there portrayed whether we see them in the size in

which they are drawn in the original picture, or in the reduced size of the engraving, or in the still more diminished form in which they appear in the photograph." Erle, C. J., *Gambart v. Ball*, 14 C. B. n. s. 317.

³ *Roworth v. Wilkes*, 1 Camp. 94; *West v. Francis*, 5 Barn. & Ald. 737; *Moore v. Clarke*, 9 Mees. & W. 692.

⁴ *De Berenger v. Wheble*, 2 Stark. 548.

⁵ *Thompson v. Symonds*, 5 T. R. 41.

⁶ *Graves v. Logan*, 7 Sc. Sess. Cas. 3d ser. 204.

Limitation of Actions.—It is provided by 8 Geo. II. c. 13, that actions and suits shall be brought within three months after the offence has been committed.¹ By 7 Geo. III. c. 38, the time is limited to six months.² No limitation is prescribed by 17 Geo. III. c. 57. In the recent case of *Graves v. Mercer*, the Irish Queen's Bench held that "the limitation of three months given by the 8 Geo. II. c. 13, applies only to actions and proceedings given by that act. The action given by 17 Geo. III. c. 57, is an action on the case, and comes under the 20th section of the Common Law Procedure Act (Ireland), 1853, which gives a limitation of six years to such action."³

Maps and Charts.—The copyright in maps, charts, and plans is now governed, not as formerly by the statutes relating to engravings, but by the 5 & 6 Vict. c. 45.⁴

PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.

Penalties and Forfeitures.—The 25 & 26 Vict. c. 68, secures to the author or the owner of a painting, drawing, or photograph the "exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death."⁵ It then provides that if the author, after having sold or disposed of the copyright, or if any other person, not being the owner of the copyright, "shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, . . . any such work or the design thereof, or, knowing that any such repetition, copy, or other imitation has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, . . . any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding

¹ s. 3.

² ss. 6, 8.

³ 16 W. R. 790.

⁴ *Stannard v. Lee*, Law Rep. 6 Ch. 346. See *ante*, p. 174.

⁵ s. 1.

ten pounds; and all such repetitions, copies, and imitations made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright.”¹

The author himself is here expressly prohibited from repeating or making duplicate copies of his production “or the design thereof,” after he has sold the copyright, although he might be able to produce a duplicate without the original or a copy before him. It will also be noticed that unauthorized copying, not only for sale, but also for hire, exhibition, or distribution, is made unlawful; and either to import, sell, publish, let to hire, exhibit, or distribute copies, knowing them to have been unlawfully made, is declared to be piracy. In the case of the person who copies or prints, or who procures the copying or the printing to be done, the statute does not require that guilty knowledge shall be shown.²

Is Unlicensed Copying of Engraving Piracy of Painting?— Where the copyright in a painting and in an engraving of it were vested in the same person, it was held to be an invasion of the copyright in the painting to make without authority copies of the engraving. The court was of opinion “that the copy from an intervening copy is a copy from the painting, and within the prohibition of the statute.”³

¹ s. 6.

² *Ex parte Beal*, Law Rep. 3 Q. B. 387, 392.

³ *Ex parte Beal*, *Ibid.* 393, 394.

“The next question,” said Blackburn, J., “is this: The copyright in the picture belongs to Mr. Graves; he made an engraving of it, of which he sold copies; he had not given any right to others to multiply them, and the photographs for which the penalties were recovered were made by photographing the engraving, and not the original picture, and it has been argued that the photograph of the engraving, being the reproduction of a copy of the design of the painting, is not a copy of the painting itself. It seems to me that cannot be so. When the subject of a picture is copied, it is of no consequence whether that is done directly from the picture itself or

through intervening copies; if in the result that which is copied be an imitation of the picture, then it is immaterial whether that be arrived at directly or by intermediate steps. It must be borne in mind that Mr. Graves is the owner of the copyright in the painting and the engraving; had they been in different persons, another question might have arisen, which it is unnecessary to consider. I think that the copy from an intervening copy is a copy from the painting, and within the prohibition of the statute. A doubt was suggested by the court whether there might not be a difficulty arising upon the wording of section 6; and it was thrown out that, *reddendo singula singulis*, the enactment might merely mean the imitation of a painting by a painting, of a drawing by a drawing, and of a photograph by a photograph, and

This judgment is open to criticism. It is true that a copy of an engraving of a painting is an indirect copy of the painting. But is it such a copy within the meaning of the law as will violate the copyright in the original? The statute secures copyright in a painting, and also in an engraving, a photograph, or other copy of it. The copyright in the original is one thing. It affords a remedy against the unlawful copying of the original by any process. The copyright in any copy is another thing. It is this copyright which makes unlawful the unlicensed copying of the copy. There appears to be no reason why the general principle, that copyright is violated only when the thing copyrighted is copied, should not govern in the case under consideration. If an engraving of a painting should become common property, and the copyright in the painting itself be valid, there is no reasonable doubt that the latter right would not be violated by any publication of the engraving. So, if the owner has sold the copyright in the engraving, and retained that in the painting, it does not appear that he would have any remedy against the unlicensed copying of the engraving, although such copying might be injurious to the property in the painting. The court admitted that such a case might be governed by a different rule from that which applies when the same person owns both original and copy. But the principle is the same in both cases.

Penalty for Every Copy Unlawfully Sold. — Where it appeared that twenty-six piratical copies had been sold in two lots, and it was contended that only two offences had been committed, as there had been but two sales, it was held that the penalty might be recovered for each copy sold.¹

that a photograph of a drawing would not be within the meaning of the legislature. But when we look at the first section, which is the key to the whole act, it gives to the author of every original painting, drawing, or photograph, the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph and the negative thereof, by any means and of any size; and the terms used are so extensive that it is plain

that a photograph of a painting, of a drawing, or of another photograph, made without the consent of the owner, though of a different size, provided it be a reproduction of the design, is such an infringement as would subject the maker to the penalty."

¹ *Ex parte Beal*, Law Rep. 3 Q. B. 387, 394. See also *Brooke v. Milliken*, 3 T. R. 509. In the former case, Blackburn, J., said: "The only other question is, whether the offender is liable to a penalty for every copy sold, or

Unlawful Importing Prohibited. — Action for Damages Given. — By section 10, the importing of piratical copies is expressly prohibited. Besides prescribing penalties and forfeitures, the statute gives to the injured owner a remedy by action for damages.¹ The statute also prescribes penalties for the sale of a painting, drawing, or photograph fraudulently represented to be the work of a person who is not the author.²

Limitation of Actions. — No limitation of time within which actions under it shall be brought is prescribed by 25 & 26 Vict. c. 68.

SCULPTURE.

The 54 Geo. III. c. 56, which secures to the owner the copyright in sculpture, models, copies, and casts, gives an action for damages against any person who shall “make or import, or cause to be made or imported, or exposed to sale, or otherwise disposed of, any pirated copy or pirated cast,” whether it “be produced by moulding or copying from, or imitating in any way” the original.³ It is provided that no person shall be subject to such action who has bought the original work by

only on each contract to sell. In point of fact twenty-six copies were sold, but they were sold in two parcels, thirteen copies in each; and it has been contended that there were but two offences. In the case of *Brooke v. Milliken*, 3 T. R. 509, the penalty was imposed by 12 Geo. II. c. 36, for importing for sale any book first published in this kingdom and reprinted in any other place, and it enacted that the offender should forfeit £5 and double the value of every book sold. In that case, there could be no doubt that the meaning of the statute was, the penalty should be cumulative, viz., double the value of each book. In the present case, the words are, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding £10. It is quite clear that this imposes a penalty for every copy sold: a different construction would result in an absurdity, and defeat the intention of the legislature. The penalty is im-

posed also for importation, and it would be monstrous that if a man had consigned from abroad a cargo of imitations, the utmost penalty that could be imposed on him would be the sum of £10. It would be well worth his while to run the risk of paying that small sum, and to import and to distribute for sale elsewhere a quantity worth many thousands of pounds. The legislature were dealing with an offence which was likely to be committed wholesale, and they have used words meaning that the sale of every copy shall be an offence; and, if ten copies be sold at one time, ten offences are committed, and the offender may be punished for each separately.”

¹ s. 11.

² s. 7. See also as to piracy of paintings, *In re Johnson*, 15 L. T. n. s. 163; *Ex parte Graves*, Law Rep. 3 Ch. 642; of photographs, *Strahan v. Graham*, 16 L. T. n. s. 87, on ap. 17 Id. 457.

³ s. 8.

a deed in writing, signed by the owner in the presence of two witnesses.¹ Actions for piracy are to be begun "within six calendar months next after the discovery of every such offence, and not afterwards."² Section 7 of 13 & 14 Vict. c. 104, imposes on the offender a penalty of not less than five nor more than thirty pounds for every offence, to be recovered by the owner of the copyright.

UNITED STATES. — BOOKS.

The act of 1831 provided that any person who should print, publish, or import a book, without the written consent of the owner of the copyright, or should sell a book knowing it to have been so printed or imported, should forfeit every copy to such owner, and should be liable to pay fifty cents for every sheet found in his possession; one-half of the penalty to go to the United States, and the other half to the owner of the copyright.³ Like provisions were contained in the statute of 1790, except that the owner of the copyright was required to destroy the forfeited copies.⁴ The act passed in 1870 abolished penalties for piracy in the case of books, and was the first American statute to give an action for damages for the infringement of copyright.⁵

Action for Damages and Recovery of Piratical Copies. — Section 4964 of the Revised Statutes enacts that "every person who, after the recording of the title of any book as provided by this chapter, shall within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, print, publish, or import, or knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction."

A wrong-doer is here made liable for a wrongful act done at any time "after the recording of the title of any book," and

¹ s. 4.

² s. 5.

³ s. 6; 4 U. S. St. at L. 437.

⁴ s. 2; 1 Id. 124.

⁵ The statute of 1856, 11 Id. 138, gave an action for damages for the invasion of playright.

within the term of protection ; but, before an action for damages or forfeitures can be brought, the copyright must be completely secured by the performance of all the statutory requisites.¹ The person entitled to bring such action is the owner of the copyright, who must either be the author of the book or hold a good legal title of ownership derived from the author. An equitable title, or interest in the work, which might entitle the holder to an injunction for the protection of his rights, is not enough in a court of law.² Two distinct remedies are given by the statute to the owner for the invasion of his property. He may sue for the damages which he has sustained, and for the recovery of the printed copies. He is not restricted to either one of these, but may avail himself of both at the same time.

Persons Liable. — Knowledge of Piracy. — These remedies lie against four classes of persons, — the printer, the publisher, the importer, and the seller of piratical copies. The first three are made liable though ignorant of the piracy ; but, in the case of the seller, it must be shown that the book was unlawfully printed, published, or imported, and that in selling or exposing to sale he was aware of that fact.³ All of the wrong-doers are made liable ; and there appears to be no reason why the injured person may not proceed against any one of them whom he may select,⁴ or more than one, if necessary to the vindication of his rights. Of course the printing, publishing, or selling, to amount to piracy, must be done in the United States.⁵ When piratical copies are imported, it is immaterial where they were printed.

Gratuitous Circulation of Copies. — In subjecting the printer, publisher, and importer to the penalty of forfeiture and an action for damages, the statute does not, as does the English law, prescribe that the copies shall be printed, published, or

¹ See *ante*, p. 265.

² Numerous authorities cited in considering transfer of copyright, Chap. VI., are to the effect that the plaintiff in an action at law must show a good legal title. In the English equity cases, *Mawman v. Tegg*, 2 Russ. 385, *Sweet v. Maugham*, 11 Sim. 51, and *Sweet v. Cater*, *Ibid.* 572, the court ordered the defendant to admit the

legal title of the plaintiff in an action at law to determine the latter's rights. See also *Sweet v. Shaw*, 3 Jur. 217.

³ See *Millett v. Snowden*, 1 West. Law Jour. 240. See *ante*, pp. 470, 478, 401-404.

⁴ *Greene v. Bishop*, 1 Cliff. 186, 203.

⁵ See *Graves v. Logan*, 7 Sc. Sess. Cas. 3d ser. 204, cited *ante*, p. 481, note 6.

imported *for sale*. Hence, the wrong-doer is made liable when he publishes or imports for gratuitous circulation, or other purposes harmful to the owner of the copyright. So the gratuitous distribution of piratical copies would be an infringement of the copyright.¹

Are Copies Subject to Forfeiture when only Part of Book is Piratical? — It is settled that when one book contains a substantial part of another, the former is, within the meaning of the law governing the infringement of copyright, a copy of the latter, and its unlawful publication will amount to piracy. Hence, under section 4964 of the Revised Statutes, which provides that any person who shall unlawfully print, publish, or import any copy of a book shall forfeit such copy, and be liable to an action for damages, there is no doubt that such action will lie when the book complained of is a substantial copy, or contains a material part, of the one entitled to protection. But is the word copy used in the same sense in relation to forfeitures? This question cannot arise concerning any other subject of copyright than a book; because in the case of maps, charts, musical compositions, prints, engravings, &c., the statute imposes penalties and forfeitures when the work is pirated “either in whole or in part.”²

In *Rogers v. Jewett*, the Circuit Court of the United States expressly held that the word copy of a book in section 6 of the statute of 1831 must be taken to mean a transcript or reprint of the entire work, and hence that the penalties imposed by that section were not incurred by the wrongful publication of any part of a book.³ The contrary doctrine had previously been affirmed by the Circuit Court of the United States in another circuit by a *pro forma* ruling in *Backus v. Gould*,

¹ See this point under the English statute considered, *ante*, p. 474.

² s. 4965. *Rogers v. Jewett*, *infra*.

³ 12 Monthly Law Reporter, 339. In *Rooney v. Kelly*, wherein the Court of Queen's Bench in Ireland held that, in an action for damages under section 15 of 5 & 6 Vict. c. 45, it was sufficient to declare that parts of the book complained of were piratical, O'Brien, J., said *obiter*: “I may observe that, from other provisions of the statute, there

appears to me great difficulty in holding that the word book *wherever* it is used in the statute, comprises and includes ‘*part of a book*.’ It would, for instance, be difficult to maintain that under the 23d section [imposing forfeitures] the proprietor of the copyright in a book would acquire the property of all copies of another book which contained printed therein a few pages or passages of his book.” 14 Ir. Law Rep. n. s. 158, 171.

which was an action for the penalties under the act of 1831 for the publication of parts of certain books. The case was taken for review to the Supreme Court of the United States; but the question which we are now considering was not passed upon by that tribunal, which simply decided that the penalty was limited to the sheets found in the possession of the defendant.¹

The doctrine that a wrong-doer is not liable to the penalties or forfeitures unless the whole of the book entitled to protection has been copied, especially in considering the meaning of the present statute with reference to forfeitures, is open to question. The early rule that penal laws are to be strictly construed has been materially modified in later times. In interpreting such statutes, the strict meaning of the language used is still kept in view; but it is not allowed to defeat the plain intent of the legislature. The courts seek to ascertain that intent and to give effect to it. In section 4964 of the existing statute the word copy is used without distinction with reference to a forfeiture of the piratical work and an action for damages. In the latter case, as has been seen, a book which contains a substantial part of another is clearly a copy; and there is nothing in the section to show that a different rule is to be applied in the case of forfeitures. The question, therefore, is, What was the intention of the legislature? In declaring that every copy of a piratical book should be forfeited to the owner of the copyright, Congress had these objects in view: 1, to deter persons from committing piracy; 2, after its commission, to punish the offender, and to remedy the injury done. The end sought was the protection of copyrighted books. It is true that the action for damages is a means to the same end. But Congress manifestly considered this to be an insufficient remedy, and therefore gave an additional one by prescribing forfeitures. If the provision concerning forfeitures is to apply only when the whole of a book is pirated, it is clear that the purposes of such provision may easily, and often will, be defeated. It will be in the power of any wrong-doer to annul the law as far as a forfeiture of copies is concerned, by leaving out a small part — a chapter, or even a few pages — in reprinting the book which he pirates. He may thus take all that is valuable in a copyrighted work, and escape the

¹ 7 How. 798.

penalty of forfeiture by omitting an insignificant part. The statute would thus fail to reach the very persons who are the most guilty; viz., those who knowingly and wilfully commit piracy. As this construction would operate to annul the law in many, doubtless a majority, of cases, and especially in the case of those against whom its penal provisions were particularly aimed, it is reasonable to suppose that it does not give effect to the intention of the legislature. On the other hand, it is clear that the law will often be harsh, and perhaps unjust, in its operation, if every book which contains a material quantity of piratical matter may be seized by the injured person.

If one or the other of these extreme constructions must be adopted, there are reasons for choosing the latter. It would doubtless give greater effect to the intention of the legislature; and would be supported by the principle, recognized in cases of piracy, that whoever wrongfully mixes the matter of another with his own must suffer the consequences. But the courts are not bound to go to either extreme in construing the statute. They may hold that the appropriation of an entire work is not necessary to subject the wrong-doer to the penalty of forfeiture; and, on the other hand, that such penalty is not necessarily incurred by taking a part, though such part may be enough to amount to piracy, for which an action of damages will lie. In this view of the law, the forfeiture would attach when a work consists chiefly or largely of pirated matter, or when it contains a large or valuable part of a book entitled to protection. But, when the pirated matter forms a small part in quantity and value of the book complained of, the injury may be redressed by an action for damages.

In the examination of this question, the fact has not been overlooked that, in that part of the statute¹ which requires two copies of every copyrighted book to be deposited in the library of Congress, the word copy must be taken to mean a transcript of the entire work. But the intention of Congress in making this provision is obvious; and that intention would clearly be defeated by holding that a substantial, and not a *verbatim*, copy was meant.

¹ s. 4956.

MAPS, CHARTS, MUSICAL COMPOSITIONS, AND
WORKS OF ART.

Penalties and Forfeitures. — Section 4965 of the Revised Statutes provides that any person who, without the written consent of the owner of the copyright, signed in presence of two witnesses, shall engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or knowing it to be so printed, published, or imported, shall sell or expose to sale any copy of a copyrighted map, chart, musical composition, print, cut, engraving, photograph, chromo, painting, drawing, statue, statu-ary, or model or design intended to be perfected as a work of the fine arts, shall forfeit to the owner of the copyright all the plates on which the same shall be copied, and every sheet thereof either copied or printed. The offender is further made liable to pay a penalty of one dollar for every sheet found in his possession, either printing, printed, copied, published, imported, or exposed for sale. In the case of a painting, statue, or statu-ary, the penalty, besides forfeiture of plates and copies, is ten dollars for every copy found in the possession of the offender, “or by him sold or exposed for sale.” The owner of the copyright is entitled to one-half of the prescribed penalties, and the United States to the other half.

In the case of all the articles above named, excepting paintings, statues, and statu-ary, the wrong-doer is not liable to pay the penalty for any copies not found in his possession.¹

¹ *Backus v. Gould*, 7 How. 798. In *Dwight v. Appleton*, which was an action in the United States Circuit Court for unlawfully importing and publishing a book, the report says that “the jury were authorized [by Mr. Justice Thompson] to give fifty cents for every sheet contained in the volumes found at any time, within the period stated in the declaration, to have been in the possession of the defendants. The law applies to all the copies which the defendants had imported or sold, or held for sale, contrary to the rights of the plaintiffs.” 1 N. Y. Leg. Obs. 198.

If by this was meant that the de-

fendants were liable to the penalties for all the copies which were in their possession when the action was brought, including all of such copies which may have been afterward sold, the ruling was doubtless correct. But if the court intended to construe the law to the effect that the defendants were liable to pay the penalties for the copies which had been imported and sold before the action was brought, and which therefore were not found in their possession, the decision was against the plain reading of the statute, and is in opposition to the law as since expounded by the Supreme Court of the United States in *Backus v. Gould*.

Persons Liable. — Knowledge of Piracy. — Besides the printer, publisher, importer, seller, and the person exposing to sale, any person who shall unlawfully “ engrave, etch, work,” or “ copy ” any article mentioned in section 4965 is made liable to the forfeitures and penalties. Guilty knowledge must be shown on the part of the wrong-doer who sells or exposes to sale, but not in the case of the others.¹

Substantial Copy subject to Penalties and Forfeitures. — The penalties and forfeitures are incurred not only when the whole of the copyrighted article has been unlawfully taken, but when it has been pirated, “ either in whole or in part, or by varying the main design with intent to evade the law.” When the thing complained of is not an exact reprint, the question is, whether it is a substantial copy of that entitled to protection.²

When the piratical copy appears to be an imitation or a colorable copy, it would seem to be necessary to show that the main design of the original had been varied “ with intent to evade the law.” But I do not understand that the words just quoted apply, or were intended to apply, to a copy which is an exact reproduction of the whole or a part of the original.

Although the statute does not expressly prohibit copying on a larger or a smaller scale than that of the original, there can be little doubt that an enlarged or a diminished copy made without authority would subject the offender to the penalties and forfeitures.³

Copying by Photography and other Processes Unlawful. — The statute prohibits unlawful copying, and the word copy is comprehensive enough in its meaning to embrace all modes and processes of multiplying copies. Thus, when the statute of 1831 was passed, photography had not been discovered; but although a photograph was not, within the meaning of section 1 of that act, a “ print, cut, or engraving ” entitled to protection,⁴ an unlicensed photographic copy of a print, cut, or

¹ *Millett v. Snowden*, 1 West. Law Jour. 240. See *ante*, pp. 478, 470, 401–404.

² *Reed v. Carusi*, Tan. Dec. 72; *Rogers v. Jewett*, 12 Monthly Law Reporter, 339. *Br. Roworth v. Wilkes*,

1 Camp. 94; *West v. Francis*, 5 Barn. & Ald. 787; *Moore v. Clarke*, 9 Mees. & W. 692.

³ See English cases on this point, *ante*, p. 481, notes 2, 3.

⁴ *Wood v. Abbott*, 5 Blatchf. 325.

engraving was within the prohibition of section 7.¹ The same construction has been given to the English statutes.²

Is Copying of Engraving or Photograph Piracy of Painting? — In England, piracy of an engraving of a painting has been held to be an infringement of the copyright in the painting. The soundness of this doctrine has been questioned in this work.³ There can be little doubt that this rule will not apply in construing the clause of section 4965 of the American statute which prescribes a penalty of ten dollars for every unlawful copy of a painting, statue, or statuary. The proper construction of this provision would seem to be, that a person is not made liable to the penalty, unless he copies directly from the painting or statue, or from a piratical copy. When he unlawfully reproduces a copyrighted engraving, photograph, or chromo of a painting, he is subject to the penalties and forfeitures expressly prescribed for such cases.

Gratuitous Circulation of Copies. — Under the statute of 1831, in an action for the penalties or forfeitures against the printer or importer, it was necessary to show, in the case of prints, cuts, engravings, maps, charts, and musical compositions, that the copies had been printed or imported "for sale."⁴ But, in the existing statute, the words for sale are omitted.⁵

Action for Damages. — Section 4965 does not give an action

¹ *Rossiter v. Hall*, 5 Blatchf. 302. Benedict, J., said: "The argument of the defendant is, that the exclusive privilege given by the first section of the act does not include the photographing the copyrighted engraving because that is not a 'printing' or a 'reprinting,' and that the general words of the seventh section cannot be held to forbid in others what has not been exclusively reserved to the author by the words of the first section; and, further, that photographing could not have been within the intent of the lawmakers, as the art of photography had not been discovered when the act was passed. In support of such a construction, the decision of Judge Shipman, in the case of *Wood v. Abbott*, 5 Blatchf. 325, is cited. I cannot agree to the construction of the act which is contended for. In my opinion, sections

one and seven should be read together; and, so taken, the words used disclose a clear intent to protect a copyrighted work from such a mode of duplication as is practised by the defendant. Section seven provides that any person who shall engrave, etch, or work, sell or copy, the engraving, shall be an offender. The word copy is a general term added to the more specific terms before used, for the very purpose of covering methods of reproduction not included in the words engrave, etch, or work, and, if it covers any thing, should cover the photographic method, which, more nearly than any other, produces a perfect copy."

² See *ante*, p. 480.

³ *Ex parte Beal*, Law Rep. 3 Q. B. 387. See *ante*, pp. 483, 484.

⁴ *Reed v. Carusi*, Tan. Dec. 72.

⁵ See *ante*, pp. 487, 488.

for damages for the piracy of any article therein mentioned ; and section 4964 provides such remedy only in the case of books. Any article, however, named in section 4965, which may be considered as a book within the general meaning of the law, is within the scope of section 4964. Thus, maps, charts, and musical compositions have been expressly held to be books. Moreover, the common-law remedy by action for damages is available in any case where such remedy is not expressly provided by the statute.¹

GENERAL PROVISIONS.

Penalty for False Printing of Copyright Notice. — Section 4963 provides that every person who shall insert or impress the notice of copyright, “or words of the same import, in or upon any book, map, chart, musical composition, print, cut, engraving, or photograph, or other article, for which he has not obtained a copyright, shall be liable to a penalty of one hundred dollars, recoverable one-half for the person who shall sue for such penalty, and one-half to the use of the United States.” Under the corresponding provision of the act of 1831,² it was held that the penalty could not be recovered in the name of more than one person ; but that the statute might admit of a more liberal construction if the penalty had been given to the person aggrieved, instead of a common informer.³

Unlicensed Publication of Manuscripts. — Section 4967 gives to the owner an action for damages against “every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained, if such author or proprietor is a citizen of the United States, or resident therein.” This provision has been fully considered in another chapter.⁴

Limitation of Actions. — Section 4968 provides that “no action shall be maintained in any case of forfeiture or penalty under the copyright laws, unless the same is commenced within two years after the cause of action has arisen.” It is no defence, in an action for unlawful printing, that more than two years have passed since the plates were engraved or stereo-

¹ See *ante*, p. 473.

² s. 11; 4 U. S. St. at L. 438.

³ *Ferrett v. Atwill*, 1 Blatchf. 151.

⁴ See *ante*, p. 124.

typed, or since copies were first printed. Every act of printing is a violation of the right secured; and, if done within two years, will subject the offender to the forfeitures and penalties.¹ On the same principle, an action against the seller is not barred by the fact that the copies sold, or offered for sale, were printed or imported more than two years before. The controlling question is, whether the sale complained of is within the two years.

The limitation clause of the statute applies only to cases wherein it is sought to recover forfeitures or penalties. The time within which an action for damages may be brought, or redress in equity sought, is not limited by the statute.²

In *Atwill v. Ferrett*, it was held that an action on the case, and not trespass, is the proper form in law for infringement of copyright.³ Penalties and forfeitures must be sued for in a court of law, and not in equity.⁴

Neither Oral Use of Production, except Dramatic Composition, nor Exhibition Prohibited. — The statute is directed against the multiplication and circulation of piratical copies, and the unlawful performance of dramatic compositions. It does not secure to the author the exclusive right of reading his production in public, except in the case of a dramatic composition; nor of publicly exhibiting any work of art, nor of performing a piece of music, unless it be also a dramatic composition. Nor is such public use of a work prohibited. Hence, statutory copyright is not violated by the unauthorized public reading of a literary or the playing of a musical composition, or the exhibition of a copy of a painting, statue, engraving, or other work of art. The unlicensed public performance or reading of a dramatic composition is a violation, not of the copyright, but of the playright therein; which is expressly secured by the statute, and for whose protection remedies are specially provided.⁵

The statutory remedies for the violation of playright are treated in Chapter XVI.

¹ *Reed v. Carusi*, Tan. Dec. 72.

² *Reed v. Carusi*, in which it was held that the defendant was liable only for a wrong done within two years before the action was brought, was a *qui tam* action for the penalties under section 7 of the statute of 1831. See 8 Law Reporter, 410.

As to limitation under English statutes, see *ante*, pp. 475, 482.

³ 2 Blatchf. 39, 47.

⁴ *Stevens v. Gladding*, 17 How. 447. See Chap. XII.

⁵ See *ante*, pp. 474, 475.

CHAPTER XI.

REMEDIES IN EQUITY FOR THE INFRINGEMENT OF COPYRIGHT.

Nature and Extent of Equity Jurisdiction in Copyright Cases.—Equity jurisdiction in cases of copyright is dependent on the legal right, and is exercised for the purpose of making that right more effective, on the ground that relief in law is inadequate.¹ “The jurisdiction upon subjects of this nature,” said Lord Eldon, “is assumed merely for the purpose of making effectual the legal right, which cannot be made effectual by any action for damages; as, if the work is pirated, it is impossible to lay before a jury the whole evidence as to all the publications, which go out to the world, to the plaintiff’s prejudice. A court of equity, therefore, acts with a view to make the legal right effectual by preventing the publication altogether.”² The remedies afforded by law are available only when the wrong has been done. They do not directly prevent a threatened mischief, nor the continuation or repetition of an injury already done. Moreover, the cost of seeking redress, the difficulty and uncertainty in ascertaining the damages sustained, and the delay in obtaining relief, are usually greater in law than in equity. Hence, in a great majority of the copyright cases which have arisen in England and the United States, protection has been sought in a court of equity. “It is quite plain,” said Mr.

¹ *Hogg v. Kirby*, 8 Ves. 215; *Wilkins v. Aikin*, 17 Id. 422; *Lawrence v. Smith*, Jac. 471; *Bramwell v. Halcomb*, 8 My. & Cr. 737; *Saunders v. Smith*, Ibid. 711, 728; *Spottiswoode v. Clarke*, 2 Phillips, 154; *Pierpont v. Fowle*, 2 Woodb. & M. 23.

² *Wilkins v. Aikin*, 17 Ves. 424. In *Hogg v. Kirby*, the same judge said: “The principle of granting the injunc-

tion in those cases is, that damages do not give adequate relief; and that the sale of copies by the defendant is, in each instance, not only taking away the profit upon the individual book, which the plaintiff probably would have sold, but may injure him to an incalculable extent which no inquiry for the purpose of damages can ascertain.” 8 Ves. 225.

Justice Story, "that, if no other remedy could be given in cases of patents and copyrights than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights."¹

The chief remedies afforded by equity are the injunction and the account of profits. By the former, the publication, sale, or other unlawful use of a piratical work may be stopped, or its intended publication prevented. By the latter, the wrong-doer may be made to pay to the owner of the copyright the profits arising from such publication and sale. To these remedies may be added that by discovery, whereby the person guilty of piracy may be ordered to disclose the number of piratical copies published, sold, or on hand, and the amount received from sales.

English chancery courts formerly had no power to adjudicate the legal questions on whose determination depended the right to maintain a suit; and in cases of doubt the plaintiff was often required to establish his right in a court of law before relief would be given by a court of equity.² Sometimes an injunction was granted, and, at the same time, the plaintiff directed to establish his title at law; the continuance of the injunction depending, of course, on the result of the legal trial.³ "The court," said Lord Chancellor Cottenham, in 1838, "always exercises its discretion as to whether it shall interfere by injunction before the establishment of the legal title."⁴ But unless, said the same judge, "the court is quite clear as to

¹ 2 Eq. Jur. § 931. "Our jurisdiction, unless I mistake, is founded on this: that the law does not give a complete remedy to those whose literary property is invaded; for, if publication after publication is to be made a distinct cause of action, the remedy would soon become worse than the disease." Lord Eldon, *Lawrence v. Smith*, Jac. 472.

² *Wolcott v. Walker*, 7 Ves. 1; *Southey v. Sherwood*, 2 Meriv. 435; *Rundell v. Murray*, Jac. 311; *Lawrence v. Smith*, *Ibid.* 471; *Lowndes v. Duncombe*, 2 Coop. (*temp.* Cottenham) 216; *Bramwell v. Halcomb*, 3 My. &

Cr. 737; *Saunders v. Smith*, *Ibid.* 711; *Spottiswoode v. Clarke*, 2 Phillips, 154; *M'Neill v. Williams*, 11 Jur. 344.

³ *Hogg v. Kirby*, 8 Ves. 215; *Wilkins v. Aikin*, 17 Id. 422; *Mawman v. Tegg*, 2 Russ. 385; *Bacon v. Jones*, 4 My. & Cr. 433; *Sweet v. Shaw*, 3 Jur. 217; *Sweet v. Maugham*, 11 Sim. 51; *Sweet v. Cater*, *Ibid.* 572; *Campbell v. Scott*, *Ibid.* 31; *Dickens v. Lee*, 8 Jur. 183; *Bogue v. Houlston*, 5 De G. & Sm. 267; *Jarrold v. Houlston*, 3 Kay & J. 708.

⁴ *Saunders v. Smith*, 3 My. & Cr. 735.

what are the legal rights of the parties, it is much the safest course to abstain from exercising its jurisdiction till the legal right has been determined."¹ In recent years, a different practice has prevailed. In 1862, courts of equity were empowered to adjudicate all questions of law or fact on which the title to relief depended,² and now, under the recent judicature acts,³ the chancery and the law divisions of the High Court of Justice have equal jurisdiction in determining rights and redressing wrongs. Hence, the courts of equity now determine all questions relating to the validity of the copyright and the alleged piracy. This is also the practice in the United States, where courts of equity in cases of copyright have usually adjudicated both the right and the infringement.⁴

COMPLAINANT'S TITLE. HIS CONSENT, DELAY, AND ACQUIESCENCE CONSIDERED AS DEFENCES OF PIRACY.

What must Appear before Equity will Interfere. — Before a court of equity will interfere in a case of alleged violation of copyright it must appear: 1. That a valid copyright exists. 2. That the plaintiff has a good title. 3. That piracy has been committed by the defendant.

It is for the complainant to show that a copyright has been secured in due form, and that he is the legal or equitable owner. "Persons claiming that they own the copyright of a book," said Mr. Justice Clifford, "in a suit for infringement must prove their ownership by competent evidence, else their suit cannot be maintained, as the burden is upon the complainant to prove his title to copyright, as well as to prove infringement."⁵ But when it appears that the copyright has been

¹ *Spottiswoode v. Clarke*, 2 Phillips, 157.

² 25 & 26 Vict. c. 42, s. 1.

³ 36 & 37 Vict. c. 66; 38 & 39 Vict. c. 77; 39 & 40 Vict. c. 59; 40 & 41 Vict. c. 9; *Id.* c. 57.

⁴ *Pierpont v. Fowle*, 2 Woodb. & M. 23; *Atwill v. Ferrett*, 2 Blatchf. 39; *Baker v. Taylor*, *Ibid.* 82; *Little v. Gould*, *Ibid.* 165, 362; *Paige v. Banks*, 7 Blatchf. 152, on ap. 13 Wall. 608; *Lawrence v. Dana*, 2 Am. L. T. R. n. s.

402; *Farmer v. Calvert Lithographing, Engraving, & Map-Publishing Co.*, 5 Am. L. T. R. 168. "It is now well settled," said the court, in the case last cited, "that both the right and the infringement may be set up and adjudicated in a court of equity without having been first determined at law." *Ibid.* 170. See also *Little v. Gould*, 2 Blatchf. 184.

⁵ *Chase v. Sanborn*, 6 U. S. Pat. Off. Gaz. 933. In *Parkinson v. Laselle*,

secured in the manner prescribed by the statute, and that it is the property of the plaintiff, a *prima facie* case is made out, and the burden is on the defendant to show that the copyright is invalid or the plaintiff's title defective.¹

Defences against Charge of Piracy. — In the United States, any one of the following defences may be pleaded in a suit for alleged infringement of copyright:

I. That the work for which protection is claimed is not a proper subject of copyright for the reason: 1. That it is a thing not within the scope of the copyright law. 2. That it is not original. 3. That it is not innocent. 4. That it is the production of a foreign author.

II. That the copyright is not valid, for the reason: 1. That the three requisites relating to the filing of the title, the printing of the copyright notice, and the delivery of copies to the library of Congress, have not been performed in accordance with the statute. 2. That the work has not been published within a reasonable time after recording the title. 3. That its publication in a foreign country preceded its publication in the United States. 4. That the copyright has expired.

III. That the plaintiff has not a good title.

IV. That piracy has not been committed, for the reason: 1. That there has been no copying from the plaintiff's book. 2. That the copying or other use made of it is within the allowed privilege of "fair use." 3. That the defendant has acted with the consent of the plaintiff.

Any one of the above defences, when established, will defeat the complainant's right to relief in equity. The defendant may plead the general issue and give the special matter in evidence.²

The qualities essential to copyright, and the statutory requisites for securing it, what amounts to piracy and what is a fair use, are fully treated elsewhere under their proper

³ Sawyer, 330, the bill was dismissed on demurrer that it did not allege a compliance with the statutory requisites essential to securing copyright. See also *Marsh v. Warren*, 9 Chic. Leg. News, 395; s. c. 4 Am. L. T. N. s. 126.

¹ "The copyright is *prima facie* evidence that he was the author, and the burden of proof is upon the defendant,

to show the contrary." Taney, C. J., *Reed v. Carusi*, Tan. Dec. 74. "*Prima facie*," said Mr. Justice Story, "the copyright confers title; and the *onus* is on the other side to show clearly that, notwithstanding the copyright, there is an intrinsic defect in the title."

² Eq. Jur. § 936, note 6.

³ U. S. Rev. St. s. 4969.

heads. Here will be considered the complainant's title, and what consent, laches, or acquiescence on his part will defeat his right to sue in equity.

Equitable Title Sufficient in Court of Equity. — It is not essential to relief in equity that the legal title shall be in the plaintiff. Where a valid copyright exists, a court of equity will protect the rights of a complainant who has a good equitable title.¹ In *Chappell v. Purday*, Lord Chief Baron Abinger, referring to Lord Mansfield's remark, in *Millar v. Taylor*, that a court of equity would not interfere unless the author had a legal right, said: "Now, if by this it was meant to be said, that a court of equity would only interfere when the legal right was in the party applying for its interference, I will not go so far; because I think that a court of equity will assist any party having an equitable right, where the legal right intervenes to prevent his obtaining justice; otherwise, great fraud would ensue."² And so, in *Bohn v. Bogue*, Vice-Chancellor Shadwell said: "This court 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."³

No general rule can be laid down as to what will amount to an equitable title or interest in the complainant sufficient for maintaining a suit. As has been seen, he may assert his rights in a court of equity without a perfect legal title. On the other hand, it is obvious that a person who has no material

¹ *Br. Mawman v. Tegg*, 2 Russ. 385; *Colburn v. Duncombe*, 9 Sim. 151; *Sweet v. Shaw*, 3 Jur. 217; *Hodges v. Welsh*, 2 Ir. Eq. 266; *Sweet v. Cater*, 11 Sim. 572; *Chappell v. Purday*, 4 Y. & C. Exch. 485, 493; *Bohn v. Bogue*, 10 Jur. 420; *Sims v. Marryat*, 17 Q. B. 281; *Turner v. Robinson*, 10 Ir. Ch. 121, 510. **Am.** *Little v. Gould*, 2 Blatchf. 362, 369; *Pulte v. Derby*, 5 McLean, 328; *Lawrence v. Dana*, 2 Am. L. T. R. n. s. 402. In *Sweet v. Shaw*, Shadwell, V. C., said: "The plaintiffs do not set up that they have the legal copyright; what they state is this, that they have agreed with

A. and B that A. and B. shall report cases for them, and accordingly A. and B. do take notes of cases which are printed by Sweet and others, the plaintiffs, and they publish them, and then the plaintiffs aver that they have a copyright in the cases published. Now I think that they have in equity, but I cannot understand how they have got the copyright at law." The plaintiffs "have made out only an equitable right, though still they have stated quite a sufficient case to support the bill." 3 Jur. 219.

² 4 Y. & C. Exch. 493.

³ 4 Jur. 421.

interest in the work for which protection is claimed has no right to complain of a violation of the copyright in such work. But, between these two extremes, what interest in the copyright will entitle a person to restrain a piratical publication must be determined by the circumstances in each case.

In England, an injunction will not be granted until the work has been registered.¹ In the United States, the copyright is not perfected, and an action at law cannot be maintained, until all the statutory requisites have been performed. But an imperfect right accrues on the recording of the title;² and the opinion has been judicially expressed, that such right is entitled to protection in a court of equity for a reasonable time before the other acts essential to complete the copyright have been done.³

Suit Barred by Plaintiff's Consent to Publication. — The statutory penalties and remedies may be enforced against any person who makes a prohibited use of a work without the written, and, in the United States, attested, consent of the owner of the copyright. But courts of equity are not governed by this rule. They have recognized the principle that a person who has consented to the doing of a thing has no right, in equity, to complain when it is done. Hence, the court will not interfere with the publication or sale of an alleged piratical work, when the defendant can show that he has acted with the express or implied consent of the owner of the copyright, though such consent is not in writing.⁴ Thus, in *Heine v. Appleton*, the plaintiff sought to restrain the defendants from publishing and selling certain books containing drawings which the former had made, and which the defendants had published, in the belief that they were public property. The court held that, even if the copyright claimed by the plaintiff were valid, the fact that he had been employed by the defendants to aid in the publication of the drawings, and that he had done so without claiming any exclusive rights in them, would be a bar to his suit. "The plaintiff," said Ingersoll, J., "thus aided in the publication of some of the works of the defendants. When

¹ See *ante*, p. 278.

² *Wheaton v. Peters*, 8 Pet. 664; *Boucicault v. Hart*, 13 Blatchf. 54.

³ *Pulte v. Derby*, 5 McLean, 332. See *ante*, p. 268.

⁴ *Latour v. Bland*, 2 Stark. 382; *Rundell v. Murray*, Jac. 311; *Saunders v. Smith*, 3 My. & Cr. 711; *Strahan v. Graham*, 17 L. T. n. s. 457; *Heine v. Appleton*, 4 Blatchf. 125.

he thus aided in their publication, he made no claim of copyright. It would be inequitable now to permit him, when he has been paid to aid in their publication and sale, and has thus aided in their publication, with a view to their sale, to stop their sale, even if he had a valid copyright in them. By aiding in their publication, he agreed to their publication; and, by agreeing that they might be published, he agreed that they might be sold; and he cannot now with success ask that the defendants may be restrained from doing that which he has agreed they may do.”¹

When Plaintiff's Consent may not be Implied. — In *Saunders v. Smith*, Lord Cottenham refused to restrain the publication of the second volume of Smith's *Leading Cases* before trial at law, for the reason that he found “in the dealings of the plaintiff in this case what amounts to that species of conduct which prevents, in this stage of the cause, at least, the interposition of this court.” After quoting from the opinion in *Rundell v. Murray*,² the Lord Chancellor continued: “Lord Eldon there lays it down that not only conduct with the party with whom the contest exists, but conduct with others, may influence the court in the exercise of its equitable jurisdiction by injunction. Now, here I find permission, whether express or implied, given to others.”³

The strongest inference against the plaintiffs, warranted by the facts in this case, was that they must be presumed to have known that the defendant, in preparing his *Leading Cases*, would take cases from their copyrighted reports. They had given the defendant no permission to do this, and had no knowledge that he was doing it, or intended to do it. They had even told him, before the publication of the first volume of the *Leading Cases*, that he might not reprint any reports from their works. They did not complain of that volume, for the reason that it contained only one case, and parts of two others, copied from their publications. They had no knowledge of the contents of the second volume until its publication, when they immediately applied for an injunction. It is not denied that the dealings between two persons may amount to an im-

¹ 4 Blatchf. 129.

² See *post*, p. 507.

³ 3 My. & Cr. 729, 730.

plied consent that one shall make use of copyrighted matter belonging to the other, and that such consent may be successfully pleaded as a bar to a suit in equity. But to hold that, in order to save his rights, even in a court of equity, the owner of a copyright is bound to warn a person not to violate that right, when he has given no consent to the contrary; and, when he has no information, nothing more than a presumptive knowledge or suspicion, that such person is doing or intends to do so, is an exposition of the law as wild as it is erroneous. Even if the owner is aware that another person is preparing a work which will infringe his copyright, he is not bound to assert his rights until the piratical book has been published; unless there has been in his conduct something more than absence of protest to encourage the defendant. A person who commits piracy cannot justify the wrong by the plea that he had no warning not to do it. In law and in equity, he is sufficiently warned by the fact that what he appropriates does not belong to him.¹

In *Morris v. Ashbee*,² one of the defendants testified that the plaintiff had said to him that it would not be unlawful for any one to copy certain parts from the plaintiff's or any other directory. The plaintiff denied having said this. Vice-Chancellor Giffard found the facts to be in favor of the plaintiff; but he said that even the conversation alleged by the defendant to have taken place would not be enough to authorize the latter to copy the parts referred to. "A copyright," said the Vice-Chancellor, "is not lost by the mere expression of an opinion." "In order that the defence should prevail, it must be made out that there is proof of at least one of three propositions: viz., either that the plaintiff authorized what was done by the defendants; or that his conduct conduced to what was done by them; or that there is enough to displace the *prima facie* proof of the plaintiff's copyright."

The plaintiff in *Maxwell v. Somerton*³ was the publisher of the *Belgravia Magazine* and the *Belgravia Annual*, which had

¹ See *Morris v. Ashbee*, *Maxwell v. Somerton*, *infra*; *Hogg v. Scott*, *post*, p. 509; *Strahan v. Graham*, 17 L. T. N. S. 457.

² Law Rep. 7 Eq. 34.

³ 30 L. T. N. S. 11.

been sent for about eight years to the defendants, who had been in the habit of selecting from them extracts, and occasionally entire stories, and reprinting them in the Bristol Mercury. The last named was a weekly paper, of which copies containing the selections referred to were sent to the plaintiff. In November, 1873, the defendants received the Belgravia Annual, with a request to notice it in their paper. They published a short review of it, and reprinted one entire story. In December, another story was taken from the magazine. In each case, due acknowledgment was made of the source whence the tale was taken, and a copy of the Mercury was sent to the Belgravia office. Without previous notice to the defendants, the plaintiff moved to restrain the further publication or sale of any copies of the paper containing either of the stories. Vice-Chancellor Bacon held, that the alleged custom of the trade was no defence, and that the defendants were not justified in reprinting, as they had done, entire stories. The injunction was accordingly granted.

Delay or Acquiescence on Part of Plaintiff.—The American statute prescribes the time within which actions for the penalties or forfeitures, but not suits in equity, shall be brought.¹ In England, the statutory limitation has been held not to apply when remedies in equity are sought.² But the doctrine has been recognized that the plaintiff may forfeit his rights in equity by laches in applying for relief. Hence, when the plaintiff has for an unusual time delayed to assert his rights, the court has sometimes denied him relief, on the ground that he is guilty of laches, or that by acquiescing in what has been done he impliedly consented to it. And the same principle has been held to apply when the plaintiff has suffered other piracies than that by the defendant to be committed without protest.³ “It is, therefore,” said Vice-Chancellor Wood, “of the utmost importance to authors to come at the earliest possible stage to obtain the protection of the court against the violation of their rights of property.”⁴

¹ See *ante*, p. 494.

² See *ante*, p. 476.

³ *Rundell v. Murray*, Jac. 311; *Saunders v. Smith*, 8 My. & Cr. 711; *Chappell v. Sheard*, 1 Jur. n. s. 906;

s. c. 2 Kay & J. 117; *Keene v. Clarke*, 5 Rob. (N. Y.) 66, 67.

⁴ *Tinsley v. Lacy*, 1 Hem. & M. 752. See also *Correspondent Newspaper Co. v. Saunders*, 12 L. T. n. s. 540.

Plaintiff not Responsible for Delay when Ignorant of Piracy. — The plaintiff will not be considered guilty of culpable delay during the time that he had no knowledge of the infringement.¹ Where it appeared that the printing of the defendant's work had been begun in 1832, and completed in 1834, that the plaintiffs learned at the end of 1837 that the sale of their work was interfered with by a Scotch publication, which in February, 1838, they ascertained to be the defendant's Gazetteer, and that they discovered the piracy by an examination of the work in June, and applied for an injunction in the following month, Lord Langdale held that there had not been any improper or unnecessary delay.²

The burden of showing that the plaintiff was aware of the piratical publication is on the defendant. "The plaintiffs have to purge themselves from the imputation of laches; but the *onus* of proving the laches is on the defendants. They must show a clear knowledge in the plaintiffs of the former infringements, and of their having put up with them for a length of time, if they wish to fix the plaintiffs with the consequences of that laches so as to prevent them from having protection against any other depredations."³

Delay may be Explained. — When the delay is explained to the satisfaction of the court, it will not be allowed to defeat the complainant's suit. Where it appeared that the first part of the work complained of, the London Encyclopædia, had been published in January, 1826, and that the plaintiffs first learned in March that many articles in it had been copied from the Encyclopædia Metropolitana, but did not file their bill till August, Lord Eldon thought that the delay was "in a great degree accounted for by the necessity of comparing the whole of the two works, for the purpose of seeing how much of the Encyclopædia Metropolitana had been in a substantial sense taken from it and infused into the London Encyclopædia, before any application could be made to this court."⁴ So in

¹ Lewis v. Fullarton, Chappell v. Sheard, *infra*. See also Greene v. Bishop, 1 Cliff. 186, 202; Boucicault v. Fox, 5 Blatchf. 87; Boucicault v. Wood, 7 Am. Law Reg. n. s. 530, 550; s. c. 2 Biss. 34.

² Lewis v. Fullarton, 2 Beav. 6.

³ Wood, V. C., Chappell v. Sheard, 1 Jur. n. s. 997.

⁴ Mawman v. Tegg, 2 Russ. 393.

Buxton v. James, it was shown that the piratical work had appeared in November, 1849, when the plaintiffs promptly protested against its publication; but they did not then begin legal proceedings owing to the doubtful state of the law as to the validity of the copyright in the work of a foreign author. This doubt was apparently removed by the decision in *Boosey v. Jefferys*, rendered May 20, 1851. On August 20, the plaintiff again notified the defendant of the violation of his rights, and soon after filed his bill for an injunction. The delay was held to be justifiable.¹

Plaintiff's Rights not Prejudiced by Custom. — The plaintiff's case is not prejudiced by the fact that he chooses to assert a right which other authors have not sought to enforce. Thus where the plaintiff moved to restrain the publication of a dramatization of his novel, and it was objected that other authors had not complained of the dramatization of their works, the court said: "It is no answer to say that similar infringements have often been committed. Although Sir Walter Scott and others did not choose to assert any claim of this kind, this does not affect the rights of the plaintiff; and it is to be observed, moreover, that there has been a considerable alteration of the law since the time referred to by the extension of copyright to dramatic performances."² Nor can the custom of the trade be successfully pleaded against the plaintiff's right to sue.³

Stronger Case of Acquiescence on Final Hearing than Preliminary Application. — A stronger case of acquiescence on the part of the plaintiff is required to justify the refusal of an injunction at the final hearing than on a preliminary application; "for at the hearing of a cause it is the duty of a court to decide upon the rights of the parties, and the dismissal of the bill upon the ground of acquiescence amounts to a decision that a right which has once existed is absolutely and for ever lost."⁴

Are Plaintiff's Rights Lost by Apparent Acquiescence? — In cases wherein the plaintiff seeks to enforce his rights after

¹ 5 De G. & Sm. 80.

² Wood, V. C., *Tinsley v. Lacy*, 1 Hem. & M. 752.

³ *Campbell v. Scott*, 11 Sim. 31; *Maxwell v. Somerton*, 30 L. T. n. s. 11,

considered *ante*, pp. 503, 504. See remarks of Lord Cottenham in *Saunders v. Smith*, 3 My. & Cr. 729.

⁴ *Turner, L. J., Johnson v. Wyatt*, 2 De G. J. & S. 18, 25.

having knowingly suffered them to be invaded for an unusually long time without protest, and wherein he offers no explanation of his delay, the practice of the courts and the views of the law expressed by them are by no means uniform. In *Rundell v. Murray*, where it appeared that the plaintiff had given a manuscript to the defendant, and permitted him to publish it as his own for fourteen years, at the end of which period she claimed the exclusive property in it, and sought to restrain the defendant from further publishing it, Lord Eldon, in refusing to grant an injunction, said: "There has often been great difficulty about granting injunctions, where the plaintiff has previously, by acquiescing, permitted many others to publish the work; where ten have been allowed to publish, the court will not restrain the eleventh. A court of equity frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining has led to the state of things that occasions the application; and, therefore, without saying with whom the right is, whether it is in this lady, or whether it is concurrently in both, I think it is a case in which strict law ought to govern."¹

In *Lewis v. Chapman*, the injunction was refused, because it appeared that the publication complained of had been issued, and the attention of the plaintiff called to it, six years before the bill was filed; and that, more than a year before beginning proceedings, the plaintiff had obtained a copy of the work for the express purpose of ascertaining whether it was piratical.² In *Chappell v. Sheard*, the defence was set up that the plaintiffs had been aware of the defendant's publication for about two months before applying for an injunction, and that they had suffered other piracies to be committed without proceeding against the offenders. Vice-Chancellor Wood refused to interfere, until the plaintiffs should make an affidavit as to whether they had had knowledge of these piracies as charged by the defendants.³

¹ *Rundell v. Murray*, Jac. 316.

² 3 Beav. 133.

³ 1 Jur. N. S. 996. "There must be a further affidavit," said the Vice-Chancellor, "on the point of knowledge by any of the partners. It appears strange that this imitation should have

been out so long ago as the 14th April, and the managing partner of the plaintiffs not to be aware of it till June; and if it turn out that he was aware of it all that time such laches would be very important."

The plaintiffs having satisfied the court that they had acted without delay when they learned that their rights had been invaded, the injunction was granted. "The only doubt," said the Vice-Chancellor, "I have felt in this case was as to the laches; I have no doubt as to the infringement. But the principle is this; that, if the owner of a copyright suffers one depredation to go unchallenged, the court will not allow him to call another's infringement in question."

In *Rundell v. Murray*, the controlling question was, not whether the plaintiff had forfeited her right to equitable relief solely by delay, but whether by agreement she had not in equity conveyed her copyright to the defendant. In *Lewis v. Chapman*, the injunction was refused on the sole ground of delay on the part of the plaintiff, and the same principle was recognized in *Chappell v. Sheard*.

Tendency of Recent Decisions toward Doctrine that Plaintiff's Rights are not Lost by Mere Delay.— But the tendency of more recent decisions has been toward the doctrine that the plaintiff's rights in equity are not lost by mere delay in asserting those rights. The defendant must show that he has acted with the express or implied consent of the owner of the copyright; and such consent is not proved by the mere fact that the owner was long aware of the piracy without protesting against it, or that he has not chosen sooner to assert his rights in a court of law or equity, against either the defendant or any other wrongdoer. In other words, the principle seems to have been recognized, though it may be going too far to say that it is established, that the defendant will not be allowed to escape the legal consequences of his wrongful acts by pleading mere delay or lack of protest on the part of the plaintiff. No person has a right to use property without the consent of the owner; and, when he does so, he must suffer the consequences.¹

As early as 1815, Lord Eldon intimated that a year's delay would not deprive the plaintiff of his remedies in equity.² And,

¹ *Br. Hogg v. Scott*, Law Rep. 18 Eq. 444; *Maxwell v. Somerton*, 30 L. T. N. S. 11; *Morris v. Ashbee*, Law Rep. 7 Eq. 34. See also *Strahan v. Graham*, 17 L. T. N. S. 457. *Am. Greene v. Bishop*, 1 Cliff. 186, 202; *Boucicault v. Fox*, 5 Blatchf. 87; *Boucicault v. Wood*, 7 Am. Law Reg. N. S. 539, 550; s. c. 2 Biss. 34.

² *Platt v. Button*, 19 Ves. 447. "The plaintiff has permitted several persons to publish these dances," said

in 1818, the opinion was expressed by the King's Bench in an action at law, wherein it appeared that the defendant had been publishing a sonata for about six years without objection on the part of the plaintiff, that, "although from the publication so long ago as the year 1812, without any complaint having been made, it might be inferred that the defendant had authority from the plaintiff to publish at that time; yet that it was impossible to infer for what time that authority might have been given, and whether it subsisted at the time of the publication of which the plaintiff complained in the present case."¹

In the recent case of *Hogg v. Scott*, it appeared that the plaintiff had published in 1868 the first, and in the latter part of 1872 the second, edition of *The Orchardist*, which contained matter pirated from the plaintiff's works. In 1869, the plaintiff received a copy of the book, and wrote a friendly letter to the defendant concerning part of its contents, without intimating that it contained any thing copied from his own publications. In June, 1873, the plaintiff, being about to publish a new edition of one of his books, and having discovered, as he alleged, in the preceding April, the piratical nature of the defendant's work, moved to restrain its further publication or sale. The bill was dismissed in July, on the ground that the plaintiff's work had not been properly registered, and a new suit was begun in August. The defence was set up that the plaintiff had knowledge in 1869 of the piracy, and was, therefore, barred by delay from bringing suit; that the defendant was about to issue a third edition of his work, and that he was entitled to republish any thing that had appeared in the earlier editions. The court held that, even if the plaintiff had been aware of the piratical nature of the defendant's book for four years before beginning suit, he was not thereby deprived of his remedies in equity. "The omission to take any proceedings at law or in equity for a time," said Vice-Chancellor Hall, "does not in itself appear to me an encouragement to the de-

the Lord Chancellor, "some of them for fifteen years; thus encouraging others to do so. That, it is true, is not a justification; but under these circumstances a court of equity will not interfere in the first instance. If, as is

represented, some of them were published, only last year, and one two months ago, the bill ought to have been confined to those." See also *Baily v. Taylor*, 3 L. J. (Ch.) 66.

¹ *Latour v. Bland*, 2 Stark. 383.

fendant amounting to an equitable bar in this court. It is not enough to show that the legal right is not to be protected here." "Knowledge by the plaintiff that the defendant was advertising his work which contained the objectionable matter and that he was going on selling it does not appear to me to amount to that description of acquiescence in the defendant's dealing with the subject-matter, which must be taken to deprive the plaintiff of the interference of this court as from any given time." ¹

¹ *Hogg v. Scott*, Law Rep. 18 Eq. 454, 456. The Vice-Chancellor said: "It does not, in the view which I take of this case, appear to me to be necessary to say what is the true conclusion or the legal inference to be drawn in reference to the knowledge of the plaintiff of the contents of the book, more or less, from the time when he received a copy of it. Assuming that he must be taken as, from the time when he received a copy, to have been fully aware of the contents, I still think that that circumstance is not sufficient to deprive him of the relief which he seeks in this suit. I have expressed my opinion upon the construction of the Act of Parliament in reference to the question — a new question, in my view — of the period within which the suit ought to have been commenced. The position of things, assuming that he had knowledge at that time, appears to me to be this: The plaintiff was at the time he received the copy of the book, which is relied upon as having given him knowledge of its contents, the undoubted legal owner of the copyright, the piracy of which is complained of. That was his property, and he had a right to say to the defendant, 'That is my property, and I will neither allow you to make nor recognize your making use of it.' The plaintiff did not take any step founded on his right to property until he filed his bill. He did file his bill soon after he received a copy of the second edition; but, assuming the most in the defendant's favor, all that had taken place in the mean time, beyond the letter which was sent to him, was the acquisition by the plain-

tiff of knowledge that the defendant was going on publishing *The Orchardist* for two years afterwards, and that the plaintiff knew in October, 1872, that the defendant was about to publish a new edition of his book, which was to be much larger and more expensive.

"Now up to the time of his knowledge of the new edition, in October, 1872, the plaintiff was aware only that the defendant was going on selling copies of *The Orchardist*. When he became aware of the defendant's intended new edition, there was nothing at all events to induce him to suppose or believe that there would be any new matter introduced into it, taken from the plaintiff's work. The matter stood, so far as the plaintiff was concerned, exactly as it did before. I have first of all to consider whether not taking any proceeding with reference to the old matter in any given time would deprive the plaintiff, on the ground of acquiescence, of the right to come to this court. The omission to take any proceedings at law or in equity for a time does not in itself appear to me to be an encouragement to the defendant amounting to an equitable bar in this court. It is not enough to show that the legal right is not to be protected here. It must not be assumed that the court is satisfied that the plaintiff by his conduct has led the defendant to incur material expenses in reference to his new book. . . .

"Now in this case knowledge by the plaintiff that the defendant was advertising his work, which contained the objectionable matter, and that he was going on selling it, does not appear to me to amount to that description of ac-

So, in *Greene v. Bishop*, the fact that the first edition of the book alleged to be piratical had been published in 1852, and a second edition in 1853, and that no legal proceedings had been taken against the publisher, was held not to be a bar to the suit brought in 1854 against the defendant as a vendor. It further appeared, however, that the unlicensed publication had taken place in another State than that in which the plaintiff resided, and in which the suit against the defendant was brought.¹

In *Boucicault v. Fox*, which was an action for damages for nine representations of a copyrighted drama, the court ruled that the fact that the plaintiff was aware of the performances during their progress, and made no objection, would not warrant the jury in inferring his assent to them. "If the defend-

quiescence in the defendant's dealing with the subject-matter which must be taken to deprive the plaintiff of the interference of this court as from any given time. I am satisfied that his legal right remained, and to have tried the question at law for damages would, under all the circumstances, have been an unsatisfactory thing to do. Then the question arises, whether the case is altered by the fact that the plaintiff knew—and I must take it that he knew—that the defendant was about to issue a new edition of his book. Am I to assume against the plaintiff that he knew what the contents of the new book would be, whether of the old matter, as in the first edition, or not? Or am I to consider that it was incumbent upon him to inquire from the defendant all the circumstances—whether he was going to put in the new edition what he was at that moment illegally retaining in the old one? Considering the time when the advertisement came out, and the character of that advertisement, and the fact that the plaintiff was one of the editors of *The Horticultural Journal*, that does not to my mind make it a sufficiently strong case of encouragement or acquiescence on the part of the plaintiff to justify me in saying that this court will withhold the relief which he would otherwise be

entitled to, leaving him with his undoubted legal right to proceed in a court of law in respect of the same matter; that is to say, that the court having determined the legal question in his favor, should send him to a court of law to get damages, and refuse an injunction. Under such circumstances, to do so would be playing with justice and the forms of procedure. I have, therefore, come to the conclusion that the plaintiff's right in this court has not been taken away by what has occurred." *Ibid.* 453, 456.

¹ 1 Cliff. 186, 202. "Both the bill and the answer," said Mr. Justice Clifford, "disclose the fact that the first edition of the respondent's book was published in 1852, in another State; and the second in 1853, by the same publishers, while the complainant was residing in this district, and this bill was filed during the following year. At what time the complainant became possessed of the knowledge of these publications does not appear; and there is no evidence tending to show that he ever in any manner acquiesced in the claim of the respondent, or recognized the validity of his acts, except what may be inferred from the omission to prosecute. No other laches appears on the face of the bill, and no such defence is set up in the answer."

ants," said Mr. Justice Shipman, "had been ignorant of the plaintiff's right, and had gone on under a misapprehension of the facts, or if they had supposed he assented, they might make this claim with a better grace."¹

In *Boucicault v. Wood*, the court expounded the law to the effect that the owner might lose his common-law rights in an unpublished play, by allowing it "to be represented throughout the community for a long space of time, without license and without objection, knowing the fact to be so. . . . But it must be apparent that it has been done with his knowledge and without objection on his part. That is to say, the facts must exist to indicate that he consented or acquiesced in their performance. Otherwise, he is not prevented from claiming his property in these plays, — I mean, of course, his property at common law."²

HOW PIRATICAL COPYING IS ASCERTAINED.

When piracy is denied, it becomes necessary to ascertain whether the defendant's work has been copied from that of the plaintiff; and, if so, to what extent, and what are the piratical parts. The determination of these questions will not only require a careful comparison of the two books, but not unfrequently, especially if the publications in controversy are compilations, a laborious examination of other works. The plaintiff

¹ 5 Blatchf. 87, 99.

² 7 Am. Law Reg. n. s. 539, 550. See also dissenting opinion of Monell, J., in *Keene v. Clarke*, *post*, p. 577, note 1. *Paige v. Banks* was a controversy as to the effect of an agreement by which the plaintiff had sold a manuscript to the defendant. The latter was the undisputed owner of the copyright during the period of twenty-eight years; but, at the expiration of that term in 1858, each party claimed to be entitled to renew the copyright for fourteen years, and each warned the other against the infringement of his alleged rights. The defendant continued to publish the book without interference by the plaintiff. The latter died in March, 1868; and ten months later his executors sought to restrain the defendant from publishing the

book. The Circuit Court, 7 Blatchf. 152, dismissed the bill on the ground that the plaintiff by the original agreement had parted with all his rights, and this judgment was affirmed by the Supreme Court of the United States. It does not appear what view of the law the court would have taken if the decision had turned on the question of delay or acquiescence on the part of the plaintiff. But there is some significance in the fact that this question was not considered by the Circuit Court, and that the Supreme Court referred to the defendant's course only as evidence of his intention in making the original agreement. 13 Wall. 608, 616. This case is considered in connection with another subject, *ante*, p. 328.

is not required to specify the parts of the defendant's publication which are piratical. A general allegation of infringement is enough.¹ The comparison of the two books may be made by the court or by a master. In England, laborious examinations have frequently been made by the judges.² In the United States, the usual practice in cases involving much labor has been to make a reference to a master.³ The reference is usually ordered and the master's report made before the final hearing; but, in *Lawrence v. Dana*, by election of the parties, the decision of the court on the legal questions involved was first rendered, and afterward the case was referred to a master to report on the extent of the piracy. The injunction was withheld until the master's report should be made. "Equity suits for the infringement of a copyright," said Mr. Justice Clifford, "are usually referred to a master before the final hearing, to ascertain whether the charge is proved, and, if so, for a final report as to the nature and extent of the infringement; and in such cases the general rule is, that the complainant, if he prevails in the suit, is entitled, if at all, to an injunction at the time the decretal order is entered, to restrain the respondent from any further violation of his rights, as the whole case is then before the court. Even when the case is heard before any such reference and report, if the charges of infringement are few and of a character that the extent of the infringement can be conveniently determined by the court without sending the case to a master, the court, if the case be one

¹ "As long as I remember the court, it has never been thought necessary for a party who complains that his copyright has been infringed to specify, either in his bill or his affidavit, the parts of the defendant's work which he thinks have been pirated from his work; but 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, and to verify the rival works by affidavit. 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." *Shadwell, V. C., Sweet v. Maugham*, 11 Sim. 53. See also *Rooney v. Kelly*, 14 Ir. Law Rep., n. s. 158.

² *Lewis v. Fullarton*, 2 Beav. 6; *Murray v. Bogue*, 1 Drew. 353; *Jarrold v. Houlston*, 3 Kay & J. 708; *Spiers v. Brown*, 6 W. R. 352; *Pike v. Nicholas*, Law Rep. 5 Ch. 251.

³ *Folsom v. Marsh*, 2 Story, 100; *Webb v. Powers*, 2 Woodb. & M. 497; *Story v. Derby*, 4 McLean, 160; *Story's Executors v. Holcombe*, Ibid. 306; *Greene v. Bishop*, 1 Cliff. 186; *Lawrence v. Dana*, 2 Am. L. T. R. n. s. 402; *Chase v. Sanborn*, 6 U. S. Pat. Off. Gaz. 932.

where an injunction is the proper remedy, will order it at the same time that the decision is announced upon the merits. But where the cause comes to a final hearing without any such report, the court, if the charges of infringement are numerous and of a character to require extended examination before the extent of the infringement can be ascertained, will ordinarily send the case to a master for further examination and report in respect to all matters not previously adjudged by the court; and the general rule in such cases is, that the injunction will not be granted until the nature and extent of the infringement are fully ascertained and determined, as its effects and operation might work great injustice. Obviously the present case falls within the latter rule; and, therefore, an injunction will not be ordered until the court shall have acted finally upon the report of the master.”¹

Where it did not satisfactorily appear that what the defendant had done or intended to do would be in violation of the plaintiff's right, the court, on a motion for a preliminary injunction which was denied, refused to make a reference to a master.²

The master may be required not only to report the facts, but also to give his opinion as to whether the plaintiff's work is original, and whether it has been infringed by the defendant;³ and whether the sale of the plaintiff's publication is prejudiced, and to what extent, by the defendant's.⁴ The master's opinion is subject to review by the court. In *Story's Executors v. Holcombe*, the master reported that the defendant's work was a *bona fide* abridgment of the plaintiff's, and therefore not piratical. But the court found that the first third of the defendant's

¹ 2 Am. L. T. R. n. s. 432. The same judge further said: "The settled practice in equity is, where the works are voluminous and of a complex character, containing, as in this case, much original matter mixed with common property, the cause will, at some stage of the case, be referred to a master to state the facts, together with his opinion, for the consideration of the court. Much the better course is to make the references before the final hearing; but the parties in this case waived any reference at that stage of the cause, and elected to proceed to final hearing

without any such report. Cases arise, where the court, under such circumstances, would not order a reference, but would proceed to compare the books and ascertain the details of the infringement; but the case before the court is far too complex to admit of that course of action." Ibid. 420.

² *Smith v. Johnson*, 4 Blatchf. 252.

³ *Story v. Derby*, 4 McLean, 160; *Lawrence v. Dana*, 2 Am. L. T. R. n. s. 402.

⁴ *Greene v. Bishop*, 1 Cliff. 180; *Osgood v. Allen*, 1 Holmes, 185.

work was not an abridgment, but a compilation pirated from the plaintiff's book, and accordingly granted an injunction.¹

Defendant should Point out Copied Parts, Produce Manuscript, &c. — Lord Eldon thought that it was the duty of the defendant, when piratical and original matter were combined in his work, to point out the parts which had been copied.² In a very doubtful case of piracy, the defendant may escape an adverse judgment of the court by producing his manuscript.³ In *Jarrold v. Houlston*, the fact that copying was denied, falsely in the belief of the court, was an important circumstance in leading the Vice-Chancellor to grant the injunction.⁴

TEMPORARY INJUNCTION.

When the validity of the copyright or the plaintiff's title is disputed, or the piracy is denied, the determination of the questions raised will often require much time, and in some cases the plaintiff may suffer irreparable damage, unless the piratical publication is restrained without delay. In such case, immediate relief may be given by a temporary or provisional injunction, which may be granted when the application is first made, or at some stage during the proceedings. It will be ordered to stand until the coming in of the defendant's answer or the master's report, or the final hearing, or the further order of the court.⁵

¹ 4 McLean, 306. For discussion as to exceptions to master's report, see *Greene v. Bishop*, 1 Cliff. 190-196.

² *Mawman v. Tegg*, 2 Russ. 395.

³ *Hotten v. Arthur*, 1 Hem. & M. 609. "It is of great importance," said Wood, V. C., "as evidence of *bona fides*, that the original manuscript should be produced. That decided me in favor of the defendant in the French dictionary case. *Spiers v. Brown*, 6 W. R. 352. I saw that he had bestowed great pains and labor on his subject; and, though he had certainly copied a great deal from the plaintiff, I was convinced that he had honestly exercised his mind upon his work."

⁴ 3 Kay & J. 708. "In the case before me," said Wood, V. C., "not only have I the fact of my arriving at

the conclusion that there has been close copying or colorable alteration of the plaintiff's book; but I have also this strong fact, and I confess I rely upon it as one that ought to have a considerable bearing upon my decision, that Mr. Philp has taken upon himself to deny by his affidavit that he has copied or taken any idea or language from the plaintiff's book. I find it impossible to come to a conclusion in his favor on the issue he has so tendered; and, that being so, the very circumstance of that denial on his part is a very strong indication of an *animus furandi*; and if the *animus furandi* be established, I ought to interfere by injunction." *Ibid.* 722.

⁵ 2 Story's Eq. Jur. § 873.

When Temporary Injunction Granted. — The question of granting a temporary injunction is affected by many considerations. It depends chiefly on the extent of the doubt as to the validity of the copyright, and whether it has been infringed; the damage that will be sustained by the plaintiff if the injunction is withheld, and the injury that will be done to the defendant if it is granted. The court will exercise its discretion in following that course which appears to be most conducive to justice to both parties.¹ Although the matter may not be wholly free from doubt, yet if the plaintiff makes out a *prima facie* case, and the court is reasonably satisfied that a piracy has been committed, a temporary injunction will usually be granted; especially if the consequences are likely to be more serious to the plaintiff if the injunction is withheld than they will be to the defendant if it is granted.² When the complain-

¹ Referring to cases wherein the plaintiff's right was doubtful, Lord Cottenham said: "But even in the cases so referred to I have always held that it was for the discretion of the court to consider whether the defendant might not suffer greater injury from an improper injunction than the plaintiff from the delay in granting a proper one. In the present case where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether. The interposition of the court in these cases [unpublished works] does not depend upon any legal right, and to be effectual it must be immediate." *Prince Albert v. Strange*, 1 Mac. & G. 46.

² *Scott v. Stanford*, Law Rep. 3 Eq. 718; *Smith v. Chatto*, 31 L. T. n. s. 775; *Little v. Gould*, 2 Blatchf. 165; *Banks v. McDivitt*, 13 Id. 163; *Shook v. Rankin*, 3 Cent. Law Jour. 210. "No doubt," said Hall, V. C., in *Smith v. Chatto*, "this question might be left to be decided at the hearing, but I think it better to decide it at once; particularly considering how difficult it would otherwise be to assess the plaintiff's damages, if he should ultimately prove to be in the right. But, in granting the injunction for which the plaintiff asks, I do not lose sight of

the fact that compensation may have to be made to the defendants, if at the hearing I decide in their favor. The amount of such compensation can, however, be more easily fixed than if it had to be made to the plaintiff; and if given will have to be substantial. . . . The plaintiff must undertake to abide by such damages, if any, as the court may, at the hearing, think fit to award."

What Vice-Chancellor Bruce said in *Dickens v. Lee*, 8 Jur. 185, concerning the course to be pursued with reference to continuing the injunction until the plaintiff should establish his legal title, is equally applicable in a case of doubt whether a temporary injunction should be granted. "Now, as far as the plaintiff is concerned, there is at least, — perhaps I should put it the other way, — there is at least a fair question whether the plaintiff is not entitled; my impression at present being that he is entitled, and that the probability of right is in his favor. . . . I am satisfied the proper course in this case is to continue the injunction, and for this reason, among others (a reason upon which the court acts very much, chiefly, indeed, with regard to patent cases): viz., that if all persons are to be allowed to infringe, without injunc-

ant makes out a *prima facie* case, "and the injury which results is not easily remedied if the injunction is refused, a court of equity will grant an injunction, unless the bill or the case made out by the bill is absolutely refuted."¹ "Where an infringement is palpable," said Mr. Justice Shipman, "and a provisional injunction will not be attended with serious injury, it is not ordinarily refused, as to so much of the work as is a plain infringement of the prior publication."²

When it appears that piracy materially injurious to the plaintiff has been committed, an injunction may be granted against the piratical part without waiting to determine the full extent of the infringement.³

When Temporary Injunction not Granted. — If the court is not reasonably satisfied that the plaintiff has a valid copyright or that piracy has been committed, an injunction will not be granted before these questions have been determined.⁴ So,

tion, until the plaintiff can succeed in an action, he may be ruined, and the value of his property may be entirely gone. For these reasons, therefore, I think it fit to continue this injunction, the plaintiff undertaking, if the defendant shall require it, to bring an action, and the plaintiff undertaking to abide by any order the court may make with regard to damages that may be sustained by the defendant in case the injunction should be dissolved."

¹ *Shook v. Rankin*, 8 Cent. Law Jour. 210.

² *Banks v. McDivitt*, 13 Blatchf. 170.

³ *Lewis v. Fullarton*, 2 Beav. 6; *Stevens v. Wildy*, 19 L. J. N. S. (Ch.) 190; *Kelly v. Morris*, Law Rep. 1 Eq. 697; *Farmer v. Calvert Lithographing, Engraving, & Map-Publishing Co.*, 5 Am. L. T. R. 168.

⁴ *Br. Bramwell v. Halcomb*, 3 My. & Cr. 737; *M'Neill v. Williams*, 11 Jur. 344; *Jarrold v. Houlston*, 8 Kay & J. 708; *Morris v. Wright*, Law Rep. 5 Ch. 279. *Am. Blunt v. Patten*, 2 Paine, 397; *Miller v. McElroy*, 1 Am. Law Reg. 198; *Jollie v. Jaques*, 1 Blatchf. 618; *Smith v. Johnson*, 4 Id. 252; *Flint v. Jones*, 1 Weekly Notes of Cases, 334. In *M'Neill v. Williams*, Vice-Chancellor

Bruce said: "The court has, of late years especially, given great weight to the consideration of the question, which of the two parties to the dispute is more likely to suffer by an erroneous or hasty judgment of an interlocutory nature against them; and to the consideration also of the very possible, if not probable effect which an injunction may have to the defendant's prejudice in an action. I agree that there ought to be none. I have in this case to weigh, on the one hand, the suspicious nature of the defendant's case, for suspicious, I confess, upon the present materials, it appears to me to be, and the probable mischief from not interfering at present in his favor, if he should ultimately prove to be right; and, on the other hand, the possibility — the rational possibility — for I am unable to bring myself to deny the rational possibility — that the plaintiff may be right. I have also to consider the mischief generally that may be done by interfering in this stage of the cause if the defendants shall ultimately appear to be right; including particularly the possible prejudice which may be created against them in an action by the existence of an injunction.

where the plaintiff has been guilty of negligence or delay in applying for an injunction, or has apparently acquiesced in what the defendant has done, the court may refuse to interfere, although it may appear on the final hearing that the plaintiff is entitled to an injunction.¹

Ephemeral Publications. — Before the rights of the parties are finally determined, the court may refuse to grant an injunction which will cause a greater mischief than it is intended to prevent. In refusing to restrain in December the sale of an almanac for the ensuing year in a case where the rights of the parties were doubtful, Lord Chancellor Cottenham said: "But the greatest of all objections is that the court runs the risk of doing the greatest injustice in case its opinion upon the legal right should turn out to be erroneous. Here is a publication which, if not issued this month, will lose a great part of its sale for the ensuing year. If you restrain the party from selling immediately, you probably make it impossible for him to sell at all. You take property out of his pocket and give it to nobody. In such a case, if the plaintiff is right, the court has some means, at least, of indemnifying him, by making the defendant keep an account; whereas, if the defendant be right, and he be restrained, it is utterly impossible to give him compensation for the loss he will have sustained. And the effect of the order

Upon the whole, I think the ends of justice in this case will be better answered by abstaining from granting the injunction at present; the defendants continuing to keep the account, which they have already undertaken to continue, and giving that undertaking which the defendant's counsel have consented to give with respect to damages, in case the infringement is proved and the plaintiff's title is established, and facilitating proceedings at law in any reasonable way the plaintiff in equity may require."

Lord Chancellor Cottenham said: "Where any doubt exists as to the legal right, it is very proper to be tried. The only question is whether, in the mean time, the injunction is to be continued, or whether it is to be dissolved, on the undertaking, which the defend-

ant has offered, of keeping an account. It is obvious that it is the interest of both parties that the injunction should be dissolved; for if, in consequence of piracy, the defendant is, in fact, selling the plaintiff's work, the plaintiff will have the profits of the publication; but if, on the contrary, no piracy has been committed, a very great hardship is inflicted upon the defendant; and, on that supposition, he has already experienced a severe hardship, because the injunction has prevented the sale of his book during the season. If Mr. Stuart thinks it proper to press for the continuance of the injunction, I must look through the passages in the respective books." *Bramwell v. Halcomb*, 3 My. & Cr. 739.

¹ *Johnson v. Wyatt*, 2 De G. J. & S. 18. See *ante*, p. 506.

in that event will be to commit a great and irremediable injury. Unless, therefore, the court is quite clear as to what are the legal rights of the parties, it is much the safest course to abstain from exercising its jurisdiction till the legal right has been determined.”¹

But, in some cases, the ephemeral character of the works in controversy may afford an additional reason for the prompt interference of the court, especially when the piratical publication is sold at a lower price than the original. In this case, it is obvious that the remedies to which the plaintiff may be entitled will be practically annulled by delay. This principle was recognized by Lord Eldon, in a case relating to an East India Calendar or Directory. “There is a great difference,” he said, “between works of a permanent and of a transitory nature. The case upon the former may be brought to a hearing. But the effect is very different upon a work of this kind, perishable, particularly in this instance; consisting of the names of persons continually fluctuating; a work that would be good for nothing in another year. . . . I am bound under these circumstances to continue this injunction to the hearing; for the defendant would merely have to account at the rate of 2s. 6d. for each book; and, if his publication proceeds at that reduced price, it will be impossible for the plaintiffs, obliged by the expense they have been at to charge a much higher price, to sell another copy.”²

Should Injunction be Refused because Piratical may Easily be Replaced by Innocent Matter? — In *Cox v. The Land and Water Journal Company*, it appeared that the defendants had published in their newspaper an article called *The Hunting Field of 1870*, which had been copied from the *List of Hounds* contained in the plaintiff's newspaper. Vice-Chancellor Malins refused to grant an interlocutory injunction, on the ground that the matter in controversy was of a nature so ephemeral that to be valuable it must be revised at short intervals; that within a very short time the defendants could obtain from the original sources, and lawfully publish the same information as that

¹ *Spottiswoode v. Clarke*, 2 Phillips, 157. See *Cox v. Land & Water Journal Co.*, Law Rep. 9 Eq. 324.

² *Matthewson v. Stockdale*, 12 Ves. 275. See also *Wilson v. Luke*, 1 Victorian Law Rep. 127.

complained of; and hence, that an injunction could protect the plaintiff but for a brief period.¹ And so in *Baily v. Taylor*, although other defences were set up, Vice-Chancellor Leach gave some weight to the consideration that the defendant, by calculating the mathematical tables which he was charged with having copied from the plaintiff's book, could immediately issue a new publication, substantially the same as that of the plaintiff, without infringing the latter's rights.²

Although granting an injunction in doubtful cases is discretionary with the court, the reasons set forth in the two cases last cited for refusing aid are by no means satisfactory. Where a material piracy is proved, the plaintiff is entitled to protection; and it is no defence that the defendant may in a short time replace the pirated matter with similar matter which is not piratical. He cannot avail himself of the plaintiff's labor, and, when called to account, successfully plead that he might himself have produced what he is charged with copying. If he chooses to pirate matter, instead of obtaining it by his own labor, he must suffer the consequences of piracy. If the above

¹ Law Rep. 9 Eq. 324. "But in this case," said Malins, V. C., "as in many others, the question arises, is it a case for the interference of the Court of Chancery at all, and if it is a case for interference, is it a case for interference on an interlocutory application? Now I do not think it is a case to be decided on an interlocutory application; and my reason is this: this list must be corrected from week to week; it could not be a correct list from the 1st of November until April, or to the end of the hunting season. Changes must take place; the list of masters, huntsmen, and whips can hardly continue to be correct even for a week. Now, suppose I were to grant an injunction, how can it be acted upon? The defendants have only to issue a fresh circular, make an urgent appeal for answers, or send a person by rail and get the information from the masters of the hunts, and next week bring out a very correct list; and how am I to know the way in which they got their information?"

At present I do not see that I can interfere. Whether the plaintiff is entitled to any remedy I do not at present decide, but I do not think it a case for an injunction, though the defendants are not entitled to avail themselves of the plaintiff's labors." Ibid. 332.

² 3 L. J. (Ch.) 66. "The plaintiff's title to the tables," said the Vice-Chancellor, "is that he calculated them; the defendant, by calculating them on his part, acquires the same right. By granting an injunction where the title is of such a nature, the court would interfere to grant protection for twenty-four hours only; for in that time the defendant might acquire as good a right as the plaintiff. Under such circumstances, therefore, I should doubt very much whether a court of equity ought to interfere to protect a title founded merely on a personal calculation, which any other individual would be equally competent to make." See also *Baily v. Taylor*, 1 Russ. & My. 76.

defence were a good one, the protection guaranteed to literary property would be defeated in numerous cases.

Account of Profits may be Ordered when Injunction Refused. — When the court refuses to grant a temporary injunction, it may order the defendant to keep an account of sales and profits until the final disposition of the case.¹

PERMANENT INJUNCTION.

Injunction Granted when Material Piracy Clear. — The facts necessary to determine the question of piracy, and its extent, having been ascertained by the master or otherwise, the case will be brought to a final hearing when the court will decide whether the plaintiff is entitled to a permanent injunction and other relief. Where the plaintiff's title has been established, and it appears that a whole or a material and valuable part of the defendant's publication is piratical, a permanent injunction is usually granted.

Injunction may be Refused in Doubtful Case. — But in a doubtful case the court may refuse to interfere unless it is reasonably satisfied that piracy has been committed.² In *Murray v. Bogue*, Vice-Chancellor Kindersley said: "On the whole, my conclusion is, that I cannot say that the defendant, in his work, makes an unfair use of the plaintiff's. I am not absolutely satisfied that the use made of it might not by another judge be looked at in a different light; but I cannot satisfy my mind that there is that unfair use which would justify me in restraining the publication of the defendant's work. The injunction must therefore be refused."³

Actual Damage Need not be Proved. — When a material piracy is shown, the plaintiff will not be required to prove actual damages. "Then the only question," said Vice-Chancellor Shadwell, "is whether there has been such a *damnum* as will justify the party in applying to the court; because *injuria* there clearly has been. What has been done is against the right of the plaintiff. Now, in my opinion, he is the person

¹ See *post*, p. 588.

² *Murray v. Bogue*, *infra*; *Spiers v.*

Brown, 6 W. R. 852; *Jollie v. Jaques*,

1 Blatchf. 618, 626.

³ 1 Drew. 353, 370.

best able to judge of that himself; and, if the court does clearly see that there has been any thing done which tends to an injury, I cannot but think that the safest rule is to follow the legal right and grant the injunction."¹

Injunction Granted when Action for Penalties cannot be Maintained. — An injunction may be granted against the piratical publication of a copyright work, although the plaintiff may not be entitled to maintain an action for the penalties and forfeitures imposed by the statute. A strict compliance with the statutory provisions is essential to the maintenance of such action. Thus a seller or importer is made liable to the statutory penalties only when he knowingly commits piracy. But ignorance of wrong is no defence in a suit to prevent the repetition of the wrong by stopping the piratical publication. So in a court of law the plaintiff must show a good legal title; but in a court of equity, as has been shown, an equitable title is sufficient. The principle on which injunctions are granted when an action for the penalties cannot be maintained is the same as that on which an action for damages may be brought under the statute, although the defendant may not be liable to the penalties and forfeitures imposed.² "Though a party," said Vice-Chancellor Wigram, "is liable to be restrained by injunction from printing a work, the copyright of which is in another person, that does not make him an offender within the act, unless the case brings him within the precise situation contemplated. The act is remedial to some extent, but, so far as the forfeiture is imposed, it would be construed strictly."³

¹ *Campbell v. Scott*, 11 Sim. 89. "It appears to me that an infringement has taken place; and that, as to damage, the view taken by Shadwell, V. C., in *Campbell v. Scott*, is correct, that when once the court has found that there is '*injuria*,' the plaintiff ought to be allowed to judge of the '*damnum*;' who can tell to what extent she may be prejudiced by the best portions of her work being printed and sold without her consent? It would be very difficult for any jury to arrive at an exact conclusion upon that subject." Wood, V. C., *Tinsley v. Lacy*, 38 L. J. N. S. (Ch.) 539. See also

Kelly v. Hooper, 4 Jur. 21; *Sweet v. Maugham*, 11 Sim. 51, 53; *Morris v. Ashbee* Law Rep. 7 Eq. 41. See Chap. XVI., under What Amounts to Piracy, where is given the opinion of Tindal, C. J., in *Planché v. Braham*, 4 Bing. N. C. 19, with the approval of Lord O'Hagan in *Chatterton v. Cave*, 3 App. Cas. 498, that the penalties for representing a drama may be recovered under 8 & 4 Will. IV. c. 15, without showing any damage. See also *ante*, p. 478, note 2.

² See *ante*, p. 473.

³ *Colburn v. Simms*, 2 Hare, 558. See also *Abernethy v. Hutchinson*, 1

Injunction against any Wrong-doer. — An injunction against the seller will not be refused on the ground that the plaintiff has not proceeded against the publisher.¹

Where there are two or more distinct acts of infringement, without privity between the wrong-doers, the latter cannot be joined as defendants in one suit.²

Injunction may be Refused when Piracy Slight. — When only a small part of the defendant's publication has been copied from that of the plaintiff, the piracy may be so slight as to create a doubt whether it is a proper case for the interference of a court of equity. The matter copied may be so inconsiderable in quantity or value; it may form so small a part of the publication complained of, and be so scattered through it; the piracy may cause so little injury to the plaintiff, and enjoining the defendant's publication may lead to consequences so serious to him, — that an injunction will produce a mischief far greater than that sought to be prevented. In such case, the court may leave the plaintiff to seek his remedy at law.³ "The piracy proved," said Lord Cottenham, "may be so inconsiderable, and so little likely to injure the plaintiff, that the court may decline to interfere at all, and may leave the plaintiff to his remedy at law."⁴ And so, in *Mawman v. Tegg*, Lord Eldon said: "But, after the quantity of matter which has

Hall & Tw. 28, 40. In a case under 27 Geo. III. c. 38, relating to copyright in designs, Lord Chancellor Lyndhurst said: "It does not appear to me that the provisions by which a remedy is given by the act, for infringement of the right, takes away the jurisdiction of this court. That jurisdiction is in my opinion founded on the first part of the clause, which gives the right of property, and which I consider to be a substantive and independent part of the act." *Sheriff v. Coates*, 1 Russ. & My. 167.

¹ *Greene v. Bishop*, 1 Cliff. 186. "Vendors are liable for the sale of a book which invades the copyright of another, on the same principle and for the same reasons that the vendor of a machine or other mechanical structure, in the case of patent rights, is held liable for selling the manufactured article

without the license or consent of the patentee; and no reason is perceived for withholding from the complainant the common remedies for the injuries he has suffered by the acts of the respondent, merely because he has elected to seek redress in this district, instead of going into another district to pursue it against the publishers." Clifford, J., *Ibid.* 203.

² *Dilly v. Doig*, 2 Ves. 486.

³ *Br. Baily v. Taylor*, 3 L. J. (Ch.) 66; *Mawman v. Tegg*, 2 Russ. 885; *Lewis v. Fullarton*, 2 Beav. 6; *Bell v. Whitehead*, 8 Jur. 68; *Sweet v. Cater*, 11 Sim. 572, 580; *Campbell v. Scott*, *Ibid.* 31; *Bohn v. Bogue*, 10 Jur. 420; *Jarrold v. Heywood*, 18 W. R. 279. *Am. Webb v. Powers*, 2 Woodb. & M. 497; *Greene v. Bishop*, 1 Cliff. 186.

⁴ *Lewis v. Fullarton*, 2 Beav. 11.

been copied has been thus ascertained, the quantity of matter not piratical with which the piratical matter has been intermixed is still a circumstance of great importance. For, though this court has long entertained the jurisdiction of protecting literary property by injunction, there may be much doubt whether it would exercise the jurisdiction where only a few pirated passages occurred, and would not rather in such a case leave the complaining party to his action at law."¹

No general rule can be laid down for determining what course should be followed under such circumstances. It will depend on the facts in each case. "It must appear," said Vice-Chancellor Shadwell, "where a complaint is made to this court that the piracy has either been of what is called 'a large part' or of 'a material part.'"²

The value of the matter taken will often be a more important consideration than the quantity.³

When Consequences to Defendant Considered.—When the piracy is important, and the consequent injury to the plaintiff material, an injunction is usually granted, notwithstanding the serious consequences to the defendant;⁴ unless perhaps there is a marked inequitable disproportion between the wrong complained of and the remedy asked. But, where the objectionable matter forms but a small part of the defendant's publication, the court will compare the damage done to the plaintiff with that

¹ 2 Russ. 394. "Decided cases have been cited by the counsel for the respondent, which show that, when the invasion of a copyright is slight, and the copying consists of indefinite or small parts, so scattered through the work that it is difficult or nearly impossible to estimate either the amount of the injury to the complainant, or the profit to the respondent, relief in equity has sometimes been refused, and the party turned over to his remedy at law. Those decisions were doubtless correct as applied to the facts and circumstances under which they were made; but it is clear, both from the finding of the master and all the evidence on which it is based, that no such difficulty can arise in this case; and consequently I hold that the complainant is entitled to an injunction, to be limited according to

the second finding of the master, and also to an account." Clifford, J., *Greene v. Bishop*, 1 Cliff. 203.

² *Bohn v. Bogue*, 10 Jur. 420.

³ *Br. Bramwell v. Halcomb*, 8 My. & Cr. 737; *Bell v. Whitehead*, 3 Jur. 68; *Kelly v. Hooper*, 4 Id. 21; *Campbell v. Scott*, 11 Sim. 31; *Tinsley v. Lacy*, 1 Hem. & M. 747, 752. *Am. Gray v. Russell*, 1 Story, 11, 20; *Story's Executors v. Holcombe*, 4 McLean, 306, 309; *Farmer v. Calvert Lithographing, Engraving, & Map-Publishing Co.*, 5 Am. L. T. R. 168, 174. See *ante*, p. 414.

⁴ *Mawman v. Tegg*, 2 Russ. 385; *Lewis v. Fullarton*, 2 Beav. 6; *Stevens v. Wildy*, 10 L. J. n. s. (Ch.) 190; *Lawrence v. Dana*, 2 Am. L. T. R. n. s. 402, see *post*, pp. 529, 530.

which the defendant will sustain if the injunction is granted and will hesitate to destroy the entire work in order to redress a very slight injury.¹ The court must sometimes "incur the hazard of occasioning finally some injurious consequence to one party or the other;"² and the aim will be to take that course which is most equitable in view of all the circumstances. "It appears to me," said Lord Langdale, "that an injunction ought to be granted whenever it appears by sufficient evidence that a copyright exists, and that piracy has been committed to an extent which is likely to be seriously prejudicial to the plaintiff; and that the extent of the injunction must depend on the amount of the proof and the nature of the work."³

Illustrations of Material Quantity and Value. — The court did not hesitate to grant an injunction, where the defendant's publication consisted of two volumes containing eight hundred and sixty-six pages, of which three hundred and nineteen pages of letters had been copied from the plaintiff's work, which was in twelve volumes, and contained six thousand seven hundred and sixty-three pages;⁴ or where, in a compilation of seven hundred and ninety pages, consisting chiefly of selections of poetry, six entire poems and extracts from others, the whole amounting to eighteen pages, had been copied from *The Poetical Works of Thomas Campbell*.⁵ In *Kelly v. Hooper*, it appeared that from the plaintiff's directory of eight hundred and seventy pages, only three and a half pages had been taken; but these formed a large part of the defendant's almanac, and constituted its chief value. An injunction had been obtained *ex parte*, and was continued.⁶ Where the defendant had published in two numbers of a periodical detached extracts amounting to six or seven pages, from a farce of forty-two pages, an injunction was granted; but, on motion to make it perpetual, it was dissolved, on the ground that the quotations had been made for purposes of criticism.⁷ In *Cobbett v. Woodward*, the court

¹ *Spottiswoode v. Clarke*, 2 Phillips, 154; *M'Neill v. Williams*, 11 Jur. 344; *Pike v. Nicholas*, Law Rep. 5 Ch. 251; *Webb v. Powers*, 2 Woodb. & M. 497.

² Lord Eldon, *Hogg v. Kirby*, 8 Ves. 226.

³ *Lewis v. Fullarton*, 2 Beav. 12.

⁴ *Folsom v. Marsh*, 2 Story, 100.

⁵ *Campbell v. Scott*, 11 Sim. 81.

⁶ 4 Jur. 21.

⁷ *Whittingham v. Wooler*, 2 Swans. 428. See also *Bell v. Whitehead*, 3 Jur. 68.

said that the plaintiff was entitled to an injunction, if he thought it worth taking, against eight lines which were found to be piratical in the defendant's publication, the Illustrated Furnishing Guide, and which had been taken from the plaintiff's New Furnishing Guide.¹ In *Mawman v. Tegg*, an affidavit was made by the defence that, from the plaintiff's work, the Encyclopædia Metropolitana, published in nine parts, and containing upward of two hundred and twenty-seven thousand lines, two thousand one hundred and sixty lines had been used in various articles in the London Encyclopædia, Lord Eldon appears to have thought that it was a proper case for an injunction; but referred the matter to a master to report as to the precise extent of the piracy, and to point out the parts copied.²

In *Chappell v. Davidson*, where the chief complaint was of the unlawful use of the title of the plaintiff's song, Vice-Chancellor Wood said: "I do not think it is necessary to lay stress on the imitation of two bars of the music. That is only a question of copyright; and certainly, if the plaintiffs intend to insist upon it as copyright, I should have to hear them in reply upon that, and to put them to an action on terms, before I could continue the injunction."³ In *Pike v. Nicholas*, on appeal, the court having found that the defendant had copied from the plaintiff's publication one passage which had been quoted from another author by the plaintiff, held that this, though under the circumstances it might be piratical, was not sufficient ground for an injunction.⁴ In *Webb v. Powers*, where it appeared that there were scattered through the defendant's work only about twenty or thirty lines of the seven thousand contained in the plaintiff's, and that they had been taken without any *animus furandi*, the court thought that whatever damage the plaintiff had sustained could be more properly remedied at law, and that it would be inequitable to destroy the defendant's publication in order to redress so slight a wrong.⁵

¹ Law Rep. 14 Eq. 407.

² 2 Russ. 385.

³ 2 Kay & J. 129.

⁴ Law Rep. 5 Ch. 251.

⁵ 2 Woodb. & M. 497. "So small a quantity," said Woodbury, J., "indicates rather illustration, and comports

with the preface acknowledging aid from the plaintiff's work, but having some different and material purposes to accomplish, and not being a material substitute with no essential changes." Ibid. 520.

In *Bell v. Whitehead*, it appeared that the defendant had published in the *Railway Times*, a weekly publication, about four and a half pages copied from an article of nineteen pages in the *Monthly Chronicle*. Lord Chancellor Cottenham dissolved the injunction, which had been granted, chiefly on the ground that the extracts had been made for the purpose of criticism. But he said: "Here the value of the extract is very minute and trifling; and, if there were nothing else in the case, the extreme minuteness of value in the extract, and of injury sustained by the plaintiff, would be sufficient to induce the court not to interfere."¹

A court of equity will not lend its aid to the protection of what is utterly insignificant. But, generally, where the value or importance of the plaintiff's publication appears to be small, the law will be construed with much liberality in his favor. If his production is a proper subject of copyright, although it may be of little worth or consequence, he is vested with a right which the law promises to protect.²

FORM OF THE INJUNCTION.

Injunction Granted only against Piratical Part. — The rule is settled in English and American chancery practice that, where only a part of a book is piratical, the remedy will not be extended beyond the injury. Hence, although the court may be satisfied that piracy has been committed, a permanent injunction is not usually granted until the extent of the infringement has been ascertained, and then only the objectionable part will

¹ 8 L. J. N. S. (Ch.) 142; s. c. 3 Jur. 68.

² *Sheriff v. Coates*, 1 Russ. & My. 159, 167; *Cobbett v. Woodward*, Law Rep. 14 Eq. 407; *Folsom v. Marsh*, 2 Story, 109-112; *Woolsey v. Judd*, 4 Duer, (N. Y.) 379. In the case first cited, Lord Chancellor Lyndhurst said: "It was said that the court ought not to interfere on account of the small value of the property in litigation. It is true that, as to the particular pieces of calico, or possibly as to the individual pattern, it may not be of much

value. But, considering this as a general question, and as one affecting the manufacture, the subject is one of great value."

"It has been said," remarked Lord Abinger, "that the case is too unimportant to be so dealt with; but the same principles must be acted upon whether the piracy consists merely in the adaptation of opera music to quadrilles, or in extracting original airs from the finest operas of Rossini or Mozart." *D'Almaine v. Boosey*, 1 Y. & C. Exch. 802.

be restrained.¹ But, when an important and distinct part of the defendant's work is clearly piratical, the publication of that part may be restrained before the nature of the rest is ascertained.²

Again, so much of the book complained of may be found to have been unlawfully copied that an injunction against the piratical part will have the practical effect of destroying the whole. In such case, it may be unnecessary to ascertain the full and precise extent of the piracy.³ Thus, in *Lewis v. Fullarton*, Lord Langdale, having satisfied himself that a large part of the defendant's work was piratical, that the parts which had been examined and compared afforded "fair indications" of the character of the rest, and that if what was known to be unlawful were taken away "there would be left an imperfect work, which could not to any useful extent serve the purposes of a gazetteer," granted an injunction against the piratical parts without examining the others.⁴ In a case somewhat

¹ *Br. Mawman v. Tegg*, 2 Russ. 385; *Lewis v. Fullarton*, 2 Beav. 6; *Jarrold v. Houlston*, 3 Kay & J. 708; *Kelly v. Morris*, Law Rep. 1 Eq. 597; *Scott v. Stanford*, 3 Id. 718; *Morris v. Ashbee*, 7 Id. 34; *Pike v. Nicholas*, Law Rep. 5 Ch. 251; *Hogg v. Scott*, Law Rep. 18 Eq. 444; *Smith v. Chatto*, 31 L. T. N. s. 775. *Am. Folsom v. Marsh*, 2 Story, 100; *Story's Executors v. Holcombe*, 4 McLean, 306; *Greene v. Bishop*, 1 Cliff. 186; *Daly v. Palmer*, 6 Blatchf. 256; *Lawrence v. Dana*, 2 Am. L. T. R. N. s. 402.

² *Kelly v. Morris*, *supra*.

³ "I do not think," said the Vice-Chancellor in *Stevens v. Wildy*, "I am bound to go through the whole book; but I apprehend that the law at present is in conformity with the old Roman law, which is, that, if the defendant will take the plaintiff's corn and mix it with his own, the whole should be taken to be the plaintiff's; and, after the defendants in this case have taken so much as I see has been taken, I think the injunction ought to be granted." 10 L. J. N. s. (Ch.) 190.

⁴ *Lewis v. Fullarton*, 2 Beav. 6, 14.

"It appears to me," said Lord Langdale, "that an injunction ought to be granted, whenever it appears, by sufficient evidence, that a copyright exists, and that piracy has been committed to an extent which is likely to be seriously prejudicial to the plaintiff; and that the extent of the injunction must depend on the amount of proof and the nature of the work. The plaintiffs in the present case ask for an injunction, to restrain the defendant from publishing the whole or any part of the defendant's gazetteer. As it appears from the evidence that there are parts of the defendant's gazetteer which are not borrowed from the plaintiff's work, I cannot grant an injunction in those terms; and it becomes a question, whether an injunction should be granted in general terms against such parts as have been pirated, or whether means should be taken to ascertain what particular parts have been pirated, in order that the publication of those particular parts may be restrained. Now it appears to me, not, it must be admitted, by absolute proof and demonstration, for the two works

similar, Lord Eldon, before granting an injunction, referred the matter to a master to report the extent of the infringement.¹

Entire Work may be Restrained when Piratical Part cannot be Separated.— When the part which has been copied from the plaintiff's work can be separated from that which has not been so copied, an injunction will be granted only against the objectionable part or parts. But if the original and the piratical matter are so mixed in the publication complained of that they cannot be distinguished, then the entire work may be restrained on the principle that whoever wrongfully mixes the matter of another with his own must suffer the consequences.²

have not been examined in every part, but upon proof and demonstration as to part, and as to the rest by strong inference and presumption, arising from the proof given as to those parts to which the proof applies, and from the nature of the work and the circumstances under which it is proved to have been composed, that if the parts pirated were taken away, though some articles would remain in their entirety, yet the greater number would be left in a state so imperfect and incomplete, that the defendant's work would lose its distinctive and useful character as a gazetteer.

"If the defendant were desirous to avail himself, as he has an undoubted right to do, of any original matter of his own, or of any matter which he has fairly taken from other sources, he would, I think, be under the necessity of recomposing his work, for the purpose of separating that which appears to me to have been improperly taken from the plaintiff's work. Lord Eldon says, 'In the cases which have come before me, my language has been, that there must be an injunction against such part as has been pirated, but in those cases the part of the work which was affected with the character of piracy was so very considerable, that, if it were taken away, there would have been nothing left to publish except a few broken sentences' [Mawman v. Tegg, 2 Russ. 85]; and it was be-

cause the evidence before him did not enable him to approach sufficiently to that result, that he made the particular order which he did in that case.

"But in this case, having availed myself of the evidence which has been so industriously collected during the long time that this motion was pending, and having read with great care all the affidavits laid before me, and more particularly the affidavits of Mr. Holliday and Mr. Cunningham, I think that I have reasons, on which I ought judicially to act; for considering that the parts of the work which have been examined and compared afford fair indications of the nature and character of those parts of the works which have not yet been examined and compared; and it appearing to me, under these circumstances, that, if the parts affected with the character of piracy were taken away, there would be left, I cannot say nothing but a few broken sentences, but there would be left an imperfect work, which could not, to any useful extent, serve the purposes of a gazetteer, I think that I ought to grant an injunction, to restrain the publication of the parts which are pirated, without waiting till all the parts which have been pirated can be distinctly specified." Ibid. 12.

¹ Mawman v. Tegg, 2 Russ. 385.

² Br. Mawman v. Tegg, *supra*; Lewis v. Fullarton, 2 Beav. 11; Colburn v. Simms, 2 Hare, 554; Stevens

“Suggestion is made,” said Mr. Justice Clifford, “that it will be impossible to separate that which is original from that which is borrowed, and to some extent the suggestion may be of weight; but the court is of the opinion that the difficulties in that behalf, when the matters pass under the searching examination of a master, will be much less than is apprehended by the parties. Should the difficulty in any instance or class prove to be insurmountable, then the rule in equity is, that, if the parts which have been copied cannot be separated from those which are original without destroying the use of the original matter, he who made the improper use of that which did not belong to him must suffer the consequences of so doing. If a second writer mixes the literary matter of another, which is under the protection of a copyright, with his own, without the license or consent of the proprietor, he must nevertheless be restrained from publishing what does not belong to him; and if the parts of the work cannot be separated, so that the injunction prevents also the publication of his own literary production so mixed with that of another, he has only himself to blame.”¹

Form of Injunction.—The parts of the publication to be restrained may be specified in the injunction.² Or, the defendant may be enjoined from printing, publishing, selling, or otherwise disposing of any copies of the book “containing any

v. Wildy, 19 L. J. N. S. (Ch.) 190. **Am.** *Emerson v. Davies*, 8 Story, 796; *Webb v. Powers*, 2 Woodb. & M. 521; *Lawrence v. Dana*, *infra*.

“As to the hard consequences which would follow from granting an injunction, 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 the law, he must again separate them, and he must

bear all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and, if the parts of the work cannot be separated, and if by that means the injunction, which restrained the publication of my literary matter, prevents also the publication of his own literary matter, he has only himself to blame.” Lord Eldon, *Mawman v. Tegg*, 2 Russ. 390.

¹ *Lawrence v. Dana*, 2 Am. L. T. R. N. S. 480.

² *Kelly v. Morris*, Law Rep. 1 Eq. 708; *Pike v. Nicholas*, Law Rep. 5 Ch. 260.

articles or article, passages or passage copied, taken or colorably altered from" the plaintiff's book;¹ or "from doing any other act or thing in invasion of the plaintiff's copyright in the said" book.² Or, the injunction may be directed specially against the piratical parts, and generally against any unlawful copying from the plaintiff's work.³

In *Dickens v. Lee*, where an injunction had been granted enjoining the defendant from "copying or imitating the whole or any part of the plaintiff's book," Vice-Chancellor Knight Bruce struck out "or imitating," saying there was no precedent for such words, but without expressing an opinion whether an injunction would properly go to that length.⁴

In *Daly v. Palmer*, the defendant was enjoined "from the public performance and representation, and from the sale for public performance or representation of the 'railroad scene' in the [defendant's] play of *After Dark*, or of any scene in substance the same as the 'railroad scene' in either of the two plays as such scene is herein defined."⁵

ACCOUNT OF PROFITS.

Besides granting an injunction, a court of equity will take from the defendant the profits he has made by the publication or sale of the piratical work and give them to the plaintiff.⁶ This, however, is but an approximate measure of the damages which the plaintiff has sustained. The profits realized from

¹ *Lewis v. Fullarton*, 2 Beav. 14; *Jarrold v. Houlston*, 3 Kay & J. 723; *Hogg v. Scott*, Law Rep. 18 Eq. 458.

² *Scott v. Stanford*, 36 L. J. N. S. (Ch.) 732. See also *Hotten v. Arthur*, 1 Hem. & M. 610.

³ *Jarrold v. Houlston*, *Scott v. Stanford*, *supra*.

⁴ 8 Jur. 185. "I am struck," he said, "with the absence of any precedent for the use of those words in any injunction upon a case merely literary; and as I am of opinion, if I rightly understand it, that what is apprehended by the counsel for the plaintiff this court would restrain, I think it more prudent and safe to narrow the present injunction, rather than to leave in it a

word apparently new in such cases, and which may be susceptible of an erroneous interpretation. I think, therefore, but I may say it without prejudice to any question whatever, without intimating any opinion of what it may be lawful or unlawful for the defendant, in the way of imitation or supposed imitation, to do, that the words 'or imitating' should be struck out."

⁵ 6 Blatchf. 271.

⁶ *Mawman v. Tegg*, 2 Russ. 385, 400; *Lewis v. Fullarton*, 2 Beav. 6, 12; *Colburn v. Simms*, 2 Hare, 543, 560; *Kelly v. Hodge*, 29 L. T. N. S. 387; *Pierpont v. Fowle*, 2 Woodb. & M. 23; *Stevens v. Gladding*, 17 How. 447, 455.

the sale of the defendant's publication may be materially less than those which the plaintiff would have made, had there been no unlawful interference with the sale of his work.¹ On the other hand, the court by this remedy may give to the plaintiff a sum greater than the amount of damages he has sustained; for the sale of his work may not have been materially diminished by even an extensive circulation of the publication complained of.²

Right to Account Dependent on Right to Injunction. — The right to an account of profits is dependent on the right to an injunction. "This court," said Sir John Leach, M. R., "has no jurisdiction to give to a plaintiff a remedy for an alleged piracy, unless he can make out that he is entitled to the equitable interposition of this court by injunction; and, in such case, the court will also give him an account, that his remedy here may be complete. If this court do not interfere by injunction, then his remedy, as in the case of any other injury to his property, must be at law."³

¹ "Though keeping an account of the profits may prevent the defendant from deriving any profit, as he may ultimately be obliged to account to the plaintiff for all his gains, yet, if the work which the defendant is publishing in the mean time, really affects the sale of the work which the plaintiff seeks to protect, the consequence is, that the rendering the profits of the former work to the complaining party may not be a satisfaction to him for what he might have been enabled to have made of his own work, if it had been the only one published; for he would argue that the profits of the defendant as compared with the profits which he, the plaintiff, has been improperly prevented from making, could only be in the proportion of eight shillings, the price of a copy of the one book, to one guinea, the price of a copy of the other." Lord Eldon, *Mawman v. Tegg*, 2 Russ. 400.

² "It is true 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 wrong-doer all the profits he has made by his piracy and gives them to the party who has been wronged. In doing this, the court may often give the injured party more, in fact, than he is entitled to; for *non constat* that a single additional copy of the more expensive book would have been sold, if the injury by the sale of the cheaper book had not been committed. The court of equity, however, does not give any thing beyond the account." *Wigram, V. C., Colburn v. Simms*, 2 Hare, 560.

³ *Baily v. Taylor*, 1 Russ. & My. 75. Quoted and approved in *Smith v. London & South-Western Railway Co.*, 1 Kay, 415. See 2 Story's Eq. Jur. § 933; also *Monk v. Harper*, 3 Edw. Ch. (N. Y.) 109.

Account may be Ordered before Injunction Granted. — But where the court has been in doubt as to the plaintiff's right, and has refused to grant an injunction until the establishment of that right, the defendant has been ordered to keep an account in the mean time.¹ On the same principle, where a temporary injunction is refused in consequence of doubt, an account may be ordered to be kept until the final hearing, when it will be decided whether or not the profits shall be paid the plaintiff.

Account Ordered when not Asked for. — Where an account is not specifically asked for, it may be ordered under the prayer for general relief.²

Past Sales. — Profits of past sales may be ascertained from affidavits made by or on behalf of the defendant;³ or a reference to the master may be ordered for that purpose.⁴

It has been held by the Circuit Court of the United States, that the owner of the copyright is entitled to the profits arising from the sales on commission of piratical copies.⁵

¹ *Wilkins v. Aikin*, 17 Ves. 422; *Mawman v. Tegg*, 2 Russ. 385; *Spotiswoode v. Clarke*, 2 Phillips, 154; *M'Neill v. Williams*, 11 Jur. 344; *Jollie v. Jaques*, 1 Blatchf. 618.

² *Stevens v. Gladding*, 17 How. 447, 455, and cases there cited.

³ *Pike v. Nicholas*, 20 L. T. N. S. 909; *Kelly v. Hodge*, 29 L. T. N. S. 387.

⁴ *Folsom v. Marsh*, 2 Story, 100; *Stevens v. Gladding*, *infra*.

⁵ *Stevens v. Gladding*, 2 Curtis, 608. "I am not aware," said Mr. Justice Curtis, "that this question has ever been made in a copyright or patent case." After referring to cases of partnership in which a court of equity had ordered profits arising from sales on commission to be accounted for, he continued: "The jurisdiction in cases of copyright rests upon a similar principle. If the proprietor will waive his action for damages, he may have an account of profits, upon the ground that the defendant has, by dealing with his property, made gains which equitably belong to the complainant. And I perceive no sound reason for restricting those gains to the difference between the cost and the sale price of the

map or book, or limiting the right to an account to those persons who have sold the work solely on their own account. He who sells on commission does in truth sell on his own account, so far as he is entitled to a percentage on the amount of the sales. What he so receives is the gross profit coming to him from the proceeds of the sales. And what he so receives diminishes the net profit of the one who employs him to sell. When the latter is called on to account, he has an allowance for the commissions he has paid; because those sums, though part of the gross profits of the sales, he has not received. That part of the profits of the sales being in the hands of the commission merchant, the consignor is not accountable for them. But why should not the commission merchant, who has them, account for them? He was liable to an action for damages for selling. That right is waived. I think he should pay over to the proprietor, in lieu of the damages, the gain he has made from the sales. It does not seem to me that the term 'profits' necessarily, or when construed in reference to the subject-matter, properly has so

DISCOVERY.

The court may require the defendant to disclose the number of piratical copies which he has printed, imported, or sold, the number on hand, the proceeds of sales, &c. But the defendant cannot be compelled to make such discovery when it will subject him to forfeitures and penalties, unless these are waived by the plaintiff.¹

In a recent English case, it was held that the plaintiff is entitled to a discovery of the sources from which the defendant's book has been compiled.² In the United States, courts of equity have no jurisdiction of the penalties and forfeitures imposed by the copyright laws. They must be recovered in a court of law.³

By the 21 & 22 Vict. c. 27, s. 2, passed in 1858, English courts of chancery were empowered to assess and award damages, either in lieu of, or in addition to, an injunction;⁴ and they have this jurisdiction under the new judicial system. Before the statute of 1858, the court had, in one case, refused to give the plaintiff more than the net profits of the defendant's publication.⁵ But in *Mawman v. Tegg*, Lord Eldon could not see

restricted a meaning as to exclude commissions received from the proceeds of sales of the property of the complainant"

¹ *Atwill v. Ferrett*, 2 Blatchf. 39, 44; *Farmer v. Calvert Lithographing, Engraving, & Map-Publishing Co.*, 5 Am. L. T. R. 165, 170; 2 Story's Eq. Jur. §§ 1319, 1494, 1509. "It is an incontrovertible principle of equity law, that a defendant cannot be compelled to make disclosures in answer to a bill which seeks to enforce penalties and forfeitures against him by means of such discoveries. In this case, the bill claims a forfeiture under section 7 of the act of Feb. 3, 1831, of the plates and pieces of music on hand. Had the forfeiture been waived by the plaintiff, the defendants might be compelled to disclose the number of their publications, the quantity on hand, and the amount realized from sales, in aid of the recovery of damages in a suit at law. So probably on such discovery

equity might compel the defendants to deliver up to the plaintiffs the forfeited copies. But the bill is clearly faulty in directly requiring the defendants to convict themselves of the act which carries with it the forfeiture sued for." *Betts, J., Atwill v. Ferrett, supra.*

² *Kelly v. Wyman*, 17 W. R. 399. "If I charge you," said James, V. C., "with having taken information from my book and you derived your information from original sources, I have a right to know what those original sources were." See also *Tipping v. Clarke*, 2 Hare, 383.

³ See *post*, p. 548.

⁴ *Tinsley v. Lacy*, 1 Hem. & M. 747; *Johnson v. Wyatt*, 2 De G. J. & S. 18; *Pike v. Nicholas*, Law Rep. 5 Ch. 260; *Cox v. Land & Water Journal Co.*, Law Rep. 9 Eq. 324; *Smith v. Chatto*, 31 L. T. n. s. 775.

⁵ *Delf v. Delamotte*, 3 Kay & J. 581; s. c. 3 Jur. n. s. 933.

why a court of equity, though he had never known it to be done, might not ascertain, and award to the plaintiff, the full amount of damages which he had sustained.¹

Rule of Damages. — In *Pike v. Nicholas*, Vice-Chancellor James laid down the following rule for estimating the damages in cases of piracy: “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.”²

INJUNCTIONS ON OTHER GROUNDS THAN INFRINGEMENT OF COPYRIGHT.

Courts of equity have frequently interfered to protect the owner’s rights in a literary work on other grounds than that of violation of the copyright, and have granted injunctions against publications which were not piratical.

Injunctions Protecting Titles. — There can be no copyright in a mere title;³ but, on general principles of equity, an injunction will be granted restraining a person from appropriating the title of a well-known publication for a rival work. Nor will a person be allowed to use a title which is a mere colorable imitation of another, for the purpose of misleading the public into buying one publication in the belief that it is the other.⁴ But, when the exact title is not copied, an injunction

¹ *Mawman v. Tegg*, 2 Russ. 400. “If the principle upon which the court acts,” said the Lord Chancellor, “is that satisfaction is to be made to the plaintiff, I cannot see, though I never knew it done, why, if a party succeeds at law in proving the piracy, the court should not give him leave to go on to ascertain, if he can, his damages at law; or if, after applying the profits which are handed over to him by the defendants, he can show that they were not a satisfaction for the injury done to him, I cannot see why the court might not in such a case direct an issue to try what further damnification the plaintiff had sustained.”

² Law Rep. 5 Ch. 260.

³ See *ante*, p. 145.

⁴ *Br. Hogg v. Kirby*, 8 Ves. 215; *Constable v. Brewster*, 3 Sc. Sess. Cas. 214; *Chappell v. Sheard*, 2 Kay & J. 117; *Chappell v. Davidson*, (in eq.) *Ibid.* 123; *Chappell v. Davidson* (in law) 18 C. B. 194; *Prowett v. Mortimer*, 2 Jur. n. s. 414; *Ingram v. Stiff*, 5 Id. 947; *Clement v. Maddick*, 1 Gilf. 98; *Bradbury v. Dickens*, 27 Beav. 53; *Kelly v. Hutton*, Law Rep. 3 Ch. 703; *Mack v. Petter* Law Rep., 14 Eq. 431; *Ward v. Beeton*, 19 Id. 207; *Metzler v. Wood*, 8 Ch. D. 606; *Am. Jollie v. Jaques*, 1 Blatchf. 618, 627; *Matsell v. Flanigan*, 2 Abb. Pr. n. s. (N. Y.) 459; *Osgood v. Allen*, 1 Holmes, 185; *Benn v. LeClercq*, 18 Int. Rev. Rec. 94; *Harte v. DeWitt*, 1 Cent. Law Jour. 360.

will not be granted, unless the title and appearance of the defendant's publication are designed to deceive persons who are ordinarily intelligent and careful. Where there was a well-known comic paper named *Punch*, and another called *Judy*, and the defendant issued a publication with the title *Punch and Judy*, the court held that the defendant would not be at liberty to use *Punch* or *Judy* singly as a title, but refused to restrain the use of a title made up of the two words, for the reason that it was not such as to deceive persons of ordinary intelligence.¹ Where the plaintiff had simply advertised the future publication of a magazine, to be called *Belgravia*, the court refused to restrain the defendant from using the same title.²

¹ *Bradbury v. Beeton*, 18 W. R. 33. "The defendants," said Vice-Chancellor Malins, "clearly have no right to use a name which is calculated to mislead or deceive the public in purchasing; and if I thought, on the whole, that their journal was calculated to mislead persons of ordinary intelligence (for these are the persons I must consider), I should grant the injunction. Now *Punch* is well known both in name and appearance, and its price is 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." See also *Spottiswoode v. Clarke*, 2 Phillips, 154; *Snowden v. Noah*, Hopkins Ch. (N. Y.) 396; *Bell v. Locke*, 8 Paige (N. Y.), 75; *Isaacs v. Daly*, 7 Jones & Sp. (39 N. Y. Superior Ct.) 511.

² *Maxwell v. Hogg*, Law Rep. 2 Ch. 307. "That expenditure upon a work not given to the world," said Lord Justice Turner, "can create, as against the world, an exclusive right to carry on a work of this nature, seems to me a proposition quite incapable of being maintained. It never, so far as I am aware, has been thought that any such equity exists. Then, if the expenditure alone will not confer such a right, will the advertisements do so? Such an advertisement is

nothing more than an announcement of an intention on the part of the plaintiff to publish in the month of October following a work under a given title. Can that be considered as constituting in him an equitable title, or any title, to the name under which that work is to be published? If it is to be considered as doing so, the consequence will be that, without having made any new publication at all, he might come to this court saying: 'I have advertised my intention to publish in October a given work under a given title, and nobody else shall publish a work under that title until I have had an opportunity of bringing my work before the public.' He does not by his advertisements come under any obligation to the public to publish the work, and therefore the effect of holding the advertisements to give him a title, would be that, without having given any undertaking or done any thing in favor of the public, he would be acquiring a right against every member of the public to prevent their doing that which he himself is under no obligation to do, and may never do.

" . . . It has been argued that there is no distinction between the case of a title acquired, as the plaintiff asserts that this title is acquired, by advertisement, and a title acquired by actual publication, and that if there had been a publication of this work by the plaintiff under the title of *Belgravia*, there

Breach of Trust. — In *Abernethy v. Hutchinson*, wherein the plaintiff sought to prevent the publication in the *Lancet* of medical lectures which he had delivered to students in St. Bartholomew's Hospital in London, Lord Eldon, without determining the doubtful question of the plaintiff's property in lectures which had not been reduced to writing, granted the injunction, on the ground of breach of an implied contract or trust existing between the lecturer and his hearers. "If there is either an implied contract on the part of the student, or a trust," he said, "and if you can make out that the student has published, I should not hesitate to grant the injunction. With respect to the stranger, if this court is not to be told (and certainly it has no right to compel the parties to tell) whether the power of giving the oral lectures to the public was derived from a student or not, I think it very difficult to tell me that that should not be restrained which is stolen, if you would restrain that which is a breach of contract or of trust." "Although there was not sufficient to establish an implied contract as between the plaintiff and the defendants, yet it must be decided that, as the lectures must have been procured in an undue manner from those who were under a contract not to publish for profit, there was sufficient to authorize the court to say the defendants shall not publish."¹

would have been an undoubted case for coming to this court to restrain another person from using that same title. It seems to me, however, that there is a great distinction between the case of advertisement followed by publication and a case resting upon advertisement only. In the case of advertisement followed by publication, the party publishing has given something to the world, and there is some consideration for the world's giving him a right; but in the case of mere advertisement he has neither given, nor come under any obligation to give, any thing to the world; so that there is a total want of consideration for the right which he claims. If this bill were to be maintained, I am not sure that a man might not advertise his intention to carry on business after a particular day under the name of a

firm which had existed before, and which name might be of the greatest value, and then come into this court to restrain any other person from using that name." *Ibid.* 311, 312. See also *Correspondent Newspaper Co. v. Saunders*, 12 L. T. N. S. 540; *Benn v. Le Clercq*, 18 Int. Rev. Rec. 94.

¹ 1 Hall & Tw. 37, 40. Lord Eldon "had no doubt whatever that an action would lie against a pupil who published these lectures. How the gentlemen who had published them came by them, he did not know; but whether an action could be maintained against them or not, on the footing of implied contract, an injunction undoubtedly might be granted; because if there had been a breach of contract on the part of the pupil who heard these lectures, and if the pupil could not publish for profit, to do so would certainly be

The same doctrine was recognized in *Prince Albert v. Strange*,¹ where the complaint was of an unlawful use of unpublished etchings, which had been obtained by surreptitious means, to which the defendant, *Strange*, was not privy. The court had no doubt that the plaintiff was entitled to an injunction, on the ground of a violation of property; "but," said Lord Cottenham, "this case by no means depends solely upon the question of property, for a breach of trust, confidence, or contract would of itself entitle the plaintiff to an injunction."² And so, in *Keene v. Wheatley*, the Circuit Court of the United States held it to be a good ground for an injunction, that the defendant had represented the plaintiff's manuscript play, through a breach of trust on the part of an actor

what this court would call a fraud in a third party. If these lectures had not been taken from a pupil, at least the defendants had obtained the means of publishing them, and had become acquainted with the matter of the lectures in such a manner that this court would not allow of a publication. It by no means followed because an action could not be maintained that an injunction ought not to be granted." See also *Newton v. Cowie*, 4 Bing. 245; *Murray v. Heath*, 1 Barn. & Ad. 804; *Turner v. Robinson*, 10 Ir. Ch. 121, 510; *Bartlett v. Crittenden*, 4 McLean, 300, 5 Id. 32.

¹ 2 De G. & Sm. 652, on ap. 1 Mac. & G. 25.

² 1 Mac. & G. 44. "Upon the evidence on behalf of the plaintiff," continued the Lord Chancellor, "and in the absence of any explanation on the part of the defendant, I am bound to assume that the possession of the etchings by the defendant or Judge has its foundation in a breach of trust, confidence, or contract, as Lord Eldon did in the case of Mr. Abernethy's lectures, and upon this ground also I think the plaintiff's title to the injunction sought to be discharged fully established. The observations of Vice-Chancellor Wigram in *Tipping v. Clarke*, 2 Hare, 393, are applicable to this part of the case. He says: 'Every clerk employed in a merchant's counting house is un-

der an implied contract that he will not make public that which he learns in the execution of his duty as clerk. If the defendant has obtained copies of books, it would very probably be by means of some clerk or agent of the plaintiff; and, if he availed himself surreptitiously of the information which he could not have had except from a person guilty of a breach of contract in communicating it, I think he could not be permitted to avail himself of that breach of contract.' In this opinion I fully concur, and think that the case supposed by Sir J. Wigram has actually arisen, or must from the evidence be assumed to have arisen in the present, and that the consequence must be what Sir J. Wigram thought would follow. Could it be contended that the clerk, though not justified in communicating copies of the accounts, might yet be permitted to publish the substance and effect of them? In that, as in this case, the matter or thing of which the party has obtained knowledge, being the exclusive property of the owner, he has a right to the interposition of this court to prevent any use being made of it, that is to say, he is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his. This was the opinion of Lord Eldon expressed in the case of *Wyatt v. Wilson* in 1820, respecting an engraving of

employed by the plaintiff.¹ So equity will restrain the publication of manuscripts obtained surreptitiously.²

False Representations as to Authorship. — In *Seeley v. Fisher*, the plaintiff was the publisher of the fifth edition of Scott's Commentary on the Bible, which contained the latest corrections and additions made by the author before his death, and not to be found in any preceding edition. The copyright had expired in the fourth edition, which was republished by the defendant, and announced "as a new and carefully revised edition of the work, and as intended to contain the whole unadulterated labors of the author, not as re-edited by a different hand and an inferior mind, but precisely as the learned commentator bequeathed them to the world; the edition being printed from the last which the author published in the vigor of his life." The Vice-Chancellor granted an injunction restraining the defendant from publishing his work with such notice, or from otherwise advertising it in such manner as to lead the public to believe that it contained the revised matter which was to be found only in the plaintiff's edition. Lord Chancellor Cottenham dissolved the injunction, on the ground that the defendant's statements did not amount to a representation that his publication contained matter which was the exclusive property of the plaintiff; and, although the defendant had represented "that any additional or other matter which was contained in any edition subsequent to the fourth was spurious, and of no value, that allegation, if untrue, was no subject for an injunction, although it might be the subject of an action, as being a libel on or disparagement of plaintiff's edition."³

In *Byron v. Johnston*, an injunction was granted, restraining the publication of certain poems falsely represented to be productions of Lord Byron.⁴ In *Hogg v. Kirby*, Lord Eldon

George the Third during his illness, in which, according to a note with which I have been favored by Mr. Cooper, he said: 'If one of the late king's physicians had kept a diary of what he heard and saw, this court would not, in the king's lifetime, have permitted him to print and publish it.' The case of *Sir J. Strange's Manuscripts*, is applicable, upon this point also." *Ibid.* 45.

¹ 9 Am. Law Reg. 33, 101. See also

Keene v. Kimball, 16 Gray (82 Mass.), 551, 552; *Keene v. Clarke*, 5 Rob. (N. Y.) 38, 61.

² *Tipping v. Clarke*, 2 Hare, 383.

³ 11 Sim. 581. See also *Archbold v. Sweet*, 5 Car. & P. 219, considered, *ante*, p. 377.

⁴ 2 Meriv. 29; see also *Wright v. Tallis*, 1 C. B. 803, considered *ante*, p. 197; *Harte v. DeWitt*, 1 Cent. Law Jour. 360.

restrained the publication of a periodical falsely represented to be a continuation of that of the plaintiff.¹

External Likeness of Publications.—An injunction may be granted to restrain the publication of a book whose external appearance is made to resemble that of a copyrighted work, for the purpose of misleading the public to believe that the former is the same as the latter.²

Libellous, Immoral, and Blasphemous Publications.—In the absence of fraud or misrepresentation, a court of equity will not restrain the publication of a literary composition on the ground that it is injurious to the reputation, or hurtful to the feelings, of the person seeking relief;³ nor, as a general rule, on the ground that it is libellous;⁴ nor on the ground that it is blasphemous, immoral, or mischievous.⁵ In refusing to grant an injunction against the unauthorized publication of Southey's poem, *Wat Tyler*, Lord Eldon said: "It is very true that in some cases it may operate so as to multiply copies of mischievous publications, by the refusal of the court to interfere by restraining them; but to this my answer is, that, sitting here as a judge upon a mere question of property, I have nothing to do with the nature of the property nor the conduct of the parties, except as it relates to their civil interests; and, if

¹ 8 Ves. 215.

² *Spottiswoode v. Clarke*, 2 Phillips, 154; *Chappell v. Davidson*, 2 Kay & J. 123; *Mack v. Petter*, Law Rep. 14 Eq. 431; *Metzler v. Wood*, 8 Ch. D. 606; *Talcott v. Moore*, 1 N. Y. Weekly Dig. 485. "The defendants," said Lord Romilly, M. R., in *Mack v. Petter*, "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 colorable imitation of that of the plaintiff." In *Metzler v. Wood*, Malins, V. C., enjoined "the defendant from publishing, selling, or offering for sale the defendant's work in or with its present form, title-page, and cover; or any other form, title-page, or cover, calculated to deceive persons into the belief that it is the plaintiff's work." 8 Ch. D. 609.

This judgment was affirmed on appeal. *Ibid.* 610.

³ *Southey v. Sherwood*, 2 Meriv. 435.

⁴ *Hime v. Dale*, 2 Camp. 27 note b. *Southey v. Sherwood*, *supra*; *Seeley v. Fisher*, 11 Sim. 581; *Clark v. Freeman*, 11 Beav. 112; *Brandreth v. Lance*, 8 Paige, (N. Y.) 24. In *Gee v. Pritchard*, 2 Swanst. 413, Lord Eldon said: "The publication of the libel is a crime, and I have no jurisdiction to prevent the commission of crimes; excepting of course such cases as belong to the protection of infants."

⁵ *Wolcott v. Walker*, 7 Ves. 1; *Southey v. Sherwood*, 2 Meriv. 435; *Murray v. Benbow*, 6 Petersd. Abr. 558; *Lawrence v. Smith*, Jac. 471; *Martinetti v. Maguire*, 1 Deady, 216; *Shook v. Daly*, 49 How. Pr. (N. Y.) 368. See Lord Campbell's criticism on Lord Eldon's course, in *Wolcott v. Walker*, *ante*, p. 183, note 1.

the publication be mischievous, either on the part of the author or of the bookseller, it is not my business to interfere with it.”¹

Specific Performance of Agreements.—An examination of the principles which govern courts of equity in cases relating to the specific performance of contracts, properly belongs to a treatise on equity jurisprudence. No further consideration of the subject will be here attempted than a reference to some adjudicated cases relating to literary contracts.

The publication of a work which is not piratical may be restrained on the ground of a violation of a covenant. Where an author has sold his copyright to a publisher, and has agreed not to prepare another work on the same subject, or not to do any thing prejudicial to the sale of the book which he has parted with, a court of equity will enjoin him or any other person from publishing a book in violation of the covenant.² And in *Colburn v. Simms* the law was laid down to the effect that a third person without notice may be restrained from publishing in violation of a covenant made by the author. “There is no question,” said Vice-Chancellor Wigram in that case, “but that a court of equity will protect a publisher from a violation of his contract, and will interpose to restrain a party from committing any act amounting to such violation, even if that party had no previous notice.”³

Where an author had sold to a publisher the copyright of a treatise on criminal law, and had agreed not to write or edit any other work on that subject, and was afterward advertised as about to edit *Burn’s Justice*, a motion was made to restrain him from editing the articles relating to criminal law in that work. Lord Chancellor Brougham, in refusing to grant an injunction, said that “the defendant was at liberty to write in his closet what he pleased; and that the court would not interfere until there was a violation of the alleged undertaking by actual printing and publication.”⁴ But in *Ward v. Beeton*

¹ *Southey v. Sherwood*, 2 Meriv. 489.

² *Morris v. Colman*, 18 Ves. 487; *Barfield v. Nicholson*, 2 Sim. & St. 1; *Brooke v. Chitty*, *infra*; *Colburn v. Simms*, 2 Hare, 543; *Ward v. Beeton*, Law Rep. 19 Eq. 207; *Warne v. Routledge*, 18 Id. 497.

³ 2 Hare, 543, 558. See also *Barfield v. Nicholson*, *supra*.

⁴ *Brooke v. Chitty*, 2 Coop. (*temp. Cottenham*) 216. See also *Stiff v. Cassell*, 2 Jur. n. s. 348.

the defendant was restrained from advertising the intended issue of a rival publication, in violation of his agreement with the plaintiff.¹

There was formerly some doubt whether a court of equity would interfere to prevent the violation of a negative covenant in a contract, if it could not compel a specific performance of the agreement affirmatively.² But injunctions are now granted to prevent a person from doing what he has agreed not to do, although the court may have no power to compel him to do what he has agreed to do. Thus, an actor will be restrained from performing at a theatre in violation of a covenant which he has made.³ And the same principle has been recognized in the case of agreements between authors and publishers.⁴ Where the plaintiffs had bought Beeton's Christmas Annual, with the exclusive right of using the defendant's name, and the latter had agreed to devote himself to the business of the plaintiffs, and not to engage in any other enterprise, he was enjoined from issuing or advertising an intended rival publication.⁵

In *Clarke v. Price*, where it appeared that the defendant Price, while under an agreement to prepare reports of cases for the plaintiffs, supplied like reports to other publishers, Lord Eldon held that he could neither compel Price specifically to perform his agreement with the plaintiffs, nor enjoin him or the co-defendant publishers from publishing the reports complained of.⁶ But this decision was doubtless based on the

¹ Law Rep. 19 Eq. 207.

² *Kemble v. Kean*, 6 Sim. 838; *Kimberley v. Jennings*, Ibid. 340; *Clarke v. Price*, 2 Wils. C. C. 157; *Baldwin v. Society for Diffusion of Useful Knowledge*, 9 Sim. 398; *Lumley v. Wagner*, *infra*.

³ *Lumley v. Wagner*, 5 De G. M. & G. 604; *Montague v. Flockton*, Law Rep. 16 Eq. 189; *Daly v. Smith*, 6 Jones & Sp. (38 N. Y. Superior Ct.), 158.

⁴ *Ward v. Beeton*, Law Rep. 19 Eq. 207; *Warne v. Routledge*, 18 Id. 497.

⁵ *Ward v. Beeton*, *supra*.

⁶ 2 Wils. C. C. 157. "I have no jurisdiction," said Lord Eldon, "to

compel Mr. Price to write reports for the plaintiffs. I cannot, as in the other case [*Morris v. Colman*, 18 Ves. 437], say that I will induce him to write for the plaintiffs, by preventing him from writing for any other person, for that is not the nature of the agreement. The only means of enforcing the execution of this agreement would be to make an order compelling Mr. Price to write reports for the plaintiffs; which I have not the means of doing. If there be any remedy in this case, it is at law. If I cannot compel Mr. Price to remain in the Court of Exchequer for the purpose of taking notes, I can do nothing. I cannot in-

ground that Price had not covenanted to prepare reports exclusively for the plaintiffs.¹ In *Montague v. Flockton*, the defendant was enjoined from acting in another theatre than that of the plaintiff, in violation of an implied covenant in his agreement with the plaintiff.² There appears to be no reason why literary contracts should not be governed by the same principle, or why a court of equity should not interfere to prevent the violation of a negative covenant which is not express, but is clearly implied and understood by the parties.³

directly, and for the purpose of compelling him to perform the agreement, compel him to do something which is merely incidental to the agreement. It is also quite clear that there is no mutuality in this contract." *Ibid.* 164.

It was not specified how long the agreement should last, but the plaintiffs were to be "at liberty to relinquish the undertaking should they think it advisable."

¹ Referring to this decision of Lord Eldon, Lord St. Leonards said: "The whole of his judgment shows that he proceeded (and so it has been considered in later cases) on the ground that there was no negative covenant on the part of the defendant that he would not

compose reports for any other person." *Lumley v. Wagner*, 1 De G. M. & G. 622.

² Law Rep. 16 Eq. 189. See also *Webster v. Dillon*, 3 Jur. n. s. 432; *Fechter v. Montgomery*, 33 Beav. 22.

³ See also, concerning the specific performance of contracts relating to copyrighted works, *Pulte v. Derby*, 5 McLean, 328, 334; *Crookes v. Petter*, 3 L. T. n. s. 225; *Strahan v. Graham*, 17 Id. 457; *Warne v. Routledge*, Law Rep. 18 Eq. 499; opinion of McLean, J., *ante*, p. 362, note 1; also, *Sweet v. Cater*, *Stevens v. Benning and Reade v. Bentley* considered, *ante*, pp. 343, 345, 351.

CHAPTER XII.

JURISDICTION OF THE UNITED STATES COURTS.

PRIOR to 1870, the several copyright statutes of the United States provided simply that actions for piracy should be brought in any court having competent jurisdiction. They were silent as to suits in equity, except that section 9 of the act of 1831 authorized courts of the United States having cognizance of copyright cases to grant injunctions restraining the unlawful publication of manuscripts.¹ The act of 1856 provided that an action for damages against any person representing a copyrighted dramatic composition without authority should be brought "in any court of the United States."² Until 1870, the circuit courts of the United States had cognizance of copyright cases, irrespective of the citizenship of the parties or the amount in dispute, by authority of the act of 1819, which gave to these tribunals original jurisdiction, as well in equity as at law, of all actions and suits arising under the copyright laws, and empowered them to grant injunctions to prevent the violation of copyright.³ The act of 1861 provided for an appeal in copyright cases to the Supreme Court of the United States without restriction as to the amount in controversy.⁴

The entire subject of jurisdiction is now governed by the Revised Statutes. Section 629⁵ gives to the Circuit Courts of the United States original jurisdiction of all suits at law or in equity arising under the copyright law, without regard to the citizenship of the parties or the amount in dispute. Section 4970 provides that "the circuit courts, and district courts having the jurisdiction of circuit courts, shall have power, upon

¹ 4 U. S. St. at L. 438.

² 11 Id. 138.

³ 8 Id. 481. Similar jurisdiction was given to the circuit courts and

district courts having the jurisdiction of circuit courts by section 106 of the act of July 8, 1870; 16 Id. 215.

⁴ 12 Id. 130.

⁵ Cl. 9.

bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violations of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, on such terms as the court may deem reasonable.”

Three distinct rights are secured and protected by the copyright law. 1. Copyright, or the exclusive right of publishing and selling a printed work.¹ 2. Playright, or the sole liberty of representing a published dramatic composition.² 3. A right of action against any person who publishes a manuscript without authority.³ For the violation of copyright or playright, or for the unlawful publication of a manuscript, an action at law for damages, or for the penalties or forfeitures in the cases wherein they are prescribed, or a suit for an injunction or other equitable relief, may be brought in the Circuit Court of the United States, or a district court having the jurisdiction of a circuit court, although the parties are citizens of the same State, and although the amount in controversy is less than \$500. And an appeal may be made to the Supreme Court of the United States without regard to the sum in dispute.⁴ Any action or suit for the violation of a right secured by the statute can be brought only in a federal court. All cases founded on any common-law right must be sued in a State court; unless the matter in dispute, exclusive of costs, exceeds \$500, and an alien is a party, or the suit is between a citizen of the State where it is brought and a citizen of another State, in which case the circuit courts have jurisdiction.⁵

¹ U. S. Rev. St. ss. 4952, 4964, 4965.

² ss. 4952, 4966.

³ s. 4967.

⁴ U. S. Rev. St. s. 699, cl. 1.

⁵ U. S. Rev. St. s. 629, cl. 1; *Jollie v. Jaques*, 1 Blatchf. 618, 627; *Pulte v. Derby*, 5 McLean, 328, 336; *Little v. Hall*, 18 How. 165, 171; *Keene v. Wheatley*, 9 Am. Law Reg. 33; *Boucicault v. Hart*, 18 Blatchf. 47; *Talcott v. Moore*, 1 N. Y. Weekly Dig. 485; *Isaacs v. Daly*, 7 Jones & Sp. (39 N. Y. Superior Ct.) 511.

straining the unauthorized publication of manuscripts. See *Folsom v. Marsh*, 2 Story, 118; *Bartlett v. Crittenden*, 4 McLean, 300, 5 Id. 32; *Woolsey v. Judd*, 4 Duer (N. Y.), 379, 382; *Keene v. Wheatley*, 9 Am. Law Reg. 33, 45; *Boucicault v. Fox*, 5 Blatchf. 97; *Parton v. Prang*, 3 Cliff. 587. The act of 1856 provided that actions for the violation of playright should be brought in any court of the United States. The corresponding sections 4966 and 4967 of the Revised Statutes are silent as to the jurisdiction of actions and suits brought for the invasion of playright and the publication of manu-

“Where a case arises under that act,” said the Supreme Court of the United States, “we have jurisdiction, though both the parties, as in this case, are citizens of the same State. But if the act do not give the remedy sought, we can only take jurisdiction on the ground that the controversy is between citizens of different States.”¹ Where complaint was made in the United States Court of the fraudulent use of the title of a musical composition, and both parties were citizens of the same State, the court said: “The question, therefore, whether the court will interfere to prevent the use of the title in fraud of the plaintiff upon principles relating to the good will of trades is not before us, as it cannot be entertained in this suit.”² So when it is sought to enforce not the copyright itself, but a contract relating to the copyright, a federal court has no jurisdiction by virtue of the copyright statute, but only on the general ground of the citizenship of the parties.³

Manuscripts are protected by the common law as well as by the statute. Hence, for the unlawful publication of a manuscript, the owner may claim his common-law remedies in a State court; or, if a citizen or resident of the United States, he may seek redress under the statute in a federal court. The representation of a manuscript drama, is not a publication prohibited by section

scripts. But, as is shown in the text, jurisdiction of all cases arising under the copyright law is expressly vested in the federal courts which are further empowered to grant injunctions to prevent the violation of any right secured by the statute. Hence there can be no doubt that the jurisdiction of the United States courts in the case of dramatic compositions and manuscripts is now the same as it was under the previous statutes and as it is under the existing statute in the case of copyright. See *Boucicault v. Hart*, 13 Blatchf. 47.

¹ *McLean, J., Little v. Hall*, 18 How. 171.

² *Jollie v. Jaques*, 1 Blatchf. 627.

³ *Pulte v. Derby*, 5 McLean, 328, 336; *Little v. Hall*, 18 How. 165. In the former case, Mr. Justice McLean said: “Does the question in this case arise under the copyright law? In the

view above taken, the controversy arises out of the contract. The authorship of the complainant is not controverted, nor is it doubted that the copyright is vested in the defendants. There is no question, then, which can be said to arise under the act of Congress. On the construction of the contract alone, the rights of the parties depend. And in such a case I am inclined to think that the circuit court cannot exercise jurisdiction.”

As to the nature of the contract in the two cases last cited, in which it was held that a State court was the proper tribunal in which to bring the action, see *ante*, pp. 355, 362. See also *Gould v. Banks*, 8 Wend. (N. Y.) 562; *Willis v. Tibbals*, 1 Jones & Sp. (N. Y.) 220; *Carter v. Bailey*, 64 Me. 458; which were actions growing out of contracts relating to copyrights, and were brought in a State court.

4967. Hence, redress for such wrong must be sought in a State court, unless a federal court has jurisdiction by reason of the citizenship of the parties.¹

Statutory Penalties and Forfeitures must be Sued for in Court of Law. — It remains to consider whether matters relating to penalties and forfeitures are within the jurisdiction of a court of equity, or whether they belong exclusively to courts of law. This question is practically obsolete in England, where the distinction between law and equity tribunals is in effect abolished. But in the United States the subject has not lost any of its practical importance. Hence, it is necessary to examine the English as well as the American decisions on this point.

In *Colburn v. Simms*, decided in 1843, Vice-Chancellor Wigram said that he had never known of an instance in which a court of equity had ordered the forfeited copies to be delivered up, except one case before Lord Eldon, where the order had been made by consent. He held that since the House of Lords, in *Donaldson v. Becket*,² had declared that there could be no copyright in a published work, except by statute, a court of equity had no power in the case of a printed book to decree a delivery of copies on the principles of the common law; that such jurisdiction, if it existed, must be derived from an act of Parliament; and whether the statutes relied on in the case before the court had that effect, it was not necessary to decide, for the reason that the plaintiff was barred on other grounds from recovering the forfeitures.³

¹ *Keene v. Wheatley*, 9 Am. Law Reg. 33; *Boucicault v. Hart*, 13 Blatchf. 47. In considering the corresponding provision in the act of 1831, Shipman, J., said: "The jurisdiction of the courts of the United States is indeed confined by the 9th section of the act of February 3, 1831, to cases of threatened or actual printing and publication, and would probably not include the public performance of a manuscript play, unless indeed the parties should be citizens of different States. But the jurisdiction of the State courts, in suits to protect the owners of manuscripts, is complete in all other emergencies." *Boucicault v. Fox*, 5 Blatchf. 97.

For a fuller consideration of the provision of the statute for the protection of manuscripts, see *ante*, p. 124.

² 4 Burr. 2408.

³ 2 Hare, 543, 553. The statutes referred to provided that the forfeited copies should be delivered to the owner of the copyright "upon order of any court of record." 54 Geo. III. c. 156, s. 4; 41 Geo. III. c. 107, s. 1. The statute now in force declares that the piratical copies of a book shall be the property of the owner of the copyright, who shall "sue for and recover the same, or damages for the detention thereof, in an action of detinue." 5 & 6 Vict. c. 45, s. 23. In *Delf v. Delamotte*, decided in 1857, the Court of

In the United States, the law may be regarded as settled that the penalties and forfeitures imposed by the statute must be sued for in a court of law. The statute of 1831 provided that in the case of a book the penalties and forfeited copies should "be recovered by action of debt in any court having competent jurisdiction thereof;"¹ and that in the case of "any print, cut, or engraving, map, chart, or musical composition," the penalties and forfeitures should "be recovered in any court having competent jurisdiction thereof."² In *Stevens v. Gladding*, wherein it was sought to recover the penalties and forfeitures prescribed by section 7 of the statute of 1831, for the piracy of a map, the Supreme Court of the United States held that it was not within the usual and ordinary jurisdiction of a court of equity to decree a payment of the penalties, or a delivery of the forfeited copies or plates. Such jurisdiction could be derived only from express statutory provision; and the only equitable jurisdiction in cases of copyright vested in the courts of the United States was that conferred by the act of 1819, which gave to such courts original cognizance, as well in equity as at law, of all cases arising under the copyright laws, and empowered them to grant injunctions according to the course and principles of courts of equity. "There is nothing in this act of 1819," said Mr. Justice Curtis, "which extends the equity powers of the courts to the adjudication of forfeitures; it being manifestly intended that the jurisdiction therein conferred should be the usual and known jurisdiction exercised by courts of equity for the protection of analogous rights."³

The law, as thus expounded by the Supreme Court in 1854, has not been changed by any statute since passed. The sections of the copyright law,⁴ which impose forfeitures and penalties, do not specify in what court they shall be recovered. Section 629⁵ of the Revised Statutes gives to the Circuit Courts of the United States original jurisdiction of all suits at law or in equity arising under the copyright laws; and section 4970 simply empowers circuit courts, and district courts having the jurisdiction of circuit courts, to grant injunctions to prevent

Chancery ordered the defendant to deliver to the plaintiff the forfeited copies. 3 Kay & J. 584.

¹ s. 6; 4 U. S. St. at L. 437.

² s. 7.

³ 17 How. 447, 455.

⁴ 4964, 4965.

⁵ cl. 9.

the violation of copyright. No one of the statutory provisions above referred to, nor any other provision, gives to a court of equity jurisdiction over forfeitures and penalties.¹

Forfeiture of Copies at Common Law.—The question has been raised whether a person, whose common-law rights in an unpublished work have been violated, is entitled to the piratical copies in the possession of the wrong-doer, and whether it is within the jurisdiction of a court of equity to order such copies to be delivered up.

In *Prince Albert v. Strange*, it appeared that the defendant had in his possession copies of etchings, taken from plates which had been surreptitiously obtained from the plaintiff. The original etchings, which had not been published, and the plates, were the property of the Queen and Prince Albert. The defendant had also prepared a descriptive catalogue of the etchings, and was intending to sell the catalogue and publicly to exhibit the etchings. Besides an injunction against such sale and exhibition, the bill prayed that the defendant be ordered to deliver to the plaintiff all copies of the etchings in his possession, and that the copies of the catalogue be delivered up to be destroyed. The relief asked was given by Vice-Chancellor Bruce,² and his judgment was affirmed on appeal.³ In reply to the objection that the plaintiff was not entitled to a forfeiture of copies, the Vice-Chancellor said: "It is then said that neither the copies of the catalogue nor the impressions that have been taken can be delivered up, or be directed to be delivered up, inasmuch as the defendant contends that he is entitled to the property in the materials on which they are printed. With regard to catalogues, no such question, I think, arises. They must be either cancelled or destroyed; and without destruction they can hardly be cancelled. With regard to the impressions, it might possibly be right to attend to the defendant's claim had the impressions been upon a material of intrinsic value, upon a material not substantially worthless, except for the impressions, which, by the wrongful act of the

¹ In *Drury v. Ewing*, the Circuit Court of the United States, after the defendants had violated an injunction, ordered them to deliver to the court all the piratical copies in their possession

as well as the plates on which they had been printed. 1 Bond, 554.

² 2 De G. & Sm. 652.

³ 1 Mac. & G. 25.

defendant, have been placed there. That case, however, does not arise. The material here is substantially worthless, except for that in which the defendant has no property. There consequently can be no reason why the effectual destruction of the subject should not be directed by the court; in doing which, I repeat, I abstain from giving any opinion as to the particular mode of proceeding which the court ought to adopt in a similar case in all points except as to the intrinsic value of the material.”¹

It was here decided that the plaintiff was by the common law entitled to the piratical copies of his unpublished production, and that a court of equity had the jurisdiction to order them to be delivered to him. But the important principles involved in the case are either not mentioned or are merely referred to in the extended opinions of the judges. Admitting that the owner of an unpublished work is entitled to piratical copies wherever found, it is by no means clear on what principle the subject of their delivery is within the jurisdiction of a court of equity. “It is a universal rule in equity,” says Story, “never to enforce either a penalty or a forfeiture.”² It has been seen that both in *Colburn v. Simms*, and in *Stevens v. Gladding*, the latter decided by the Supreme Court of the United States, it was held that a court of equity has no jurisdiction in the case of forfeitures and penalties, unless such jurisdiction is expressly conferred by statute.³

“The general rule undoubtedly is,” said the court in the former case, “that, where a party seeking equitable relief is incidentally entitled to the benefit of a penalty or forfeiture, the court requires him, as a condition of its assistance, to waive the penalty or forfeiture. If, therefore, this court is bound to order the delivery of the copies, the right to that relief must be found in some common-law right of the proprietor of the copy, independently of the penal provisions of the statutes, or it must be found in those words of the statute which relate to suits in equity.

“Now, I am not aware that the title of the plaintiff to the exercise of the jurisdiction of this court, to compel the delivery

¹ 2 De G. & Sm. 716.

³ See also *Monk v. Harper*, 3 Edw.

² 2 Eq. Jur. § 1319. See also following sections. Ch. (N. Y.) 109.

up of the copies of the work in question to the proprietors of the copyright, has been, or can be, founded upon any common-law right anterior to or independent of the statute of Queen Anne. There would be great difficulty in applying to this subject the principles of the common law, which, in certain cases, give to the owner of an original material the right of seizing it, in whatever shape it may be found, if he can prove it to be his own, or which relate to what is termed confusion of goods, by which if one man voluntarily mixes his property with that of another, so that the two become inseparable, the entirety is held to belong to him whose property has been invaded. It may be true, that, if one writes or prints upon the paper of another, the writing or printing becomes his to whom the paper belongs; but it does not necessarily follow that the converse of that proposition would be true, — that one who writes or prints upon his own paper the composition of another, has thereby so mixed his property with the property of the author whose work he has copied, that he has lost his original title to the material which he has so employed. . . . I think, therefore, the case for the plaintiff on this point must be placed on another ground, and that his right to a decree of this court for the delivery up of the copies, if that right exists, must be found within the provisions of the statute, and not upon any common-law right independent of them.”¹

It is true that, both in *Colburn v. Simms* and in *Stevens v. Gladding*, the question related to the statutory penalties, and that, in the former suit, the Vice-Chancellor intimated that a different principle might perhaps be held to apply in a case governed not by the statute, but by the common law.² The statute, which imposes penalties and forfeitures, settles the question that the wronged person is entitled to the penalties and forfeitures. But unless the legislature has expressly declared in what tribunal they shall or shall not be recovered,

¹ Wigram, V. C., 2 Hare, 554, 555.

² Continuing the remarks quoted in the text, he said: “There might indeed have been some countenance for such a principle before the judgment of the House of Lords, in the case of *Donaldson v. Becket*, 4 Burr. 2408, had confined the exclusive right of

authors within the limits prescribed by the statute, and thereby negated the existence of that absolute common-law right in their works which had been previously supposed to exist, and which the decision in the Court of King’s Bench, in the case of *Millar v. Taylor*, 4 Burr. 2303, had tended to affirm.”

this question is left to be determined by the general principles which distinguish equity jurisdiction from that of courts of law. And, in the absence of such statutory direction, the jurisdiction of courts of equity, in the matter of penalties and forfeitures, is the same whether the right to them exists by the common law or is conferred by statute. Hence, if a court of equity, as was held in *Colburn v. Simms*, and *Stevens v. Gladding*, has no jurisdiction of statutory penalties and forfeitures, except by express authority of the legislature, it can have no cognizance of the same matter under the common law.

CHAPTER XIII.

COMMON-LAW PLAYRIGHT IN UNPUBLISHED DRAMAS.

Playright Defined. — A dramatic composition is capable of two distinct public uses. It may be printed as a book and represented as a drama. With respect to the former use, there is no distinction in law between a dramatic and any other literary composition. The exclusive right of multiplying copies is called copyright. But this does not embrace the right of representation. As these two rights are wholly distinct in nature, it is not only important but necessary that they should be distinguished in name. The property in a dramatic composition is often called dramatic copyright. But this expression is faulty and inaccurate. If it refers to the exclusive right of printing a drama, it would be equivalent to the name poetic copyright, prose copyright, or historical copyright, as applied to works in poetry, prose, or history. If its use is restricted to the right of representing a drama, it is not accurate; because this is not a right to multiply copies in the proper meaning of that expression, and cannot therefore strictly be called copyright. If it is intended as a name for both rights together, it can serve only to increase the confusion which should be wholly removed. The sole liberty of publicly performing a dramatic composition might more properly be called dramatic right or acting right. The expression, stageright, coined by Charles Reade, is not uncommon. But there are objections to this word with respect both to its formation and the purpose which it is required to serve. I have adopted playright as being, in my judgment, the best name for the purpose. It is a convenient euphonious word, and its formation is analogous to that of copyright. As the latter word literally means the right to copy a work, or the right to the copy, so playright means the right to play a drama, or the right to the play. And it may properly be used to mean

not only the right of representing a play, but also the right of performing a musical composition.

In the United States, playwright is secured by the statute in published, and exists by the common law in unpublished, dramatic compositions. The English statute secures the right of performing both printed and manuscript dramas, and will probably be construed to have taken away common-law playwright in unpublished as well as in published plays. In this chapter, the common-law rights of dramatists will be considered.

ARE THE OWNER'S COMMON-LAW RIGHTS LOST BY THE PUBLIC PERFORMANCE OF A MANUSCRIPT DRAMA ?

It has been shown that the author of any intellectual production, whether it be a literary, dramatic, or musical composition, or a work of art, has in it by the common law a property which is absolute and complete until lost by some act of the owner or by the operation of some statute.¹ This property secures the owner in the exclusive enjoyment of any and every use of his production which does not in law amount to a forfeiture of his exclusive rights. The law has been settled to the effect that, by publication in print, the owner's common-law property is lost, and that in a work so published he has no other rights than those secured by statute. Hence, a dramatist may have a statutory but no common-law right to the exclusive representation of a drama which he has published in print. But the exclusive right of the owner publicly to represent a manuscript play exists by the common law, unless such public representation, by operation of the common law or by force of some statute, works an abandonment of the right.

The question, then, is raised whether the common-law property in a manuscript play is lost or prejudiced by the public performance of the play.

Public Performance not a Publication which Defeats Copyright. — It may be regarded as settled that the authorized public performance of a manuscript drama is not such a publication as will defeat a copyright afterward obtained.² Where it

¹ See Chap. 1.

Roberts v. Myers, 18 Monthly Law

² *Boucicault v. Fox*, 5 Blatchf. 87; Reporter, 396; *Keene v. Knibball*, 16

appeared that Boucicault's *Octoroon* had been publicly represented in New York by the author from Dec. 6 to Dec. 12, 1859, before a copyright was applied for, it was held that such representation did not defeat the copyright, and could not "be regarded as any evidence of his abandonment of the manuscript to the public or to the profession of players."¹ So the representation of a manuscript opera in Paris was held to be no prejudice to the copyright, which was afterward secured by a first publication of the work in London.²

Is the authorized public performance of a manuscript drama an abandonment of the owner's common-law rights to the extent that any one without license may publish it in print or represent it on the stage? I shall first review the authorities, and then consider the true principles by which the question is to be determined.

Review of English Authorities.—The English cases which are frequently cited on this subject, but rarely with intelligence, lend but little aid to the solution of the problem. Since the 3 & 4 Will. IV. c. 15, was passed, in 1833, the right of representing manuscript as well as printed plays has been secured by statute in England; and since 1842 there has been a statutory provision declaring that the first public representation of a dramatic composition shall be equivalent to the first publication of a book.³ The decisions in *Boucicault v. Delafield*⁴ and *Boucicault v. Chatterton*,⁵ in which it was held that an author forfeits his title to English playright in a manuscript drama by first representing it in a foreign country, were governed by the above and other statutory provisions. Hence, these authorities have no bearing on the question relating to the common-law rights of dramatists in the United States.

Four cases, decided before the 3 & 4 Will. IV. c. 15 was passed, are often cited on the question under consideration, but two of them have no bearing on the subject. *Coleman v. Wathen*, decided in 1793, was an action to recover the penalties, under the statute of Anne, for the unlicensed performance of

Gray (82 Mass.), 549; *Boucicault v. Exch.* 288, 299. See also *Clark v. Wood*, 2 Biss. 34; *Boucicault v. Hart*, Bishop, 25 L. T. n. s. 908.
13 Blatchf. 47. ³ 5 & 6 Vict. c. 45, s. 20.

¹ *Boucicault v. Fox*, 5 Blatchf. 97.

⁴ 1 Hem. & M. 597.

² *D'Almaine v. Boosey*, 1 Y. & C.

⁵ 5 Ch. D. 267.

O'Keefe's Agreeable Surprise. This act secured copyright, but not playright; it prohibited unlawful printing, but not public representation. Hence, whatever may have been the common-law rights or remedies of the plaintiff, it is clear that he was not entitled to the statutory penalties, since the unlicensed performance of his play was not a violation of the right secured by the statute, and was not a thing prohibited by the statute. And this was the judgment of the court, which decided simply that representation was not publication within the meaning of the statute.¹

In *Murray v. Elliston*, decided in 1822, the defendant was charged with representing on the stage an abridged version of Lord Byron's published tragedy, *Marino Faliero*, the copyright in which belonged to the plaintiff. The question was referred by Lord Eldon to the King's Bench, whose decision was that "an action cannot be maintained by the plaintiff against the defendant, for publicly acting and representing the said tragedy, abridged in manner aforesaid."² What weight the court gave to the consideration that it was an abridged version which had been represented cannot be determined. But this fact had no true bearing on the question involved. As the tragedy had been published in print, the plaintiff could have in it no exclusive rights, except under the statute securing copyright; and the representation complained of was not such a publication as was prohibited by the statute. Hence, there was no ground on which the defendant could be held guilty of piracy.

Macklin v. Richardson, decided in 1770, related to Macklin's farce, *Love à la Mode*, which had been publicly performed by the author, but had not been published in print by him. The defendant having employed a short-hand writer to make a report of the farce during the performance, published a part of the copy so obtained in a monthly magazine, with the announcement that the rest would appear in the next number. Such publication was rightly held to be piratical; but the court

¹ 5 T. R. 245. "The statute for the protection of copyright," said Lord Kenyon, "only extends to prohibit the publication of the book itself by any other than the author or his law-

ful assignees. It was so held in the great copyright case by the House of Lords. But here was no publication."

² 5 Barn. & Ald. 657, 661.

expressed no opinion on the question whether an unlicensed performance of the piece would have been unlawful.¹

The latter question was directly raised in 1820, in *Morris v. Kelly*, on an *ex parte* application for an injunction to restrain the defendant from representing O'Keefe's Young Quaker. This comedy had been publicly represented by the author, but had not been printed by him.² It does not appear in what manner the defendant had obtained a copy. The injunction was granted by Lord Eldon; but his views of the legal principles involved do not appear in the report of the case.³

From this review, it will be seen that the only English authorities which bear on the question as to what effect the authorized public representation of a play has on the owner's common-law rights are *Macklin v. Richardson*, in which it was held that such representation does not entitle any one without authority to print a copy of the play got by stenography; and *Kelly v. Morris*, which is an authority in support of the doctrine that the owner's exclusive right at common law to represent a manuscript play is not lost by its public performance.

Review of American Authorities. — The question whether any person without license is at liberty to publish in print or to reproduce on the stage a manuscript play after its public performance by the owner has been judicially discussed in several recent American cases, and in none at greater length than in *Keene v. Wheatley*, where it was first raised in the United States Court in 1860.⁴ This suit was brought by Miss Laura Keene, for the alleged invasion of her rights in *Our American Cousin*. She had bought the manuscript of this comedy from its author, Tom Taylor; and, after making in it material alterations, including additions suggested by Joseph Jefferson, an actor employed by her, she entered the title for copyright under the statute of the United States, but did not publish the play in print. It was first publicly performed at her theatre in New York in 1858. Soon after, it was brought out in Philadelphia by the defendants, William Wheatley and John S. Clarke, who were in possession of a copy of the original manu-

¹ Amb. 694.

² See *post*, p. 567, note 5.

³ 1 Jac. & W. 461.

⁴ 9 Am. Law Reg. 88.

script, which had been surreptitiously obtained in London, where the comedy had not then been performed. The changes and additions made by Miss Keene had been got by the defendants from Jefferson. It appeared, therefore, that the defendants, in representing the play, had derived no aid from any person who had witnessed its authorized performance. On these facts there were but two essential questions of law before the court: 1. Whether Miss Keene's statutory copyright was valid. 2. Whether the performance by her was an abandonment of her common-law rights, so as to entitle the defendants to represent the play through the means by which they were enabled to do so. The court held that the copyright was invalid, on the ground that the comedy was the production of a foreign author; that the question whether the use by the defendants of the manuscript surreptitiously obtained was not properly before the court, because this fact, though proved by the evidence, had not been alleged in the complainant's bill; but that, on the general principles of equity, independently of her property in the manuscript, the complainant was entitled to maintain the suit on the ground that the communication by Jefferson to the defendants of a material part of the play was a breach of the implied confidence between him and his employer.

Law Judicially Construed that any Person may Represent or Print Play obtained by Memory, but not by Writing, from Public Performance. — The consideration of the question whether any person without authority is entitled to print or to act a manuscript play which has been obtained from its authorized public performance was wholly extra-judicial in this case, since the defendant's representation had not been effected by this means. Nevertheless, the court entered into a long discussion of the subject, in which was advanced the novel theory that the exercise of memory is a lawful means of depriving the owner of his rights in a manuscript drama which he has caused to be publicly performed. The rule was laid down that the performance of a manuscript play before a public audience is a publication to the extent of conferring upon any spectator who has obtained it by "fair means" the right either to represent or to print it without the consent of the owner. The distinction was drawn between the exercise of memory and the

use of writing as a means of subsequent representation or publication; and the opinion was expressed that "the literary proprietor of an unprinted play cannot, after making or sanctioning its representation before an indiscriminate audience, maintain an objection to any such literary or dramatic republication by others as they may be enabled, either directly or secondarily, to make from its having been retained in the memory of any of the audience;"¹ but that no one, in order to get the play for representation, might lawfully make use of stenography, writing, notes, or any other except "fair means." And "the only fair means by which others could have obtained the words were, through their impression upon the memory of some person whose constant attendance at her performances of the play might at length enable him elsewhere to repeat or to write out its language."²

The language above quoted goes to the extent that it is not piratical either to represent on the stage or to publish in print a manuscript play obtained through the memory of any person who has witnessed its public performance.³ This doctrine was afterward approved by the New York Superior Court in *Keene v. Clarke*, and appears to have been recognized by the Circuit Court of the United States in *Crowe v. Aiken*. But in neither of these cases did the decision turn on the question of memory. In *Keene v. Clarke*, the defendant was charged with unlawfully representing *Our American Cousin*, which he had got in the manner above described in considering *Keene v. Wheatley*. The case was brought before the General Term of the New York Superior Court on certain exceptions in law which made the views expressed by Chief Justice

¹ Cadwalader, J., 9 Am. Law Reg. 85.

² Ibid. 51.

³ That the court approved the theory that the unlicensed printing of a manuscript play obtained by memory from its public performance is not violation of the owner's rights is also shown by the following language of the opinion: "In cases not legislatively provided for, the public circulation of a literary composition thus authorizes any person to republish it from any

composition so circulated. If it is a dramatic composition, it may be republished either by reprinting it, or by theatrical representation. If we now recur to the case of a dramatic composition, which, though unprinted, has been publicly represented on the stage, we will see that the principle applicable must be the same, so far as this representation of it may have been the means of enabling ulterior publication to be made." Ibid. 92.

Robertson on the question here under consideration wholly extrajudicial.¹

Crowe v. Aiken was brought in 1869 by the husband of the actress well known as Miss Kate Bateman, to restrain the unlicensed playing of the drama, *Mary Warner*, the manuscript of which Mrs. Crowe had bought from Tom Taylor. It was first brought out by her in London, in June, 1869, and in the following autumn in New York. There was no authorized publication of it in print. The defendant having, as he alleged, got a printed copy from Robert M. De Witt, a New York publisher of dramas, announced the play for performance at his theatre in Chicago. This was held to be a threatened invasion of the plaintiff's rights; and an injunction was accordingly granted. It did not appear by what means the play had been obtained for publication; but it was without the knowledge or consent of Mrs. Crowe or Mr. Taylor. The court had no doubt that "De Witt obtained the copy of the play of *Mary Warner*, which he furnished to the defendant in this case, either in whole or in part, through a short-hand reporter, or in some other unauthorized or wrongful way, and not by memory alone."² The question of memory, therefore, did not enter directly into the decision; but the court seems to have recognized the soundness of the distinction between memory and stenography, which had been advanced in *Keene v. Wheatley*, and approved in *Keene v. Clarke*.

Unlicensed Performance of Play Got by Memory Held Lawful. — In *Keene v. Kimball*, the Supreme Court of Massachusetts, in 1860, following the authority of *Keene v. Wheatley*, affirmed the doctrine that it is not unlawful to represent on the stage a manuscript play obtained through the memory of any one who has witnessed its public performance; but expressed the opinion that the unlicensed publication in print of a drama so obtained is piratical.³ The play in controversy was *Our American Cousin*. The bill alleged that "the comedy, as produced at the Boston Museum, was produced in palpable imitation of the manner in which it was produced at the

¹ 5 Rob. (N. Y.) 38. See remarks of Monell, J., *Palmer v. De Witt*, 2 Sweeny, 543-545.

² 2 Biss. 208, 215.

³ 16 Gray (82 Mass.), 545.

plaintiff's theatre; and that the defendant had sent his artists, or some one or more of them, or some person whom he engaged to instruct them in the proper manner of performing the comedy, to witness its representation at the plaintiff's theatre, in order that that representation might be copied by the artists in said representation at the Boston Museum." In the opinion of the court, this was no violation of the complainant's rights; and, as there was no allegation that the defendant had made use of stenography, or other "surreptitious means," in obtaining the play, it was held on demurrer that this omission was fatal to her suit, on the ground that "the representation by the defendant of a dramatic work, of which the proprietor has no copyright, and which she had previously caused to be publicly represented and exhibited for money, is no violation of any right of property, although done without license from such proprietor; and, as it does not appear to have been done in violation of any contract or trust, cannot be restrained by injunction."¹

In *Shook v. Rankin*, decided in 1875 by the United States Circuit Court in the district of Minnesota, the defence of memorization was set up by the defendants, when charged with the unlawful representation of the *Two Orphans*. The court found that the play had not been obtained by this means, and granted an injunction; but District Judge Nelson, without expressly approving or disapproving the theory of memorization, seems to have given it some countenance.²

¹ *Ibid.* 552. I am informed that the defendant in this case was in possession of a written copy of the play, which had been obtained without the consent of Miss Keene; and that members of his company had attended her theatre merely for the purpose of learning the "stage business," &c., in order to imitate her performance of the comedy. But there was nothing in the bill to show that the defendant had not got the play through the memory of those who witnessed its authorized performances. On this point, the court said: "The counsel for the plaintiff in their argument have laid much stress upon the

allegation that the defendant has availed himself of a surreptitious copy of the manuscript play. But there is no such allegation in the bill, and no such fact is admitted by the demurrer." *Ibid.* 551.

² 3 Cent. Law Jour. 210. The right to reproduce on the stage an unpublished opera, when obtained by memory from its public representation, was recognized *obiter* by Vice-Chancellor Bacon, in the recent case of *Boosey v. Fairlie*. "If there were no statute," he said, "he [defendant] would have been at liberty by the exercise of his memory — and some people have been so gifted — to recollect the notes of the

Unlicensed Performance of Play Obtained by Memory Held Piratical. — The same question was raised in the case of *French v. Conolly*, decided by the New York Superior Court in 1875. The defendants were charged with representing the unpublished play, *Around the World in Eighty Days*, which the plaintiffs had bought from the French authors, Verne and D'Ennery. The defendants pleaded that they had got the play by dramatizing Jules Verne's published story, *Le Tour du Monde en Quatre-vingts Jours*. The court found that this defence was not sustained by the facts.¹ It was shown by the plaintiff that one of the defendants had deposed in another case that he had produced the play from memory, after witnessing its authorized representation in Paris. The defendants now contended that this was no violation of the plaintiff's rights. The court held that this was not a good defence, and granted an injunction. After referring to the conflict of judicial opinion on this point, Judge Curtis said: "It would seem better to accord with justice and good morals, that the carrying away in the memory, or in the stenographic notes, of a spectator, of the contents of a play, unauthorized by the owner, is an infringement of his proprietary rights. It is a surreptitious mode of procuring the literary property of another; and, when done from motives of pecuniary gain, at the expense of the owner, is not defensible."²

This case is a direct authority in support of the doctrine that the unlicensed performance of a play, obtained by memory from its authorized performance, is piratical.

Unlicensed Printing of Play Got from Public Performance Held Piratical. — The question involved in *Crowe v. Aiken*, as to

airs, and perhaps more than the airs, the choruses and other things, and to have written them in music, and have had them sung and performed at his own instance. Indeed there is a very remarkable instance in the history of the theatre, when Beaumarchais' plays were exciting so much popularity in France. An English dramatist who happened to be in France, with the help of his friend, took down — not in short hand, for they could not write that, but took down — in their memories, the scenes in the *Mariage de*

Figaro, and went out at the end of each scene or act and transcribed it, so that within a short period after the public representation of that play in Paris, the *Marriage of Figaro* was brought out on the English stage, no line of it having been printed, and no manuscript ever having been furnished to them. I say, if there was no statute, that might be done by anybody with Offenbach's music." 7 Ch. D. 309.

¹ See *post*, p. 580.

² N. Y. Weekly Dig. 197.

the right of any person to print a manuscript play got without license from its authorized public performance, was a direct issue in *Palmer v. De Witt*. The defendant had published without authority Robertson's Play, the manuscript of which, with the exclusive right of representation in the United States, had been bought from the author by the plaintiff. There had been no authorized publication of the comedy in print, either in the United States or in England; but it had been publicly represented by the author in London, and by the plaintiff in New York. The defendant alleged that he had obtained a copy through persons who had witnessed the performances in London, and maintained that these, as well as the representations in New York, were an abandonment of the work to the public. At the trial, the Special Term of the Superior Court of New York city, following the doctrine advanced in *Keene v. Wheatley* and *Keene v. Clarke*, decided in favor of the defendant.¹ This judgment was reversed by the General Term of the court.² In the opinion delivered by Judge Monell, who had dissented from the other two judges in *Keene v. Clarke*, it was maintained that the owner's rights in a manuscript play are not lost or prejudiced by its public performance; and that, no matter by what means a copy may be obtained, either unlicensed publication in print or representation on the stage is piratical.

The decision of the General Term, that the unlicensed printing of the play was an invasion of the plaintiff's rights, was affirmed by the Court of Appeals, which declared that "lectures and plays are not, by their public delivery or performance in the presence of all who choose to attend, so dedicated to the public that they can be printed and published without the author's permission. It does not give to the hearer any title to the manuscript or a copy of it, or the right to the use of a copy."³ This language clearly expresses the true principle that the unlicensed publication in print of a play obtained from its public performance, by any means, whether writing or memory, is piratical. But the court seems to have given some weight to the consideration that there was no allegation or

¹ 7 Rob. (N. Y.) 530.

² 2 Sweeny (N. Y.), 530.

³ 47 N. Y. 532, 543.

proof that the play in controversy had been secured through memory. "The fact is found," said Judge Allen, "that the defendant received the words of this comedy, and a description of the arrangement, general stage directions, division of acts and scenes, as printed by him, from one or more persons who had seen or heard the same publicly performed in England. It is not found that it was reported by the witnesses of the performance from memory; and it would be entirely consistent with the findings that copies of the play as performed, with the stage directions, &c., were surreptitiously obtained and put in the possession of the defendant." ¹

Theory of Restrictive Notice. — In *Keene v. Clarke*, the theory was judicially advanced, that the owner might reserve his rights in a manuscript play after public representation, by a restrictive notice to the spectators, which would prevent them from lawfully making any use of it to his injury. It was said that the effect of such notice was to create an understanding between the spectators and the owner of the play that they should not make any use of their remembrance of it to his prejudice, and that the violation of such understanding might, in the language of Chief Justice Robertson, who pronounced the opinion, "be restrained upon the same principle as any other betrayal of confidence; such as the disclosure of the secrets of a business, art, trade, or mystery agreed not to be divulged." Such understanding, it was further held, could not be implied as one of the ordinary terms of admission to the performance, but "might be created by indorsements on a ticket of admission, or notices publicly posted in the place of performance, or other modes. Such precautions are necessary to protect the exclusive right to an uncopyrighted production; otherwise, they would stand on the same footing as if they were copyrighted." ²

In this country, the doctrine that restrictive notice is necessary to protect the rights of an owner in his manuscript play has met with no recognition outside the Superior Court of New York, where it was first announced in 1867. And, even there, its unsoundness was soon forcibly pointed out by Judge Monell in the following language: "Whatever means a prudent man may adopt to prevent his property from being feloniously taken

¹ 47 N. Y. 542.

² 5 Rob. (N. Y.) 61.

from him, it cannot, I think, be successfully contended that, if he chooses to take the risk, he may not leave it exposed without mark or other sign to designate it as his property; or that, by thus exposing it, he would lose his title, and could not afterwards recover it, or its value, from one who tortiously took it. A wrong-doer cannot get title to property, or escape the responsibility of his tortious or felonious act, merely because the owner has failed to give public notice or warning that it was not to be stolen. If carrying away in the memory of a spectator, or otherwise surreptitiously obtaining the contents of a play, is without the consent of, or unauthorized by, the owner, and therefore an infringement of his property in the play, the act is not excused by the omission of the owner to notify the audience that they will not be allowed or are forbidden to carry it away in that manner.”¹

It has also been declared unsound in the United States Circuit Court by Mr. Justice Drummond, who said that “it is not easy to see, however, how a notice can have any effect upon the rights of the owner or of the auditor. If the latter had the right to carry away the play in his memory, or take it down phonographically, and in either case to use or publish it, the notice prohibiting it could not affect or change that right.”²

Result of Authorities. — It has now been shown that, although the novel theory relating to memory has been approved or recognized in several recent American cases, yet in every one, excepting *Keene v. Kimball*, the approval was wholly extrajudicial. In *Keene v. Wheatley*, and *Keene v. Clarke*, it was expressly shown that the authorized performance was not the means of the alleged piratical representation. Neither in *Crowe v. Aiken*, nor in *Palmer v. De Witt*, did it appear that the defendant had been aided by the memory of any person in getting possession of the play; and, in both cases, the court

¹ *Palmer v. De Witt*, 2 Sweeny, 558.

² *Crowe v. Aiken*, 2 Biss. 212. In determining the effect of the public exhibition of an uncopyrighted painting on the owner's rights, the Irish Chancery Court gave much consideration to the inquiry whether there had been a restrictive notice; and on the existence of such notice and the fact

that the exhibition had been for the qualified purpose of obtaining subscribers for an engraving of the picture was based the decision that exhibition was not such a publication as would destroy the owner's common-law rights. *Turner v. Robinson*, 10 Ir. Ch. 121, 510.

assumed that it had been obtained by other means. There is, then, no direct authority in support of the theory that any person may publish in print a dramatic composition obtained by memory from its authorized public performance; and none that unlicensed representation on the stage under such circumstances is not piracy, except the single case of *Keene v. Kimball*, decided by the Supreme Court of Massachusetts in 1860. Against this authority is the judgment of the New York Superior Court, in *French v. Conolly*.

What is settled by the American authorities is: 1. The public performance of a manuscript dramatic composition by the author is not such a publication as will defeat a copyright afterward secured.¹ 2. No person without leave may publish in print or publicly represent the play, if obtained by fraud or through a breach of contract or confidence,² or if got from its lawful performance by any other means than memory.³

REFUTATION OF THE THEORY THAT THE RIGHT TO USE A PLAY MAY BE ACQUIRED BY MEANS OF MEMORY.

Of all the vagaries and erroneous notions that have gained judicial currency in construing the law of literary property, the most absurd is the theory that the unlicensed publication or representation of a manuscript play is lawful when effected by means of the memory of any witness of its authorized performance. Proclaiming it for the first time in this country, the Court said, in *Keene v. Wheatley*, that "the doctrine of the *dictum* of Buller, J., as to repetition from the memory of the audience, may be regarded as established," and that "*Macklin v. Richardson*, if to be followed as an authority, is decisive of the present case. A like remark might be made as to *Morris v. Kelly*."⁴ At that time, there was no decision in the English or American reports to give the shadow of support to this theory. On the contrary, Vice-Chancellor McCoun, of New York, had declared as early as 1843, "that to

¹ See *ante*, p. 554.

² *Keene v. Wheatley*, 9 Am. Law Reg. 33, 101; *Keene v. Kimball*, 16 Gray (82 Mass.), 551, 552; *Keene v. Clarke*, 5 Rob. (N. Y.) 38, 61.

³ Conceded by all the authorities on this point.

⁴ 9 Am. Law Reg. 90, 95.

carry off a manuscript drama, with intent to perform the piece on the stage against the author's will, was an invasion of his common-law rights."¹ So far from being settled in England, the question had neither arisen nor been discussed. No reference to it was to be found in any reported English opinion, except the ambiguous *dictum* of Judge Buller in the obscurely reported case of *Coleman v. Wathen*, decided, under the statute of Anne, in the last century.² In *Macklin v. Richardson*, it was expressly found that the farce had been obtained by stenography;³ and there is nothing in the report of *Morris v. Kelly*⁴ to show that the performance complained of was due to the memory of any person, while there are sufficient reasons for believing that it had been effected solely by means of an unauthorized printed copy.⁵ Mr. Justice Hoar rightly said in 1860, after the decision in *Keene v. Wheatley* had been made, "the precise question which the case at bar presents has never been determined, so far as we are aware, in any reported case."⁶

The theory is as unsupported by principle or reason as it is by authority. No reasonable grounds have been given in its support, and it is difficult to conceive any. In *Keene v. Wheatley*, it was said that "the manager of a theatre may prevent a reporter from noting the words of such a play phonographically or stenographically or otherwise. As one of the audience, he would, in doing so, transgress the privileges conceded in his admission. But the privileges of listening and of retention in the memory cannot be restrained. Where the audience is not a select one, these privileges cannot be limited in either their immediate or ulterior consequences."⁷ In *Keene v. Kimball*, the court said that Miss Keene had "em-

¹ *Jones v. Thorne*, 1 N. Y. Leg. Obs. 409.

² "Reporting any thing from memory can never be a publication within the statute. Some instances of strength of memory are very surprising; but the mere act of repeating such a performance cannot be left as evidence to a jury that the defendant had pirated the work itself." 5 T. R. 245.

³ Amb. 694.

⁴ 1 Jac. & W. 461.

⁵ O'Keefe says: "My five Haymarket pieces, locked up in manuscript, have been repeatedly printed and published surreptitiously;" also, that the *Agreeable Surprise* and *Young Quaker* were not printed by authority. *Recollections of the Life of John O'Keefe*, written by himself. (2 vols. in one, Phila. 1827), Vol. II., pp. 167-200.

⁶ 16 Gray (82 Mass.), 550.

⁷ 9 Am. Law Reg. 85.

ployed actors to commit the various parts to memory; and, unless they are restrained by some contract, express or implied, we can perceive no legal reason why they might not repeat what they have learned before different audiences and in various places. If persons, by frequent attendance at her theatre, have committed to memory any part or the whole of the play, they have a right to repeat what they heard to others. We know of no right of property in gestures, tones, or scenery, which would forbid such reproduction of them by the spectators as their powers of imitation might enable them to accomplish.”¹ The Chief Justice argued, in *Keene v. Clarke*, that “where the audience is not limited, as in the case of a public theatrical performance, the public are held entitled to make use of that faculty, which is necessarily addressed by such representation, to wit, the memory, for the purpose of repeating the contents of the play, even in performing it elsewhere, when the owner has laid no restraint upon such use of the knowledge so obtained and retained by memory only. . . . Remembering to a certain extent is the natural consequence of hearing, and using such recollection naturally flows from possessing it. The right of taking notes is not one of the privileges necessarily conceded by a public performance, and the use of any such artificial aids to, or substitutes for, memory may be restrained by a court as a violation of the terms of admission, or may be made part of the police of the place of performance, so as to justify not only its prevention, but even the expulsion of the offender.”²

The effect of this reasoning is that, memory being given to man to be used, any use which can be made of it is legitimate, and that, if a spectator at a public performance is able to carry away in his memory the contents of a play unrestrained by “police” arrangements, he has acquired a lawful right to make any use of such play he chooses, however harmful it may be to the owner. This fallacy is too apparent to need serious consideration. It would be as wise to argue that because a man has hands for legitimate uses he is justified in putting them into his neighbor’s pockets. Memory may be employed as a means of improvement, enjoyment, and profit, but not to

¹ 16 Gray (82 Mass.), 551.

² 5 Rob. (N. Y.) 59, 60.

invade the rights of another, or to acquire, without consideration, title to the property of another. In paying for admission to a public performance, a spectator is entitled to such instruction and enjoyment as he may derive from witnessing and hearing the performance and from recollecting it. In other words, he is entitled to just what he pays for. This is the consideration for the price of admission. But there is no agreement express or implied, no consideration, no understanding, that the spectator shall acquire any title to the property in the play, or make of it any use against the rights of the owner. To argue that a lawful title to a play may be acquired through the exercise of memory, but not by the use of writing, on the ground that any one of the audience, by taking notes during the performance, "would transgress the privileges conceded in his admission," but that "the privileges of listening and of retention in the memory cannot be restrained," is the shallowest sophistry. In admitting the public to a dramatic performance, the owner no more transfers or concedes to any one of the audience the right to exercise his memory in getting possession of the play for subsequent use, than he does the privilege of using stenography. Nor is it easy to understand why writing notes in a theatre, even to the extent of reporting by short-hand the language of the play, is any more unlawful than exercising the memory; or why the manager has any more authority to prevent a person from taking notes during the performance, or to put him out of the theatre for so doing, than he has to exercise the same powers in the case of any one found writing a criticism of the acting or an original poem. The unlawful act is to be found in the actual or attempted use of the play; and, until unlawful use is shown to have been made or threatened, no rights have been violated. But even conceding that taking notes in a theatre may be prohibited, the fact that a spectator cannot be prevented, by police arrangements or otherwise, from retaining in his memory a knowledge of the contents of a play, does not invest him with a right of property in it, and is no reason why a court should not restrain him from taking such property of another to which he has acquired no title, or should not require him to make good the damage caused by such unlawful appropriation.

The absurdity of this distinction between the exercise of memory and the use of the pencil becomes still plainer when we consider that it is within the range of practicability to get a copy of a play from its public performance as promptly, and as effectually, by the former as by the latter method. Instances of memories remarkable by nature are not rare; and the memory, not less than the hand, can be trained to do wonders. Older than the system of stenography, and as old as Simonides, who lived about 500 B. C., is the art of mnemonics, whose teachers have shown it capable of wonderful results.¹ With entire success can the memory be so trained as to become the means of securing a copy of a play from its public performance with the promptness and ease of a stenographer. Wherein then is the principle different, whether in getting the play one person uses this means or another his skilful hand? The mnemonic faculties of actors are in constant practice; and it is practicable for a rival manager to enlist in his service men and women whose trained memories would enable them to reproduce a play after witnessing its performance but two or three times. But does this give them the right to do so? Can the ownership of valuable property be thus acquired? The proposition should need no refutation.²

¹ About 1609, Lambert Schenkel astonished all classes in France, Germany, and the Netherlands, by his mnemonic performances, which were so wonderful that they were pronounced by some the devil's doings.

² The following instances of remarkable memories are cited by Sir William Hamilton: "For intellectual power of the highest order, none were distinguished above Grotius and Pascal; and Grotius and Pascal forgot nothing they had ever read or thought. Leibnitz and Euler were not less celebrated for their intelligence than for their memory, and both could repeat the whole of the *Æneid*. Donellus knew the *Corpus Juris* by heart, and yet he was one of the profoundest and most original speculators in jurisprudence. Muratori, though not a genius of the very highest order, was still a man of great ability and judgment; and so

powerful was his retention, that, in making quotations, he had only to read his passages, put the books in their place, and then to write out from memory the words. Ben Jonson tells us that he could repeat all he had ever written, and whole books that he had read. Themistocles could call by their names the twenty thousand citizens of Athens; Cyrus is reported to have known the name of every soldier in his army. Hortensius, after Cicero the greatest orator of Rome, after sitting a whole day at a public sale, correctly enunciated from memory all the things sold, their prices, and the names of the purchasers. Niebuhr, the historian of Rome, was not less distinguished for his memory than for his acuteness. In his youth he was employed in one of the public offices of Denmark; part of a book of accounts having been destroyed, he restored it

The distinction making the acquisition of a drama by stenography unlawful, but proclaiming it the legitimate spoil of

from his recollection." Lectures on Metaphysics and Logic (ed. by Mansel and Veitch, 4 vols. Edinburgh, 1870-74), Vol. II., p. 223.

The story narrated by Muretus in his *Varie Lectiones* of the wonderful memory of a young Corsican who had gone to Padua to study civil law is thus told by Hamilton: "He was a frequent visitor at the house and gardens of Muretus, who, having heard that he possessed a remarkable art, or faculty of memory, took occasion, though incredulous in regard to reports, of requesting from him a specimen of his power. He at once agreed; and, having adjourned with a considerable party of distinguished auditors into a saloon, Muretus began to dictate words, Latin, Greek, barbarous, significant and non-significant, disjointed and connected, until he wearied himself, the young man who wrote them down, and the audience who were present; 'we were all,' he says, 'marvellously tired.' The Corsican alone was the one of the whole company alert and fresh, and continually desired Muretus for more words, who declared he would be more than satisfied if he could repeat the half of what had been taken down, and at length he ceased. The young man, with his gaze fixed upon the ground, stood silent for a brief season; and then, says Muretus, '*Vidi facinus mirificissimum.* Having begun to speak, he absolutely repeated the whole words in the same order in which they had been delivered, without the slightest hesitation; then, commencing from the last, he repeated them backwards till he came to the first. Then, again, so that he spoke the first, the third, the fifth, and so on; did this in any order that was asked, and all without the smallest error. Having subsequently become familiarly acquainted with him, I have had other and frequent experience of his power. He assured me (and he had nothing of the boaster in him) that he could recite in the manner I have mentioned

to the amount of thirty-six thousand words. And what is more wonderful, they all so adhered to the mind, that after a year's interval he could repeat them without trouble. I know, from having tried him, he could do so after a considerable time (*post multos dies*). Nor was this all, Franciscus Molinus, a patrician of Venice, was resident with me, a young man ardently devoted to literature, who, as he had but a wretched memory, he sought the Corsican to instruct him in the art. The hint of his desire was enough, and a daily course of instruction commenced, and with such success that the pupil could, in about a week or ten days, easily repeat to the extent of five hundred words or more in any order that was prescribed.'" Ibid. 219.

Fauvel-Gouraud tells the story that when Voltaire was at the Court of Frederick the Great, he spoke enthusiastically to the king one evening of a new poem of considerable length on which he was at work. On its completion, the brilliant literary society of Berlin was assembled at the Prussian court to hear the new poem read by its author. When the reading was finished, the king was as lavish with his praises as were his learned guests, but laughingly remarked to the philosopher that the same composition had been submitted to his criticism a few months before by one of his officers. Here the king summoned a young officer, and asked for the manuscript. He replied that it had been lost, but that he could recite the poem from memory, which he did with strict accuracy, to the great astonishment of the company and the confusion of Voltaire. Frederick now explained to the French wit that the officer, stationed behind a curtain, had heard the poem read by the author, and was thus enabled to repeat it. *Phreno-Mnemo-techny* (N. Y. 1845), 35. In the same book, other instances of remarkable memories are given.

tenacious memories, is one merely between the modes or means of getting a play; and it is not easy to see why one method should give a better title than the other, since both are without consideration, and without the authority or consent of the owner. The simple manner of getting the play, as long as it is without consideration or authority, cannot affect the fundamental principle at issue. There is a principle of justice, older than the written law, that property can rightly be acquired only by a good consideration. Either the public representation of a play is a publication, so as to work an abandonment of the owner's rights of property therein, or it is not; and in either case the mode of obtaining it is immaterial, as affecting the owner's rights or the invader's wrong, as long as there is no consideration and no agreement.

There is, then, no foundation for the disjunction which has been judicially recognized between the different means employed in obtaining a play from its public performance,—making one mode lawful and the other unlawful. The real question is, whether the public performance of a play not published or copyrighted is *per se* an abandonment of the owner's rights; and whatever may be the true solution, the principle is not affected by the means of reproduction, or by the presence or absence of a restrictive notice. This question may be regarded as virtually settled. It is conceded that the public performance of a manuscript play is not a publication prejudicial to the rights of the owner, except as far as others may become possessed of a copy through the agency of memory. As there is no sound distinction in principle between memory and any other unauthorized means of getting a copy, the doctrine of the courts, carried to its natural and logical extent, must be that, whether the play be obtained by the use of writing or the exercise of memory, or any other means without the consent of the owner, representation is not a publication destructive of the owner's common-law rights. This is the true doctrine. It was affirmed, as has been seen, by the New York Superior Court, in *French v. Conolly*,¹ and it will doubtless be adopted by the courts hereafter.²

¹ See *ante*, p. 562.

² Monell, J., gave expression to the following sound views on this subject, in delivering the opinion of the General

Common-Law Rights in United States not Prejudiced by Public Performance of Play. — The true principle which governs the question relating to the effect of public representation on the owner's exclusive rights in a manuscript dramatic composition has been wholly overlooked in the recent judicial discussions

Term of the New York Superior Court in *Palmer v. De Witt*: —

"It seems to me that any surreptitious procuring of the literary property of another, *no matter how obtained*, if it was unauthorized and without the knowledge or consent of the owner, and obtained before publication by him, is an invasion of his proprietary rights, if the property so obtained is made use of to his injury. Each of the learned justices admits that a play cannot be lawfully taken down by a short-hand writer from the lips of the actors during a public performance. If taken thus by a stenographer, is it different, in its legal effect and resulting consequences, from committing to memory and afterwards writing it out? In principle it is not. They are only different modes of doing the same thing, and, if without the author's consent, are alike injurious to his interests. The objection is not to the committing a play to memory, for over that no court can exercise any control, but in using the memory afterwards as the means of depriving the owner of his property. Such use, it seems to me, is as much an infringement of the author's common-law right of property, as if his manuscript has been feloniously taken from his possession. I can see no difference. . . . Upon a careful consideration, therefore, of the subject, I have not been able to appreciate the distinction which the learned judges, in *Keene v. Wheatley* and *Keene v. Clarke* and *Crowe v. Aiken*, have attempted to draw between different modes of obtaining the contents of a manuscript play from its public performance. They are equally objectionable, and are merely different modes of depriving an author of his literary property; and therefore any *mode* which effectu-

ates that purpose is unlawful." 2 Sweeny, 557, 559.

And so in *Boucicault v. Fox*, although the question as to the distinction between memory and writing was not raised, Mr. Justice Shipman took the strong ground that "there can be no evidence of abandonment to the public of any rights growing out of the authorship of a manuscript drawn from the mere fact that the manuscript has, by the consent and procurement of the author, been read in public by him or another, or recited or represented by the elaborate performances and showy decorations of the stage. If the reading, recitation, or performance is conducted by his direction, by his agents, for his benefit and profit, with the sanction of the law, how can it be said to be evidence of his intention to abandon his production to the public? Suppose Mrs. Kemble were to read in her unrivalled manner a drama of her own production, would the reading be a dedication to the public, and authorize any elocutionist to read it, who could obtain a copy, against the consent of the author? How would it change the matter, if she should, instead of reading the play, have it brought out by a company at Wallack's or the Winter Garden, with all the embellishments which the stage can lend? The true doctrine is, that the literary property in the manuscript continues in the author so long as he exercises control over it, or has the right to control it; and, until its publication, no one has a right to its use, or that of its contents, without his consent. Therefore any special use of it by him in public, for his own benefit, is a use perfectly consistent with his exclusive right to its control, and is no evidence of abandonment." 5 Blatchf. 98.

of the subject. If such rights are lost, restricted, or prejudiced by public representation, it must be either by force of the common law or by operation of some statute. It has been shown elsewhere in this work that by the common law no rights in an intellectual production are forfeited by a publication of any kind. The property in a literary work is not, by the common law, prejudiced even by its publication in print. As far as the common law is concerned, the owner's rights are the same after publication in print as they were before. The now settled doctrine that there can be no copyright after publication except under the statute is based on the ground, not that publication is by the common law an abandonment of the author's rights, but that the common-law property in a published work is taken away by operation of the statute.¹

It is then clear, both on principle and authority, that the property in a manuscript play is not injuriously affected by authorized public representation, unless by the operation of some statute. Now, in the United States, there is no statute which can have this effect, because there has been no legislation relating to manuscript dramatic compositions. Statutory play-right is secured in published compositions alone, and representation is not publication within the meaning of the statute. When a dramatic composition is published in print, the owner's common-law rights are destroyed by operation of the statute, to which he must look for protection. But property in a manuscript play is governed exclusively by the common law, and is in no wise affected by any statute. Hence, in the United States, the owner's rights in a manuscript play are not prejudiced by its authorized public representation.

Representation made Equivalent to Publication by English Statute.—In England, the question is affected by other considerations. Parliament has granted the exclusive right of representing not only printed, but also manuscript, dramatic pieces.² The latter, equally with the former, are brought within the operation of the statute. Moreover, it is expressly declared that the public representation of a dramatic composition shall be equivalent to the publication of a book.³ There

¹ See *ante*, p. 116.

² 3 & 4 Will. IV. c. 15.

³ 5 & 6 Vict. c. 45, s. 20.

can be little doubt that statutory playwright in a manuscript play can be secured only on the conditions imposed or implied by the statute, one of which is that the first public performance of the piece shall be in the United Kingdom.¹ Hence, where it appeared that a manuscript drama had been first publicly represented in a foreign country, it was held that the title to English playwright was thereby forfeited.²

Has Common-Law Playright been taken away by English Statute? — It is an important question whether the exclusive right of representing a manuscript play has existed by the common law in England since it was secured by the 3 & 4 Will. IV. c. 15, passed in 1833. There is no doubt that the common-law right was in full force until the act of William was passed, and it still remains unless it has been taken away by the operation of that statute or the 5 & 6 Vict. c. 45. This question has not been judicially considered, and I have found no discussion of it. It should have been, but was not, raised in *Boucicault v. Delafield* and in *Boucicault v. Chatterton*.³ In each of these cases, the plaintiff claimed the exclusive right of representing a manuscript drama which he had caused to be performed in the United States before its public representation in England. There was little doubt that by the first performance of the play in a foreign country he had forfeited his claim to protection under the English statute; and it was so held by the court. But the question whether the common-law property in the play had been lost was not referred to in either case.

The settled doctrine that there is no copyright by the common law in a book after its publication is based on the reasoning that in securing the right by statute the legislature intended to take away the right recognized by the common law. In other words, the statutory was given as a substitute for the

¹ See *post*, p. 604.

² *Boucicault v. Delafield*, 1 Hem. & M. 597; *Boucicault v. Chatterton*, 5 Ch. D. 267. These two cases were decided under section 19 of the International Copyright Statute 7 & 8 Vict. c. 12, but they might have been properly decided without any reference to this act. See *ante*, p. 294, and p. 295,

n. 3. There is little doubt that, independently of this provision, public representation of a manuscript play in a foreign country would be held to defeat the exclusive rights conferred by 3 & 4 Will. IV. c. 15, and 5 & 6 Vict. c. 45. See *post*, p. 604.

³ *Supra*.

common-law right. When a manuscript is published within the meaning of the statute, the common-law right ceases, and the statutory copyright vests, provided there has been a compliance with the conditions of vestment. The soundness of this reasoning is open to criticism, and it has been criticised in that part of this work where it is maintained that the statute cannot rightly be construed to have destroyed the common-law property in a literary production.¹ But whether sound or unsound, the reasoning which has been applied to the copyright statute is equally applicable to the statute which secures playright. Applying to the latter act the same principles of construction which have been held to govern the former, it will follow that in granting the exclusive right to represent a manuscript play the legislature intended to supersede the common-law right; and that when a play is published within the meaning of the statute the common-law right ceases, and the statutory right attaches on certain conditions. Now, within the meaning of the statute which secures playright, a manuscript dramatic composition is published when it is publicly represented; because not only is the relation which representation bears to playright analogous to that which publication bears to copyright, but the statute expressly declares that the public performance of a dramatic composition shall be equivalent to the publication of a book.² Hence, the conclusion to which we are brought is that, in England, the common-law right to the exclusive representation of a manuscript play is lost by the public performance of the piece, and that thereafter the only protection to which the owner is entitled is that given by the statute. This construction is in harmony with that which has been given to the copyright statute, and it is probable that it is the view which will be adopted when the question shall be presented for judicial determination.

GENERAL PRINCIPLES GOVERNING PROPERTY IN UNPUBLISHED PLAYS.

Acquiescence in Unlicensed Performances. — The principle has been recognized that the owner's common-law property in a

¹ See *ante*, p. 20, *et seq.*

² 5 & 6 Vict. c. 45, s. 20.

play may be forfeited by acquiescence in its unlicensed use. No general rule can be given as to how long or by how many persons or in how many places the unlicensed representations of a play, without objection on the part of the owner, must be shown in order to prejudice his rights. But it would seem that a general and long-continued unlicensed use should be made to appear, and there is no doubt that the owner must be shown to have had knowledge of this fact.¹

Common-Law Rights Lost by Authorized, but not Unauthorized Publication. — When a dramatic composition is published in print, by authority, all common-law rights in it are lost.² The composition becomes public property unless a valid copyright is secured under the statute. And this is equally true whether the publication be made in one country or in another; whether in the United States or in Europe.

But only an authorized publication works an abandonment of common-law rights. These are not prejudiced when a play is published without the consent of the author or owner.³ In *Crowe v. Aiken*, the defendant pleaded that it was by printed

¹ See consideration of this subject in the case of published works, *ante*, p. 504 *et seq.* See also *Boucicault v. Wood*, 7 Am. Law Reg. n. s. 550; s. c. 2 Biss. 40; *Keene v. Clarke*, 5 Rob. (N. Y.) 66, 67. In his dissenting opinion in *Keene v. Clarke*, Monell, J., said: "I cannot concur in the opinion that the plaintiff lost her literary property in the play, merely because it was acted from a manuscript, made up from memory, at various times and places, without the sanction or knowledge of the plaintiff, nor even if it was thus acted with her knowledge, but without her consent. I do not think the title to literary property is divested, or the right to its exclusive possession lost, by merely suffering infringements of such rights to pass unnoticed. An owner is not obliged to involve himself in expensive litigation with every wrong-doer, for the purpose of preserving or protecting his right ultimately to assert his title; and certainly, without proof of some actual dedication, nothing that falls short of a long-continued acquiescence in surreptitious

performances of a play would be sufficient to imply a dedication. The infringements in this case, as disclosed by the evidence, were, as far as it appears, without the plaintiff's knowledge, and certainly without her consent. I cannot, therefore, yield to the conclusion that, under such circumstances, the presumption could be justified that the plaintiff intended to dedicate her property in the play to the public. At most, to authorize such presumption, the surreptitious performances must have been so long continued, in so many different places, and under such circumstances, as to reasonably imply knowledge in the owner and therefore assent; otherwise knowledge, coupled with such continued performance, must be affirmatively shown." 5 Rob. (N. Y.) 70.

² *Boucicault v. Wood*, 2 Biss. 34. See authorities in the case of books cited, *ante*, p. 101, note 4.

³ *Boucicault v. Wood*, 2 Biss. 34, 39; *Crowe v. Aiken*, *Ibid.* 208, 211; *Palmer v. De Witt*, 2 Sweeny (N. Y.), 530, 551, on ap. 47 N. Y. 532; *Shook*

copies that he was enabled to represent the drama in controversy; but this defence was overruled when it appeared that these copies had been published without license, and that there had been no authorized publication of the play.¹

In the recent case of *Shook v. Neuendorff*, in the New York Supreme Court, the plaintiffs claiming by purchase from the authors, Alexandre Dumas and Pierre de Newsky, the exclusive right of performing *Les Danicheffs* in the United States, sought to prevent the defendant from bringing out a German version. In defence, it was alleged that a German translation of the play had been published in Austria by authority of the person to whom the authors had sold the right of representation in that country, and that it was this translation that the defendant was intending to represent. The court held, at the special term, that it was not enough to prove that the play had been published abroad in print; but that such publication must be shown to have been authorized by the authors of the drama. The injunction, therefore, was granted.²

v. Neuendorff, 11 Daily Reg. (N. Y.) 985. See also views of Monell, J., *ante*, p. 577, note 1.

In *Boucicault v. Wood, Drummond, J.*, said: "The fact that the two unpublished plays, after having been entered here, were published in England, would make no difference [in the plaintiff's rights], unless that publication was with the consent of the plaintiff. No one would have the right to import and use them. Such consent, however, would be an abandonment of his rights, under our laws, and place him simply in the position of an ordinary English dramatist, who had published his plays in his own country; but this consent must be affirmatively proved." 2 Biss. 39. See *ante* p. 512.

¹ 2 Biss. 208, 211.

² In the opinion as reported in the N. Y. Tribune, Feb. 7, 1877, Mr. Justice Donohue said: "Where, as in this case, a defendant sets up no title other than the abandonment by its author of the play to the public, sets up no equitable title to it, he must be prepared to show an authorized use beyond any doubt of the play which he

claims the right to perform. This, it seems to me, the defendant has not done in this case. The principal ground he puts his case on is that what he proves as an abandonment could not have existed without such being the fact. Unfortunately, too many instances of unauthorized use of other people's property exist to make the presence of such use proof of its being rightful, and on the ground of such abandonment or permission I find against him. The claim that the plaintiffs themselves do not pretend that they will lose money by the defendant's performance, and so are not entitled to an injunction, is without weight, because, should plaintiffs not enjoin this defendant from acting, it will be an evidence to others that plaintiffs have permitted the public use of the play and will so destroy their right. Some other party will come forward, and, as a defence to the use of the play in English, will show the defendant's performance, and argue, as defendant now does, that it must have been authorized, or it would not have occurred."

This judgment was affirmed on appeal by the General Term of the Supreme Court.¹

In this case, and in *Boucicault v. Wood*,² it was held that the burden of showing an authorized publication was on the defendant.

In *Palmer v. McDonough*, application was made in the United States Circuit Court to restrain the defendant from performing *After Dark*, the right of representing which in the United States the plaintiff had bought from the author, Boucicault. The bill alleged that the play had not been printed. It appeared, from affidavits made on the part of the defendant, that, before its representation in New York, printed copies of the play had been on sale in London; that the defendant had obtained one of these copies; and that printed copies had been offered for sale in New York. In denying the motion for a preliminary injunction, Nelson, J., said: "Now, although there is no direct evidence that the printed publications in London were prior to the assignment to the complainant, or that they were made with the assent of the author, yet taking into account the fact of the printed copy being on public sale in the city of New York, where the complainant resides, we are of opinion that, as it respects the complainant himself, who is the party exclusively interested in this country, a case has not been made that would justify us in granting a preliminary injunction. Some explanation in a more authentic form than can be made by affidavits should be made of the several printed copies on sale, as is shown both in London and the city of New York. And for this reason the injunction should be withdrawn till the hearing on the pleadings and proofs."³

¹ 11 Daily Reg. (N. Y.) 985. In delivering the opinion, Davis, P. J., said: "The defendants did not establish on the trial to the satisfaction of the court below, that the German translation of the play had been published or used by the authority of the authors, and it was held that, in the absence of such authority, the defendant acquired no right to use the play in the United States by reason of its unauthorized publication in German. . . . It may be made to appear on the trial that the

publication in German was with authority, in which event the case may assume a different aspect; but, as it now appears before us, we think the decision of the court below was correct for the reasons assigned in the opinion of Judge Donohue."

² 2 Biss. 34, 39-40.

³ This opinion is published in the N. Y. Times and the Tribune, Aug. 12, 1869. I have not found it reported in any authoritative report, or in a more accessible publication than the above.

Dramatizations, Adaptations, and Translations.—The same principle which governs original plays is equally applicable to dramatizations, adaptations, and translations. When unpublished, these are protected by the common law, although the original from which the translation or adaptation has been made is a published work. But when the stage version itself is published in print, the common-law rights therein are lost, as in the case of an original drama. In the United States, a dramatist is entitled under the common law to protection for his own unpublished translation of a published foreign play, or his own unpublished dramatization or adaptation of a novel published in a foreign country. In such case, the published drama or story is common property in this country, and may be translated, dramatized, or adapted for the American stage by any person. Each dramatist will have exclusive rights in his own production. But no one will be entitled to represent the version made by another.

In the case of *Tompkins v. Duff*, which came before the New York Supreme Court in 1878, the plaintiffs claimed the exclusive right of representing *The Exiles*, of which Victorien Sardou and Eugene Nus were the authors. The play, however, was not original with these dramatists, but had been founded on or produced from the novel *Fonctionnaires et Boyards*, written by Prince Joseph Lubomirski. And when it appeared that the defendants had not taken the plaintiff's adaptation, but were in possession of a dramatization made by George Fawcett Rowe, from the published novel, the injunction which had been granted was dissolved.¹ The law in this case was clear. No person without authority had the right to use the version owned by the plaintiffs. But any person was free to represent an independent dramatization of the published romance.

In *French v. Connolly*, decided by the New York Superior Court in 1875, it appeared that Jules Verne had published in France a story called *Le Tour du Monde en Quatre-vingts Jours*. With the aid of the French dramatist D'Ennery, he afterward wrote a play bearing the same name as the story. The two

¹ See N. Y. Tribune, March 1, 3, 14, 1878; also 13 Daily Reg. (N. Y.) 421, 493.

productions were in many respects alike; but the drama contained some characters, incidents, and scenes not found in the story. The play was not published in print. An English translation was made with the title *Around the World in Eighty Days*; and the exclusive right of representation in the United States was sold to the plaintiffs. When the defendant was charged with invading the plaintiffs' common-law rights, he pleaded that he had obtained the play by dramatizing the published story. If this defence had been true in fact, it would have been good in law. The published story was common property in this country, and its *bona fide* dramatization would not have infringed any rights in the unpublished play. But the fact was found by the court that the defendant's version contained "what is not found in the original story, but is found in the plaintiff's play; and, unless adapted from the latter, it could not be very satisfactorily accounted for." An injunction was therefore granted.¹

Immoral Plays. — The courts will not protect any person in the exclusive right of representing an immoral play.²

Foreign Dramatists. — The common law makes no distinction between a native and a foreigner.³ In nearly all of the cases wherein the American courts have protected the common-law property in unpublished plays, the plaintiffs have been the assignees of foreign dramatists.

Transfer of Playright. — The owner's rights, either in whole or in part, in an unpublished play, may be transferred by parol.⁴

When two persons claim by purchase from the author the exclusive right of representing a manuscript play, he will be

¹ 1 N. Y. Weekly Dig. 196. See also *French v. Maguire*, 55 How. Pr. (N. Y.) 471, and *Shook v. Rankin*, *post*, p. 583; also *post*, p. 596.

² In *Shook v. Daly*, 49 How. Pr. (N. Y.) 368, the defence was set up that the unpublished play in controversy, *Rose Michel*, was immoral. "If this play," said Curtis, J., "or any literary production, is of that character, it is no part of the office of this court to protect it by injunction or other-

wise. The rights of the author are secondary to the right of the public to be protected from what is subversive of good morals. But the examination of the original manuscripts fails to show that either version is amenable to this charge." See also *Martinetti v. Maguire*, 1 Deady, 216; *Keene v. Kimball*, 16 Gray (82 Mass.), 548-549.

³ See *ante*, p. 106.

⁴ See *ante*, p. 104.

protected who shows the better title, provided, of course, his title is good.¹

Important questions may arise as to the rights of a person who has acquired not the absolute property in a play, but a limited right or interest. The law on this point has not been fully and clearly expounded by the courts; but the principles governing the subject are tolerably clear. When a person, native or foreigner, owns the absolute property in an unpublished drama, he is entitled to the exclusive right of representing it in the United States. He may license one or more persons to perform it anywhere, without giving to any one the exclusive right of representation. In this case no licensee, but only the owner, may complain of unauthorized performances. The owner may grant the exclusive right of representation for any named part of the country, as any State or city. Within such territory, no one without the consent of the grantee has the right to use the play.²

What are the rights of a person who is not the owner of the entire property in an unpublished drama, but has acquired the exclusive right of representation in the United States? Let us suppose a case. A French dramatist writes an original play, which is performed in Paris, but is not published in print. He sells to one person the exclusive right of representation in Great Britain, and to another the exclusive right of representation in the United States. To each buyer is given a copy of the French original; and each, independently of the other, prepares a translation or version, for use in his own country. While the American owner is thus vested with the sole right of representation throughout the United States, the play is produced on the stage by another person, who pleads that he is representing, not the American, but the English version, which he has obtained from the English assignee. Is this a good defence?

This question is not settled by direct authority. It must be treated on principles. It is clear that the original author, though a foreigner, has in the United States a perfect right to

¹ See *Wallack v. Daly*, 1 N. Y. Weekly Dig. 198; *Shook v. Daly*, 49 How. Pr. (N. Y.) 366; also *Widmer v. Greene*, 14 Daily Reg. (N. Y.) 529.

² See *Roberts v. Myers*, 13 Monthly Law Reporter, 396.

the exclusive representation of the play as long as it remains unpublished, and until he parts with that right. When he transfers the exclusive right of performance in the United States to any person, such person becomes vested with all the author's common-law rights in this country, and the author becomes divested of them. The author then has no right himself, and hence cannot confer upon any third person the right, to represent the play in this country. In like manner, the English assignee has and can confer no rights in this country. The play being nowhere published in print, the American owner's common-law right of representation in the United States is as complete as it would be if he were the original author and absolute owner of the play. And that right is invaded when any person without the consent of the American owner represents the same play, or any translation, adaptation, or version, which is a substantial copy of the original. For the American owner bought not merely a particular translation or adaptation of the original for use in the United States, but the play itself. His rights extend, as far as the United States is concerned, to all copies and versions which are in substance the same as the original.

In the case above supposed, the English version could not, in my judgment, be lawfully represented in the United States, without the consent of the American owner. Of course, when the original play is anywhere published in print by authority of the author, it becomes common property in this country at least, and may be translated or adapted by any person.

Facts somewhat similar to those above supposed were presented in *Shook v. Rankin*, decided in 1875 by the United States Court in the Northern District of Illinois. The plaintiffs alleged that D'Ennery and Cormon, the French dramatists, had sold to N. Hart Jackson the exclusive right of representing *The Two Orphans* in the United States; that this play had been performed in Paris, but had not been published in print; that Jackson had prepared and copyrighted in the United States an English version, and had then transferred all his rights to the plaintiffs. The defendants claimed to be in possession of an adaptation of the play, which they alleged had been made by John Oxenford, for use in England, with the

consent of the authors. The court restrained the defendants from representing the Jackson translation; but refused to enjoin them from using the Oxenford version, and afterward decided that they were free to use it.¹

Neither the essential facts nor the precise questions decided can be satisfactorily ascertained from the report of the case. The suit was decided under the copyright statute, and not the common law. But the report throws little light on the vital question whether the Jackson translation had been published in print. If it had, there was no common-law property in it; if it had not, the statutory copyright was not valid. Assuming that it had been published in print, and that there was a valid copyright in it, there is no doubt that the plaintiffs had the exclusive right under the statute to represent that translation. It is equally clear that they could not prevent the defendant from performing the Oxenford version. For the original play being the production of foreign authors, the statutory copyright secured to the plaintiffs the sole right of performing only their own translation; and this having been published in print, whatever common-law rights they had in the play were clearly gone. The case was further complicated by the fact that a story founded on the drama, and entitled *The Two Orphans*, had been published in print by authority of the complainants. What effect this publication had on the statutory rights of the complainants in their play, it is not material here to consider. But, as far as the story was substantially the same as the play, the publication of the former was destructive of the common-law property in the latter. As neither of the parties was a citizen of the State in which the suit was brought, the court had no jurisdiction of any common-law question.

The decision, then, determines nothing concerning the question whether the use of the Oxenford adaptation would have been an invasion of the common-law property in the Jackson translation. But, if the play was unpublished, and the story founded on it had not appeared in print, the plaintiffs' common-law rights would have been complete, and would have been

¹ 6 Biss. 477, 482, note.

violated, according to the above reasoning, by the unlicensed performance of the Oxenford version.¹

Remedies for Violation of Playright. — The common-law remedies for the violation of playright are, in equity, the injunction, account of profits and discovery,² and, in law, the action for damages. Redress must be sought in a State court, unless a federal court has jurisdiction by virtue of the citizenship of the parties.³

At common law, there is no prescribed limit, as under the statute, to the amount of damages which may be recovered for the piratical use of a play. The extent of the damage sustained by the plaintiff is a question of fact to be determined on the evidence by the jury.⁴

¹ Shook & Palmer of the Union Square Theatre, New York, obtained in several western courts, state and federal, injunctions restraining McKee Rankin from performing *The Two Orphans*. See 8 Cent. Law Jour. 201. But most of these cases are not reported in any accessible publication. The report of *Shook v. Rankin*, *Ibid.* 210, in which an injunction was granted in St. Paul, Minn., by United States District Judge Nelson, throws little light on the questions considered in the text. An injunction was refused on technical grounds by the United States Circuit Court in Boston, in *Tompkins v. Rankin*, *Ibid.* 443.

² See Chap. XI.

³ See Chap. XII. In *French v. Maguire*, decided by the special term of the New York Supreme Court in August, 1878, Daniels, J., held that the court had jurisdiction to grant an injunction in favor of a resident plain-

tiff, restraining the defendant, who was a citizen of California, but who had been served with the summons and injunction order while temporarily in New York, from representing a play in San Francisco in violation of the plaintiff's rights. 55 How. Pr. (N. Y.) 471.

⁴ In *Boucicault v. Wood*, Drummond, J., said to the jury: "But you will see that under this branch [common law] of the case there is no limit as in the statute to the amount of damages; but it simply then comes, if you believe that the defendant is responsible in damages for the representation of these plays, to the question as to the damages which the plaintiff has actually sustained by the use of the plays by the defendant. That is a question of proof, to be determined by the evidence in the case and in relation to which you are to form your own conclusions." 7 Am. Law Reg. n. s. 550.

CHAPTER XIV.

WHAT IS A DRAMATIC COMPOSITION WITHIN THE
MEANING OF THE STATUTE.

THE 3 & 4 Will. IV. c. 15, gives to the author of "any tragedy, comedy, play, opera, farce, or other dramatic piece or entertainment," the sole liberty of representing it. This right is affirmed by 5 & 6 Vict. c. 45,¹ which further declares that "the words 'dramatic piece' shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment."² This definition is little more than an enumeration of certain things which are commonly recognized as dramatic productions. It does not afford a satisfactory test by which may be determined, in all cases, what is a dramatic piece within the meaning of the law. The statute of the United States³ grants to the owner of a copyrighted "dramatic composition" the exclusive right of publicly representing it, but does not indicate more specifically what kinds of productions are entitled to this protection.

The important question is presented, therefore, what is a dramatic composition within the meaning of the law? This question has not been solved by the legislature or the courts, although some light is thrown on it by several decisions. On the one hand, it may be contended that the legislature used the words "dramatic composition" in their ordinary and popular meaning; which is that of a production, such as a tragedy, comedy, farce, opera, which has been expressly written and adapted for public performance. But even here a difficulty arises. A work not intended for the stage may be in substance a drama, and may be easily adapted for representation. Is it excluded from the operation of the statute because it is not, in

¹ s. 20.

² s. 2.

³ U. S. Rev. St. s. 4952.

form and name, a drama? Again, if fitness for public performance is the test of a dramatic composition, are songs within the purview of the statute? These are hardly dramatic compositions in the ordinary meaning of the expression; yet they are often more valuable for public singing than for printing. On the other hand, it may be maintained that any production which has the essential elements of a drama, and which is a dramatic composition in any true meaning of the word, however comprehensive, must be taken to be embraced within the operation of the statute.

Let us first try to ascertain what are the essential characteristics of a dramatic composition in a broad sense, and what are the general boundaries separating dramatic from other productions.

COMPREHENSIVE MEANING OF DRAMATIC COMPOSITION.

Drama, from the Greek *δρᾶμα*, action, *δρᾶν*, to do or act, is usually defined as a literary composition in which the action is not narrated or described, but represented.¹ This definition is faulty, at least for the purposes under consideration, and it is hardly possible to give one which will be concise, intelligible, and accurate. The depiction of action is an essential and distinguishing feature of a dramatic composition. A production without this quality, as a description of scenery or a treatise on metaphysics, is without the essence of a drama. The manner in which the subject is treated is also a prominent characteristic of the dramatic form. In the drama, events real or imaginary are represented as actually occurring. Characters are introduced as living, speaking, and acting. By their words, expression, and action, the story is told, the plot unfolded, emotions and passions expressed, character portrayed. Thus,

¹ "Poem accommodated to action; poem in which the action is not related, but represented." Johnson. "A poem or prose composition in which the action or narrative is not related, but represented." Worcester.

Bacon divides poetry into narrative, representative and allusive. "The narrative is a mere imitation of history,

with the excesses before remembered; choosing for subjects commonly, wars and love, rarely state, and sometimes pleasure or mirth. Representative is as a visible history; and is an image of actions as if they were present, as history is of actions in nature as they are (that is) past." Advancement of Learning, Book II., Poesy.

what is real or supposed to be real in life, what has been said or done, or supposed to have been said or done, is directly imitated by persons representing the original actors. The reader of the drama or the spectator of its performance is supposed to see and to hear the real characters, and to be a witness of events actually occurring.

When the subject-matter is not thus represented, but is given in the form of narrative or description, the composition is usually regarded as not a drama. But all productions in which actions are described or narrated cannot be excluded from the class of dramatic compositions, at least according to the meaning which must be given to that expression in law. In many dramas, important scenes are represented on the stage by action without words, and hence can only be described in written language. A pantomime or a ballet may be a drama.¹ The acting of either is a dramatic representation; the written description or directions for the actors is a dramatic composition in which the action or story is narrated. Indeed, many scenes or occurrences constituting, in themselves, dramas or material parts of dramas can be represented on the stage by action alone; in language they can only be described. Yet they are dramatic productions.

A drama should also have dramatic unity and interest enough to make its representation on the stage practicable, and to some degree effective. A prosy history of events, filling a long series of years, or occurring in times and places widely distant from one another, would be wholly unsuited for public performance, and could not be regarded as a dramatic composition. But a record of important deeds, showing unity of time, place, and action, may be at once a history and a drama.

A play is usually in the form of dialogue spoken by two or more persons; but there may be a dramatic composition in which but one character is represented. In the earliest form of the Greek drama but one actor appeared. It was not till the time of Æschylus that a second actor and dialogue were

¹ In his *Des Ballets Anciens et Modernes*, the Jesuit, Le Père Menestrier (Claude François), says: "Ballets are dumb comedies, which should be divided into acts and scenes, like other theatrical pieces. Recitations divide them into acts, and the *entrées* of dancers are equal in number to the scenes."

introduced. Whether a production is called a poem or a tragedy, a novel or a comedy, a history or a drama, or whether its author did or did not intend it for public representation, is immaterial in ascertaining whether it is a dramatic composition. This question is determined by the character of the work, and not by what it is called, or the purpose for which the author has intended it. So also it is immaterial whether the words of a drama are spoken or sung; whether they are or are not accompanied with instrumental music. An opera, not less than a play without music, is a drama.

Nor is it essential that a literary creation, in order to be considered a dramatic composition, shall be in the precise form best adapted for stage representation. A work of fiction, or even a history, may have all the requisites of a play, and be capable of dramatic representation substantially as written. It is true, alterations and omissions may be necessary to adapt it for the most effective and successful performance. But, while the drama is improved, it is not created, by such changes. It exists in the original work of which it constitutes an essential part. The change affects the form, and not the essence; and is made, not because the work is incapable of representation in its original form, but because its fitness for this purpose admits of improvement. The greater part of a novel may be, and often is, in dramatic form. Does the original lack the requisites of a dramatic composition, because a part is omitted in the representation, or because slight alterations are made in the rest? So one or more chapters of a work of fiction may make a complete play. Is the character of a dramatic composition to be denied to the whole, which thus contains within itself a complete drama? In such cases, the essence of the play, and, to a great extent, its form, are found in and taken from the original work, which must, therefore, be regarded as a dramatic composition.

If adaptation to successful and effective performance were an essential attribute of a dramatic composition in the meaning of the law, not a few undisputed dramas would lack this requisite. The changes necessary to adapt a play for effective performance are sometimes greater than are required to dramatize a novel. After Tennyson's drama, *Queen Mary*, had

been published, radical and extensive changes were made to prepare it for public performance. Composed as a drama, it was necessary to dramatize it for the stage. The test, then, is not whether changes are necessary to fit a work for successful and effective performance; but whether it is capable of representation, either with or without alteration in form. If it can be made capable of performance by changes which do not destroy its character, or create another work, it is a dramatic composition.

What Meaning should be Given to Dramatic Composition as Used in Statute? — I have tried to point out as clearly and as definitely as the nature of the subject will admit the essential and distinguishing characteristics of a drama in its true and comprehensive meaning. It is not denied that the boundaries here marked out embrace a larger class of productions than what are ordinarily and popularly known as dramatic compositions. The question now arises whether the legislature used the words “dramatic piece” and “dramatic composition” in their broad or their restricted meaning.

It is a general rule that words in a statute should be taken in their plain and ordinary sense. But governing this is the principle that the true construction of a statute is that which will most truly give effect to the intention of the legislature, and will most effectively secure the objects for which the law was passed. Hence, in interpreting “book” in the copyright statutes, the courts have rightly given to the word a meaning far more comprehensive than that in which it is ordinarily used. The legislature was supposed to have legislated for the protection of all literary productions, and not merely for those popularly known as books; hence, it was necessary to construe the language of the statute liberally, in order to give effect to the intent of the legislature. So, in the case under consideration, the objects intended by the legislature will be best secured by adopting the liberal rather than the restricted meaning of dramatic composition.

Before playright was secured by statute, there was a marked and unjust defect in the laws for the protection of literary property. Authors had only the exclusive right of printing their works. In many cases, intellectual productions were val-

uable for other purposes than printing, but there was no statute to secure the owner in the enjoyment of such uses. The inefficiency and the injustice of the law were specially apparent in the case of works useful and valuable for dramatic purposes. It is a narrow and illiberal construction of the statute passed to meet this want to hold that it was intended to embrace dramatic compositions only in a restricted sense. What was needed was protection for all works capable of dramatic uses, and not merely for those popularly known as dramas. It was just and expedient that the benefits of the law should be extended to the former, and there is no reason to suppose that the legislature intended to protect only the latter.¹ The intention of the legislature may fairly and properly be taken to have been to secure in the full enjoyment of the fruits of his literary labor every author whose production is useful and valuable for dramatic purposes. The construction that only what are popularly known as compositions of this kind are within the law will exclude many productions which are essentially dramatic, which are not less entitled to protection than what are strictly dramas in name and form, and which it is reasonable to suppose the legislature intended to protect.

JUDICIAL INTERPRETATION OF DRAMATIC COMPOSITION.

Broad Meaning given by English Courts. — In the cases which have arisen the courts have plainly indicated that the boundaries of dramatic literature within the meaning of the law are to be drawn with great liberality. The judicial construction given to “dramatic piece,” as used and defined in the English statute, is broad enough to embrace every composition

¹ “After the decision of *Murray v. Elliston*, 5 Barn. & Ald. 657,” said Lord Denman, “it seems to have been considered that publication to an audience was not within the provision of the acts relating to copyright; consequently statute 3 & 4 Will. IV. c. 15, was passed, and, in respect to dramatic literary property, gave to authors the profits arising from publication by representing the piece on the stage. As

there appears no reason for favoring one kind of literary property more than another, it is probable that this protection was intended for all productions adapted to this mode of publication. Now the use of the production in question, both by the plaintiff and the defendant, shows that it is so adapted and is supposed to be profitable to those who publish it.” *Russell v. Smith*, 12 Q. B. 236.

which is dramatic in character and is suitable to be performed, recited, read, or sung for the entertainment of an audience. A single song, a poem of a few stanzas, a short descriptive composition, may be a dramatic piece; and singing, reciting, or reading it in public may be a dramatic representation.

A song founded on the loss of the Kent by fire in the Bay of Biscay, and representing a storm at sea, the burning of the ship, and the rescue of the passengers by another vessel, was held to be a dramatic composition, although almost entirely descriptive, and sung by one person. Citing the statutory definition of a dramatic piece, Lord Chief Justice Denman said: "These words comprehend any piece which could be called dramatic in its widest sense; any piece which, on being presented by any performer to any audience, would produce the emotions which are the purpose of the regular drama, and which constitute the entertainment of the audience. They comprehend, therefore, the production in question, the nature of which in this respect was above pointed out. In holding this production to be a dramatic piece, we give effect to the intention of the legislature, as we collect it from the series of statutes relating to literary property; namely, to give to authors the profits from the publication of their works."¹

In a more recent case, the court held the song *Come to Peckham Rye*, which has little, if any, of the dramatic character to be a dramatic piece.² It should be noted, however, that, by the English statute, playwright is expressly extended to musical

¹ *Russell v. Smith*, 12 Q. B. 236. "The song in question," said the Chief Justice, "is stated in the bill to be founded on the loss of the Kent by fire in the Bay of Biscay. It represents a storm at sea, the burning of the ship and an escape by boat to another ship, and so a safe return to land. It moves terror and pity and sympathy, by presenting danger and despair and joy, and maternal and conjugal affection. A witness of great experience in publishing music deposed that this was considered a dramatic song, and published with the title of a dramatic and

descriptive song; and there was no evidence that any one considered it not dramatic. Thus the nature of the production places it rather in the representative than the narrative class of poetry, according to Lord Bacon's division of dramatic from epic (*Advancement of Learning*, Book II. *Poesy*); and the evidence states it to be known as dramatic among those who are conversant with such things." *Ibid.* 235. See also *Russell v. Bryant*, 8 C. B. 836; *Planché v. Braham*, 8 Car. & P. 68, on ap. 4 Bing. N. C. 17.

² *Clark v. Bishop*, 25 L. T. n. s. 908.

compositions generally,¹ and that dramatic piece is defined to include every "musical or dramatic entertainment."² It is not improbable that the statute will be judicially construed to embrace any song, whatever may be its character. But, in *Russell v. Smith*, Lord Denman said that it was not necessary in that case to determine whether all songs were entitled to protection. The judgment of the court was based on the sole ground that the song in question was a dramatic piece.

A pantomime is a dramatic composition, within the meaning of the law.³

United States.— There is no reason why the liberal construction given to the English statute should not be accepted in this country to the extent that the words dramatic composition rightly include any production which is dramatic in character, and which, in the language of Lord Denman, "on being presented by any performer to an audience would produce the emotions which are the purpose of the regular drama."⁴

It is not easy to determine how far the American courts will, or should, go in the direction of holding that songs nearly or quite destitute of dramatic qualities are entitled to protection as dramatic compositions. Does a song not dramatic in itself become a dramatic composition within the meaning of the law by being sung in public for the entertainment of an audience? If so, all songs may be regarded as dramatic compositions. If, on the other hand, only those dramatic in character, such as the *Ship on Fire*, are within the meaning of the law, it will be difficult, if not impracticable, to draw the line between those which are and those which are not entitled to protection. It would avoid confusion, and would be in accordance with justice, if the courts should declare that all songs are within the meaning of the law; but it remains to be seen whether they will go to this extent in the case of songs lacking in dramatic attributes. But they will be clearly justified in holding all dramatic songs to be within the purview of the statute.

In a recent American case, it was held that the written

¹ 5 & 6 Vict. c. 45, s. 20.

² *Id.* s. 2.

³ *Lee v. Simpson*, 3 C. B. 871, 881; *Daly v. Palmer*, *post*, p. 594.

⁴ See *ante*, p. 592.

description or directions for acting a scene designed to be represented on the stage wholly by action is a dramatic composition. It appeared that the "railroad scene" in Daly's play *Under the Gaslight* had been substantially reproduced, without authority, in Boucicault's *After Dark*. This scene was represented on the stage chiefly by action, but partly by dialogue. The law was correctly laid down by Mr. Justice Blatchford as follows: "A composition, in the sense in which that word is used in the act of 1856, is a written or literary work invented and set in order. A dramatic composition is such a work in which the narrative is not related, but is represented by dialogue and action. . . . A pantomime is a species of theatrical entertainment in which the whole action is represented by gesticulation without the use of words. A written work consisting wholly of directions, set in order for conveying the ideas of the author on a stage or public place, by means of characters who represent the narrative wholly by action, is as much a dramatic composition designed or suited for public representation, as if language or dialogue were used in it to convey some of the ideas. The railroad scene, in the plaintiff's play, is undoubtedly a dramatic composition. Those parts of it represented by motion or gesture, without language, are quite as much a dramatic composition, as those parts of it which are represented by voice. This is true, also, of the railroad scene in *After Dark*. Indeed, on an analysis of the two scenes in the two plays, it is manifest that the most interesting and attractive dramatic effect in each is produced by what is done by movement and gesture, entirely irrespective of any thing that is spoken. The important dramatic effect, in both plays, is produced by the movements and gestures which are prescribed, and set in order, so as to be read, and which are contained within parentheses. The spoken words in each are of but trifling consequence to the progress of the series of events represented and communicated to the intelligence of the spectator, by those parts of the scene which are directed to be represented by movement and gesture."¹

¹ *Daly v. Palmer*, 6 Blatchf. 264. p. 410, note 4), and citing their approval by Mr. Justice Nelson in *Jollier v. Jaques* (see *ante*, p. 411, note 2), Mr. After quoting the views of Lord Abinger in *D'Almaine v. Boosey* (see *ante*,

Spectacular Pieces.—In *Martinetti v. Maguire*, the *Black Crook* was held to be “a mere spectacle,” and, therefore, not entitled to protection as a dramatic composition.¹ That some spectacular representations lack the essential attributes of a dramatic composition, and are not worthy of protection, is not denied. But all spectacular productions cannot rightly be excluded from the benefits of the statute. Not a few legitimate dramas are largely spectacular in character. Others contain important scenes of this kind. The spectacular may be an important and essential feature of the drama, and, as such, entitled to protection. A satisfactory general rule cannot be given for determining where the line shall be drawn in the cases under consideration between what is, and what is not, a proper subject of playwright. But when the dramatic element, the dialogue, action, &c., is sufficient to sustain copyright,—and the requirements of the law in this respect are by no means exacting,—the playwright does not fail because the literary ele-

Justice Blatchford said: “They are eminently sound and just and are applicable to the case of a dramatic composition designed for public representation. Such a composition when represented excites emotions and imparts impressions not merely through the medium of the ear, as music does, but through the medium of the eye as well as the ear. Movement, gesture, and facial expression, which address the eye only, are as much a part of the dramatic composition as is the spoken language which addresses the ear only; and that part of the written composition which gives direction for the movement and gesture, is as much a part of the composition, and protected by the copyright, as is the language prescribed to be uttered by the characters. And this is entirely irrespective of the set of the stage or of the machinery or mechanical appliances, or of what is called, in the language of the stage, scenery or the work of the scene painter.” *Ibid.* 268.

¹ 1 Dedy, 216. “The *Black Crook*,” said Judge Dedy, “is a mere spectacle, -- in the language of the craft a spectacular piece. The dialogue is

very scant and meaningless, and appears to be a mere accessory to the action of the piece,—a sort of verbal machinery tacked on to a succession of ballet and tableaux. The principal part and attraction of the spectacle seems to be the exhibition of women in novel dress or no dress, and in attractive attitudes or action. The closing scene is called *Paradise*, and, as witness Hamilton expresses it, consists mainly ‘of women lying about loose,’ a sort of Mohammedan paradise, I suppose, with imitation grottos and unmaidenly houris. To call such a spectacle a ‘dramatic composition’ is an abuse of language, and an insult to the genius of the English drama. A menagerie of wild beasts, or an exhibition of *model artistes* might as justly be called a dramatic composition. Like those, this is a spectacle; and, although it may be an attractive or gorgeous one, it is nothing more. In my judgment, an exhibition of women ‘lying about loose,’ or otherwise, is not a dramatic composition, and therefore not entitled to the protection of the copyright act.” *Ibid.* 221.

ment is subordinate or accessory to the spectacular, or because the representation is largely of the latter character.

The judgment in *Martinetti v. Maguire* cannot be sustained on the ground that the *Black Crook* was "a mere spectacle." This piece was more than a spectacle. While ballets, marches, tableaux, dazzling scenes, &c., may have constituted its chief attractions, an important feature was the dramatic dialogue, plot, and characters, which clearly made the production a dramatic composition within the meaning of the law.

Scenic Effects.—The definition of dramatic piece, in the English statute, includes "scenic" entertainments.¹ Where it appeared that the defendant had taken from the plaintiff's play two scenes or situations, consisting more of scenic effects than of dialogue, it was held that the quantity copied was not enough to amount to piracy; but Mr. Justice Brett said: "Now, it was first said that the subject-matter of the action was not the subject-matter of copyright; that the act gives a property in words, and not in situations and scenic effects; but I think that these latter are more peculiarly the subject of copyright than the words themselves."²

Dramatic Composition must be Original and Innocent.—The same tests as to innocence, originality, &c., are to be applied to dramatic as to literary compositions.

An immoral play is not entitled to protection.³

In *Hatton v. Kean*, where it appeared that the defendant had designed a dramatic representation, consisting of one of Shakespeare's plays with certain alterations in the text, original music, scenic effects, and other accessories, the court did not doubt that the production, as a whole, was a proper subject of playright, although the play itself was, in its original form, common property.⁴

Dramatizations, Adaptations, and Translations.—A dramatization or an adaptation of a novel or other work, which the dramatist has a right to use, will receive the same protection accorded to an original drama. The same is true of a transla-

¹ 5 & 6 Vict. c. 45, s. 2.

² *Chatterton v. Cave*, as reported 83 L. T. N. s. 256. See also *Hatton v. Kean*, 7 C. B. N. s. 268.

³ *Martinetti v. Maguire*, 1 Deady,

216; *Shook v. Daly*, 49 How. Pr. (N. Y.) 366; *Keene v. Kimball*, 16 Gray (82 Mass.), 548.

⁴ 7 C. B. N. s. 268.

tion of a foreign play. Any number of persons may dramatize or translate a work which is common property, or, with the consent of the owner, a copyrighted work. Whatever may be the similarity between two dramatizations, adaptations, or translations, each dramatist will have playwright in his own version.¹ Whether any person without authority may dramatize for the stage a work protected by copyright is a question which is considered elsewhere.²

Test of Originality in Dramatization. — The validity of the copyright or playwright in a dramatization is not affected by the fact that the dramatist has extensively, or even chiefly, retained the dialogue and monologue in the language of the work dramatized. In many cases this must be done to a large extent, and to do otherwise would be to lessen the merits of the play. The function of the dramatist is to select from the novel those parts which are best fitted for acting, to arrange them effectively with reference to swift action, dramatic situations, climaxes, &c., and generally to meet the requirements of dramatic composition and representation. A work of fiction not adapted to acting, as originally written, is thus reproduced in a new form, and is brought into a new and valuable use. Such a dramatization is regarded by the law as a new production, and as such is a proper subject of copyright. But a play which is not materially different from the novel, and which owes nothing substantial to the labors of the dramatist, is only a copy of the work claimed to have been dramatized. In such case, the adapter is a mere copyist, and shows nothing on which to base a claim for protection.

As the dramatization of a work of fiction is a proper subject of playwright, it is clearly no objection in law to the originality of a drama that its characters and incidents are like those found in a previously published novel; provided, of course, there is no piracy of the novel.³

¹ *Br. Planché v. Braham*, 8 Car. & P. 68, on ap. 4 Bing. N. C. 17; *Shepherd v. Conquest*, 17 C. B. 427; *Reade v. Conquest*, 11 C. B. n. s. 459; *Levi v. Rutley*, Law Rep. 6 C. P. 523; *Toole v. Young*, La. Rep. 9 Q. B. 523; *Chatterton v. Cave*, Law Rep. 10 C. P. 572, 1st ap. 2 C. P. D. 42, 2d ap. 3 App. Cas. 483. *Am. Shook v. Rankin*, 6

Biss. 477; *Shook v. Rankin*, 3 Cent. Law Jour. 210; *Benn v. Le Clercq*, 18 Int. Rev. Rec. 94. See also *Tompkins v. Duff*, and *French v. Conolly*, considered *ante*, p. 580.

² See *ante*, pp. 456, 461.

³ *Boucicault v. Fox*, 5 Blatchf. 87, 100-101.

Foreign Dramatists.—As the exclusive right of representing a dramatic composition is given by the statute only in case copyright has been secured for it, and as copyright is limited to the works of native authors, it follows that there is no statutory protection for the productions of foreign dramatists. But, as copyright will vest in the translation or adaptation of a foreign play, or the dramatization of a foreign novel, made by a resident or a citizen,¹ so the statute secures the exclusive right of representing such translation, adaptation, or dramatization.²

MUSICAL COMPOSITIONS.

Compositions Consisting of Words and Music.—It has been seen that some musical productions are dramatic compositions within the meaning of the law. In such case, there can be no reasonable doubt that the literary part, independently of the music, as the libretto of an opera, may be a complete dramatic composition.³ But the playright cannot rightly be considered as vesting alone in the words of a musical composition; it must extend also to the music, which is a constituent part of the whole. Music is but a form of language by which expression is given to thoughts, emotions, passions, feelings, &c., whose communication is the province of all language. In a musical drama, poetry and music are co-ordinate means working toward the same results. Both are in harmony, and used to give expression to the same thoughts and feelings. The

¹ See *ante*, p. 232.

² *Shook v. Rankin*, 6 Biss. 479; *Shook v. Rankin*, 3 Cent. Law Jour. 210; *Benn v. Le Clercq*, 18 Int. Rev. Rec. 94. In the first-named case, Drummond, J., said: "D'Ennery and Cormon were the [foreign] authors of a drama in the French language, called *Les Deux Orphelines*; Jackson translated it into English and adapted it to representation on the stage. This was with the consent of the authors. After this was done, he applied under the law for a copyright; and the question is, whether there was any valid objection to his obtaining a copyright for the play thus translated into English. I

do not see that there was. He was the translator of the play. He adapted it to representation on the stage, and was in the sense of the law the author of that for which he obtained a copyright. No one could complain of this except the authors of the play in French, and it affirmatively appears that they assented to this action on the part of Mr. Jackson. Then I do not see why he was not protected under the law for his translation and adaptation of the work to the stage, and of which he was in one sense the author."

³ *Planché v. Braham*, 8 Car. & P. 68, on ap. 4 Bing. N. C. 17.

music is not a meaningless accompaniment, intended simply to please the ear. Its true function is to emphasize, to intensify, the meaning of the poet.

Hence, in a musical dramatic composition, whether it be a grand opera or a simple song, both words and music must be considered as constituting the dramatic essence. And, as the playwright attaches to the whole and the constituent parts, it must extend to the music as well as to the words.¹

Instrumental Music. — In a broad sense, music, as well as literature, is susceptible of classification into that which is and that which is not dramatic. But what is communicated definitely and with clearness by written or spoken language can be expressed only vaguely by music without the aid of words. Music designed to be interpreted by instruments alone, as a symphony, can hardly be considered a dramatic work within the meaning of the law. As the American statute does not secure the exclusive right of performing any piece of music which is not a dramatic composition, it follows that in this country there is no statutory property in other instrumental music excepting the right of publication in print.

Section 20 of 5 & 6 Vict. c. 45, secures the sole liberty of performing musical compositions on the same conditions and for the same term as are prescribed in the case of dramatic compositions. The meaning of this provision has not yet been judicially interpreted. But dramatic musical compositions were already protected by the 3 & 4 Will. IV. c. 15,² and they are expressly included in the definition of dramatic piece contained in the statute of Victoria. Hence, the provision expressly extending protection to musical compositions has neither object nor meaning, unless it be taken to refer to the right of playing instrumental music. It is reasonable to assume, then, that it embraces all kinds of music, whether dramatic compositions or not, and whether vocal or instrumental.³ If this construction is right, the owner of a purely

¹ The music of an opera, independently of the words, was protected in the recent English case of *Boosey v. Fairlie*, 7 Ch. D. 801.

² *Planché v. Braham*, 4 Bing. N. C. 17.

³ In *Russell v. Smith*, it was con-

tended that only dramatic musical compositions were within the purview of the statute. To which Erle, J., replied: "Why should the legislature have intended to protect these rather than oratorios and other strictly musi-

instrumental piece, whether written for the orchestra, organ, piano, or other instrument, may have in it not only copyright, but playright; not only the exclusive right of printing it, but the sole liberty of playing it in public.¹ And, as in the case of dramatic compositions, statutory playright is secured not only in printed, but also in manuscript musical compositions.

cal works?" 12 Q. B. 231. In *Russell v. Smith*, in chancery, 15 Sim. 181, 182, Vice-Chancellor Shadwell said that "the words of the songs were protected by the former copyright acts and the music of them by the act of Victoria." This language implies that

the music of a dramatic composition was not protected by 3 & 4 Will. IV. c. 15. But this does not appear to be the natural construction of that statute.

¹ See *Hatton v. Kean*, 7 C. B. N. S. 268; *Wallenstein v. Herbert*, 15 L. T. N. S. 364, on ap. 16 Id. 453.

CHAPTER XV.

STATUTORY PLAYRIGHT IN DRAMATIC AND MUSICAL COMPOSITIONS.

Playright and Copyright Distinguished. — Under the statute, playright and copyright are treated as two independent and distinct rights. The former is secured only in dramatic or musical compositions. In a printed production of this kind, both rights may exist together; and, in general, the principles governing the vesting and the ownership of each are the same. But an invasion of one right is not a violation of the other, and the penalties of piracy prescribed in one case are different from those in the other. Copyright may be infringed by publication in print, but not by public performance; playright, by representing but not by printing the play. The copyright in a dramatic composition is in no respect different from the copyright in any other literary production.

In England, the statute grants the exclusive right of publicly performing both printed and manuscript plays. In the United States, the right is secured only in published compositions; the statute affords no redress for the unlicensed representation of manuscript plays.

GREAT BRITAIN.

Duration of Playright in Printed and Manuscript Compositions. — The first statute giving to dramatists the exclusive right of performing their plays was the 3 & 4 Will. IV. c. 15, passed in 1833. By this act and the 5 & 6 Vict. c. 45, passed in 1842, British playright is now governed. The first section of the statute of William declares that the author of any unpublished tragedy, comedy, play, opera, farce, or other dramatic piece or entertainment shall have the sole liberty of representing it at any place of dramatic entertainment in Great Britain; and

that the author of a published production of this kind shall have the same right for twenty-eight years from the time of publication. Protection is here provided for two classes of compositions, — 1. Manuscript. 2. Those published in print. The statute plainly declares that playright in printed plays shall begin at the time of publication and continue for twenty years. But there is nothing in the act showing when the right in an unpublished play shall begin or when it shall end. The term of protection is in no wise limited. The only sound construction of which the statute is capable is that the owner of a manuscript play, provided he does not publish it in print, and complies with the conditions on which protection is granted, has for ever the exclusive right to perform it in public, and is entitled to the statutory remedies provided for the invasion of that right.

It is now necessary to inquire what changes have been made in the provisions of this statute by the 5 & 6 Vict. c. 45. Section 20 of the latter act, after citing the 3 & 4 Will. IV. c. 15, and declaring that "it is expedient to extend the term of the sole liberty of representing dramatic pieces given by that act to the full time by this act provided for the continuance of copyright," and also to provide protection for musical compositions, enacts, "that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof, and his assigns, for the term in this act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect to the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the first publication of any book."

This language taken in connection with the statute of 1833 is confusing, and its effect on playright as governed by that statute is doubtful. The declared object of section 20, just

cited, is to extend the term of protection granted by the act of William. But we have seen that the latter statute makes a distinction between manuscript and published plays, and that in the case of the former the term of protection is unlimited, and hence incapable of extension. The preamble, therefore, of section 20 of 5 & 6 Vict. c. 45, is intelligible only when applied to printed plays. It may be contended with much reason that, in the absence of language expressly or by clear implication repealing or restricting the unlimited duration of playright in unpublished productions granted by the statute of William, that right must remain unchanged. But the important distinction drawn by the statute of William between published and unpublished plays has been wholly overlooked or disregarded in the enacting part of section 20 of 5 & 6 Vict. c. 45; and it may be urged that the provisions of that section are such that they cannot reasonably be construed as applying exclusively to printed plays.

Whether this section must be interpreted as making the duration of playright in both published and unpublished compositions the same as that of copyright in a book, or as leaving it unlimited in manuscript dramas, as it was under the statute of William, is a question which has been carelessly left in much doubt for judicial determination.

Conditions on which Playright may be Secured. — The correct reading of 5 & 6 Vict. c. 45, appears to be that the same conditions and requirements prescribed concerning the registration of copyright were intended to be applied to playright. But the courts have held that registration is essential neither to the vesting of playright nor to the right of the owner to maintain an action for infringement.¹

¹ *Russell v. Smith*, 12 Q. B. 217; *Clark v. Bishop*, 25 L. T. n. s. 908. See also *Lacy v. Rhys*, 4 Best & S. 873; *Marsh v. Conquest*, 17 C. B. n. s. 418. This construction of the statute is open to criticism. There is nothing concerning registration in 8 & 4 Will. IV. c. 15. Section 20 of 5 & 6 Vict. c. 45, enacts that "the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition," except that the first performance of a play shall be equivalent to the publication of a book. Then follows a proviso prescribing how dramatic and musical compositions in manuscript may be registered. Section 24 then enacts that no action for the infringement of copyright in a book shall be maintained unless the book has been registered before the

The statute of William mentions no requirement to be performed by the author or owner of a dramatic composition in order to secure playright; and none are prescribed by the act of Victoria, except that relating to registration. The latter statute declares that "the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the first publication of any book."¹ It cannot be determined with certainty precisely what effect this provision was designed to have, or what judicial construction will or should be given to it. It was doubtless intended to apply to compositions not published in print. The relation which the public performance of a manuscript drama has to the playright therein is analogous to that which the publication of a book bears to the copyright in it. Printing and acting are but different modes of publication. It would seem that Parliament intended simply to affirm this principle.

Applying to publication by representation the same general principles which are recognized as governing publication by printing, and giving effect to the statutory provision above cited, it will follow that, as copyright in a book dates from the time of first publication, so playright in a manuscript play begins with its first public performance. As first publication of a book in the United Kingdom is a condition precedent of copyright, so the first representation of a manuscript drama must be in the United Kingdom in order to secure playright.² As an alien author may acquire copyright by being on English soil when his work is published in Great Britain, so playright may be secured by a foreign dramatist who is anywhere within the

beginning of the suit, and contains a proviso "that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the act passed in the third year of the reign of his late Majesty King William the Fourth, to amend the laws relating to dramatic literary property, or of this act, although no entry shall be made in the book of registry aforesaid."

The meaning of these provisions

concerning registration in the case of playright is worse than bewildering, unless the language last quoted be taken to refer exclusively to compositions in which rights had already vested under the statute of William, and to mean that such rights only were not to be defeated by want of registration.

¹ s. 20.

² *Boucicault v. Delafield*, 1 Hem. & M. 597; *Boucicault v. Chatterton*, 5 Ch. D. 267.

British realm when his manuscript drama is first acted in the United Kingdom. As protection in the case of a book in which copyright has vested extends throughout the British empire, so protection in the case of playwright in a production not printed is guaranteed in a coextensive territory. In other words, the general conditions which govern the vesting of copyright, and the beginning and territorial extent of protection, apply in the case of playwright in manuscript compositions. Playright, then, may be secured in a manuscript drama, on the sole condition that its first public representation be in the United Kingdom, and that the author, if a foreigner, be on English soil at the time of such representation. The right, if not perpetual, will last for forty-two years, or for the life of the author, and seven years after his death, whichever may be the longer period.

If the above views are correct, there can be no statutory playwright in a manuscript dramatic composition which has not been publicly represented.

PUBLICATION AND REPRESENTATION CONSIDERED WITH REFERENCE TO PLAYRIGHT IN GREAT BRITAIN.

While the validity and the beginning of the playwright in a manuscript play are thus governed by the time and place of its first public representation, there can be little doubt that the same questions in the case of a dramatic composition, which is published in print before it is publicly performed, are governed by the publication in print, and not by the representation. In such case, copyright and playwright vest together and on the same conditions, and last for a like period, or they fail together. Assuming this to be the true principle, it follows: I. That, when playwright has been thus secured, it cannot be affected by any subsequent representation of the drama. Thus, if first publication be in Great Britain, both copyright and playwright vest at the same time, and the latter right cannot be lost by a first representation of the play made afterward in a foreign country. II. Failure of the title to copyright involves a failure of the title to playwright. Thus, a prior publication of the play in print in a foreign country would defeat the claim, not only to copyright, but also to playwright, so that the latter right could

not be secured, though the first representation of the play should afterward be given in England.

But difficult questions arise in the case of a published drama, whose public representation has preceded its publication in print. In such case, it is clear that the validity and duration of the copyright are governed, not by the representation, but by the publication. The copyright dates from publication, and it cannot be defeated or affected by any public performance of the play, no matter when or where made.¹ But does the playright begin with and depend on the first public representation, or the publication in print? Suppose that, after a dramatist has enjoyed for years the exclusive right of representing a manuscript play, he publishes it in print, and secures the copyright in it. Such copyright will date from the publication in print, and will last for forty-two years. But is the duration of the playright forty-two years from first publication in print, or from first representation? If the latter, copyright may continue after playright has expired in a printed composition in which both have vested; and cases may arise in which copyright, but not playright, will vest in a published production. The most natural construction of the statute in this case would seem to be that the playright, when it vests in a printed composition, will begin to run from the publication in print.

Does the failure of the title to playright in a manuscript composition involve the failure of the title to playright in the same composition when published? Thus, by first representing an unpublished drama abroad, the owner forfeits his claim to the exclusive right of representing that unpublished drama in England. As prior representation in a foreign country is no bar to the vesting of copyright, he may afterward obtain copyright by first printing the composition in England. But is the right of representation also thereby secured?

Again: when playright has once vested in a manuscript play, is it affected by a subsequent publication of the composition in print, so that, if the title to copyright is forfeited by such publication, the playright already secured is defeated?

¹ See *D'Almaine v. Boosey*, 1 Y. & C. Exch. 288, 299; *Clark v. Bishop*, 25 L. T. N. S. 908.

In other words, to preserve the right of representation, is it necessary either to keep the composition in manuscript, or to protect it by copyright, if it is published as a book?

The above are important questions, which are likely to arise at any time, and on which little light is thrown, either by the statutes or by the decisions. Without attempting to determine the principles which govern the law in all of the cases which have been suggested, I shall simply offer my opinion on some of the questions which I have raised without going fully into the reasons.

When the title to playwright in an unpublished production has been forfeited, as by first representation in a foreign country, it would seem that it cannot be recovered by afterward publishing the composition, and thereby securing a copyright for it; for the playwright has become common property.

After playwright has once vested in a manuscript composition, it may be lost by such a publication in print as will amount to an abandonment of the copyright. The right of representing a manuscript play rests on the condition that the composition is not published in print. After it has been so published, it passes from the class of manuscript to that of printed plays, and becomes subject to the conditions on which playwright will vest in published plays. The playwright then becomes subordinate to the copyright, and the validity of the former is dependent on that of the latter right. An abandonment of the copyright, which is the greater right, involves an abandonment of the lesser playwright. When the title to copyright is forfeited, the work becomes public property as far as printing copies is concerned; and this would seem to make it public property as far as representing it is concerned. If this be true, the copyright covers the playwright, and the former must be secured in order to preserve and protect the latter.

The principle that copyright may be lost after it has been secured is recognized by the law of the United States. Section 4962 of the Revised Statutes makes it essential to copyright that the notice of entry shall appear in every copy of a book published. Hence, after the copyright has been enjoyed for years, it may be lost by publishing copies without the required notice.

In the recent case of *Boosey v. Fairlie*,¹ the plaintiffs claimed under the International Copyright Act, the exclusive right of representing in Great Britain *Vert-vert*, a comic opera composed by Offenbach. The opera was first represented March 10, 1869, in Paris. On the 28th of that month, an arrangement for the piano-forte made by Soumis, with the consent of Offenbach, was published in Paris. Soon after, another authorized arrangement for piano and voices was made by Soumis, and published in Paris. At various places in this arrangement were inserted the names of certain orchestral instruments "which," as the court said, "if the piano-forte arrangement were to be converted into a full operatic score, would afford some indication of the instruments to be used." In June of the same year, Offenbach sold the exclusive right of printing and representing the opera in Great Britain to the plaintiffs, to whom he delivered a manuscript copy of the score. On June 9, the plaintiffs registered the opera under the 7 & 8 Vict. c. 12, s. 6, in the name of Offenbach, as composer and owner. The time and place of the first publication of one of the piano-forte arrangements were also entered in the registry, and a copy of this publication was deposited with the officer of the Stationers' Company. Afterward, on the same day, the assignment to the plaintiffs was registered. At this time there had been no publication of the opera in print, other than that of the two piano-forte arrangements. On August 9, 1869, four of the orchestral parts of the opera; viz., those for first and second violins, violincello and contra basso, were printed for sale in Paris, by authority of Offenbach. This publication was not registered in London. In May, 1874, the defendant brought out at the St. James's Theatre in London, an *opéra bouffe* called *Vert-vert*. A material part of the music was substantially the same as that composed by Offenbach. It had not, however, been copied from the latter's orchestral score, but it had been taken from one of the piano-forte arrangements made by Soumis, and had been arranged for the orchestra by a musician employed by the defendant. The plaintiffs now sought to restrain this representation as an infringement of their rights.

¹ 7 Ch. D. 301.

Vice-Chancellor Bacon ruled that there had not been a valid registration either of the opera itself or of the piano-forte arrangement, and dismissed the bill.¹ The Court of Appeal held that the registration of the unpublished score of the opera was good, and hence secured to the plaintiffs the exclusive right of representation; that there had been no lawful registration of the piano-forte arrangement, which consequently was not protected; but that the performance of the music obtained from either of the arrangements was a violation of the right of representing the opera secured to the plaintiffs.²

Assuming that the Court of Appeal was right in holding that the registration of the opera, but not of the piano-forte arrangement, was valid, it becomes necessary to inquire what right was secured by such registration, and whether it was complete or sufficient to prevent an unauthorized representation of the music obtained from the unregistered piano-forte arrangement. The plaintiffs' rights in this case were governed by section 6 of 7 & 8 Vict. c. 12, which makes registration of works first published in a foreign country a condition of securing protection in England. This act and the order in council made in pursuance of it give a foreign author of a dramatic or musical composition two privileges; viz., the exclusive right of printing and the sole liberty of representing it. The latter right may be secured either for a printed or for a manuscript composition, and section 6 of 7 & 8 Vict. c. 12, prescribes the mode of registration for each case. If the work has been published in print, the time and place of such publication, as was conceded in *Boosey v. Fairlie*, must be registered, and in default thereof no right is secured. If it has not been published in print, but has been publicly represented, then it is enough to give the time and place of such representation. When an opera or a play is registered as an unpublished work, the registration is valid only on condition that it is true that the work has not been published. If a part of it has been published, the registration can be good only to the extent of the unpublished matter. Thus, if one of the three acts of an opera has been printed, the registration of the whole as

¹ 7 Ch. D. 307.

² *Ibid.* 311.