copyright is for life, and for fifty years to his children, and is assignable in writing, but an author is not at liberty to reserve the right of translation.[1]

la durée fut de 20 ans à partir de l'extinction des droits de la veuve, et pour les autres héritiers de 10 ans à compter du décès de l'auteur, comme antérieurement, mais avec cette différence cependant, que par suite du droit viager accordé à la veuve, ils n'avaient plus rien à prétendre si ce droit s'était prolongé pendant 10 ans. La loi du 8 avril 1854, porta à 30 ans le droit des descendants, à partir du décès de la veuve, et laissa subsister pour les autres héritiers le délai de 10 ans à partir du décès de l'auteur. Enfin, la loi de 1866 ne fait plus, quant au délai, de distinction entre les descendants et les autres héritiers; la durée est de 50 ans à partir du décès de l'auteur pour tous les héritiers, successeurs irreguliers, donataires ou légataires; il s'en suit que, si la jouissance du conjoint survivant se prolongeait pendant cinquante années, les successeurs n'auraient rien, quand bien même ce seraient des descendants.

Quant aux cessionnaires, avant la loi de 1866 leurs droits étaient aléatoires, la durée en étant réglée par la qualité des héritiers; ils se prolongeaient d'abord pendant la vie de la veuve, unsuite pendant trente ans s'il y avait des descendants; pendant dix ans s'il n'y avait ni veuve ni descendants. Sous l'empire de la loi actuelle, le délai étant toujours de cinquante années, les éditeurs sauront que le droit qu'ils achètent ne pourra jamais se prolonger au delà, à partir du décès de l'auteur, quand même la vie du conjoint survivant se prolongerait plus de cinquante ans.

En résumé, d'après la loi nouvelle, l'auteur conserve son droit exclusif pendant toute sa vie, conformément au droit commun en matière de propriété. Le conjoint survivant est ensuite préféré à tous héritiers, par dérogation aux principes qui régissent les contrats de mariage et les successions, puisque le Code Napoleon ne lui accorde aucun droit viager sur les biens du conjoint décédé, et qu'il n'est habile à lui succéder que s'il n'y a aucun héritier. Quant aux héritiers, leur droit dure cinquante ans à partir du décès de l'auteur, et ce délai court pendant le droit de survie accordé au conjoint survivant.

Ajoutons, pour compléter cette exposition, que les constatations de contraventions sont faites par les commissaires de police; que les peines sont purement pécuniaires; et enfin qu'il faut faire le dépôt de deux exemplaires de chaque ouvrage

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[1] Fliniaux.

228. In Sweden and Norway a copyright law was enacted in 1812. In Austria the first law dates from 1813, in Belgium from 1814, and in Holland from 1619,

pour la bibliothèque impériale et le ministère de l'intérieur; s'il contient des estampes il faut présenter un troisiéme exemplaire pour l'autorisation de police.

Œuvres dramatiques. — Le droit des auteurs d'empêcher ou de permettre la représentation de leurs œuvres ne parait pas avoir été réglementé dans l'antiquité païenne; on sait cependant combien dans la Grèce était cultivé l'art dramatique, combien à Rome étaient applaudies les œuvres de l'esprit avant que les peuple en le repaissant de jouissances materielles.

En France les représentations des mystéres ou scènes religieuses paraissent avoir été les premières œuvres scèniques; mais en 1547 un arrêt du Parlement défendit avec raison de jouer sur le théâtre des sujets sacrés et en 1566 le concile de Tolède mit definitivement fin aux abus que ces représentations avaient introduits. Ce ne fut donc qu'à la fin du XVI^e^ siècle que l'art dramatique commença en France à prendre toutes les formes; un grand nombre de théâtres furent alors construits en rotonde avec loges et gradins comme ceux de nos temps modernes; puis survinrent, au siècle suivant, Corneille, Racine et Molière; enfin, la sociétié de la Comédie Française se fonda en 1680. Mais aucun règlement n'apparut en ette matière jusqu'à la révolution 1789.

Nous avons déjà vu que le décret de l'Assemblée constituante du 19 janvier 1791 déclarait que tout citoyen pouvait élever au théâtre; il accordait en outre à l'auteur pendant sa vie le droit de permettre la représentation de ses œuvres, et à ses héritiers pendant 5 ans après sa mort. Quant au droit de publication, il a toujours été réglé de la même manière que pour les autres œuvres littéraires.

La loi du 3 août 1844 donna à la veuve et aux descendants les mêmes droits que pour la publication, c'est-à-dire qu'elle accorda un droit viager à la première et un délai de 20 ans aux seconds; la loi du 8 avril 1854 porta le délai de 20 à 30 ans confirmant ainsi cette assimilation. Quant aux héritiers autres que les descendants, ils restèrent pendant tout ce temps sous l'empire du décret de 1791 qui leur accordait 5 ans à partir du décès de l'auteur; toutefois un arrêt de cessation du 5 decembre 1843 leur accordait 10 ans conformément a la loi de 1793. En vetu de la loi nouvelle ce délai est de 50 ans pour tous héritiers même autres que descendants, et le droit de représentation est complétement assimilé au droit de publication.

while Germany, the country where the art of printing had its birth, was still more tardy to come to the rescue of her authors. By a royal ordinance promulgated

Il faut ajouter que l'autorisation est nécessaire pour pouvoir représenter les œuvres dramatiques ; elle doit émaner du ministère de la maison de l'Empereur pour Paris, et des préfets pour les départments. (Décret du 8 juin 1806.—Loi du 30 juillet 1850.—Loi du 31 juillet 1853. — Décret du 30 décembre 1852. — Décret du 6 juillet 1853. — Décret du 6 janvier 1864.)

Œuvres d'art. — L'ancien droit ne nous fournit pas de documents législatifs en ce qui concerne la reproduction des œuvres d'art ; c'est seulement, en effet, après le perfectionnement des procédés mécaniques que l'on put arriver à multiplier ces œuvres. Or, quoique les anciens aient connu la gravure en creux, l'art de tirer des épreuves des planches gravées sur métal ne remonte pas au delà de l'annéé 1452 ; la gravure à l'eau forte était connue des Chinois dès le xi^e^ siècle et des Indiens dès le xiii^e^, mais elle ne fut introduite en Europe et perfectionnée que vers l'an 1445. Quant à l'invention des procédés de moulage, elle ne remonte pas au delà du xiv^e^ siècle. Le mode de reproduction le plus ancien est celui de la fonderie, puisque les Egyptiens et les Grecs le connaissaient, mais ce n'était pas un moyen de multiplier une œuvre artistique ; il servait seulement à la transformer en un métal plus solide.

Les premiers documents que nous trouvons sur la règlementation des reproductions artistiques sont : une sentence du 11 juillet 1702, qui défend aux fondeurs de se dessaisir des ouvrages des sculpteurs, et aux sculpteurs des modèles faits pour les fondeurs ; puis une ordonnance de police de 1^er^ octobre 1737. Les règlements de 1730 des corporations de peintres et sculpteurs, ceux des graveurs, des ciseleurs et ceux des fondeurs de 1766 continnent aussi quelques dispositions prohibitives. Deux arrêts du Conseil du 19 juin 1774 et du 14 juillet 1787, sont plus explicites ; ils défendent expressément d'imiter les dessins des étoffes de soie et de les reproduire sans le conseviement de l'auteur. Nous avons va que la loi de 1795 assimilait pureœent et simplement aux auteurs d'ecrits les peintres et Ressinateurs qui font graver les tableaux et dessins ; les lois qui se sont succédé, ainsi que la loi de 1866. Ont reproduit la même assimilation ence qui concerne la gravure. En vertu de l'ordinnance de 1824, it faut faire le dépôt de trois épreuves des planches et estampes ; il faut en outre présenter un quatrième excomplaire pour obtenir

June 11th, 1837, copyright was bestowed upon authors for their lives, and to their heirs for thirty years thereafter. In the rest of Germany, by the act of union of the Germanic confederacy of 1815, copyright is perpetual[1] and there is a reciprocal security of copyright between Prussia and Austria. Then followed Bavaria in 1840; Saxony in 1844; Spain in 1847; Portugal in 1851; Denmark in 1857; and Italy in 1865.[2]

l'autorisation de police exigée par le décret organique de 1852. — Flinaux Legislation et Jurisprudence, concernant la Proprieté Littéraire.

[1] La proprieté littéraire en allemange est perpetuelle et transmissible, comme toute outre autre espèce de propriété.—Didot, La Proprieté Littéraire, p. 13.

[2] *Des legislations étrangères.* — C'est seulement depuis environ cinquante ans que la plupart des nations civilisées ont commencé à régler le droit de reproduction des œuvres littérares et des œuvres artistiques; elles se sont aussi occupées des œuvres dramatiques ou musicales, tant au point de vue de la publication qu'au point de vue de la représentation. Les solutions, auxquelles ces questions ont donné lieu, sont diverses, et parfois opposées entre elles; il est non seulement curieux, mais encore utile, de les grouper et de les comparer, afin de pouvoir mieux apprécier les différents points de vue sous lesquels on peut se placer relativement à une même question.

Les lois les plus nouvelles sont celles de Bavière du 28 juin 1865, d'Italie du 25 juin 1865, du Danemark du 31 mars 1864 et du 25 février 1866; plusieurs autres lois, quoque plus anciennes, sont également importantes, ce sont celles d'Espagne, d'Angleterre, d'Autriche, de Prusse, de Portugal et de Russie, et il faut avouer qu'elles sont plus complétes que la loi française, qui, comme nous l'avons vu, laisse à la jurisprudence le soin de résoudre presque toutes les questions.

La plupart des législations emploient le nom de propriété littéraire et artistique pour désigner les droits dont il s'agit; l'Angleterre les désigne sous le nom de droits de copie et la Hollande sous celui de droits de reproduction; en France l'ancienne formule vient d'être abandonnée pour adopter celle de droits d'auteur.

Œuvres littéraires.—Il faut noter d'abord qu'aucune nation

In May, 1840, a treaty was entered into by the Austrian-Lombardy and Sardinian governments providing for the security of literary property, and also

n'a adopté le système de la perpétuité ; et ensuite que toutes en Europe ont laissé à l'auteur un droit exclusif pendant sa vie ; la cession du droit n'est prohibée nulle part, elle est même suvent expressément accordée.

Pour les héritiers le délai varie dans des proportions assez notables, main on ne distingue guères, pour en régler la durée, entre les diverses classes d'héritiers, descendants, ascendants ou collatéraux. Du reste dans aucun pays on ne sort en cette matière du droit commun tel qu'il est établi relativement aux successions et aux droits des conjoints ; ainsi le conjoint survivant n'a pas de droit de survie au détriment des autres héritiers, si la loi du pays ne lui en accorde pas en toute autre matière. C'est un point qu'il est bon de remarquer puisque la loi française de 1866 accorde au conjoint survivant un droit viager ou de préférence, et déroge au droit commun dans ce cas spécial.

Le délai pour les héritiers est en Espagne et en Russie, comme en France, de 50 ans à partir du décès de l'auteur ;—en Italie de 40 ans ;—en Autriche, en Allemagne, à Bade, en Hollande, en Prusse, en Portugal, en Wurtemberg, en Saxe, en Hanovre, en Bavière, en Suisse de 30 ans ; en Belgique, en Danemark, en Suéde de 20 ans ;—en Grèce de 15 ans ;—à Venezuéla de 14 ans ;—à Rome de 12 ans ,—au Mexique de 10 ans ; au Chili de 5 ans ;—en Turquie le droit s'éteint avec la mort de l'auteur.

L'Angleterre, l'Italie, la Russie, la Suède, les Etats-Unis et la Suisse méritent sur ce point une mention particulière, parce que ces Etats ent inauguré des systèmes spéciaux.—La législation anglaise accorde 7 ans aux héritiers ; mais si, à la fin de cette période de 7 ans, il n'y a pas 42 ans écoulés depuis la première publication, les héritiers conservent le droit jusqu'à ce que cette période soit terminée ; ils ont donc 7 ans au moins, 42 ans au plus, suivant les circonstances.—En Italie deux périodes sont également distinguées mais avec plus de complications. Si l'auteur a vécu moins de 40 ans depuis la première publication, les héritiers conservent le droit jusqu'à la fin de cette période ; puis ils ont encore pendant 40 autres années, quoique l'ouvrage soit tombé dans le domaine public, un droit de 5 % sur le prix fort de chaque exemplaire. Si au contraire l'auteur a vécu plus de 40 ans, l'ouvrage tombe a sa mort dans le domaine public, mais la redevance de 5 % est

extending to works of science and art, to which the king of the two Sicilies, the grand duke of Tuscany, and the dukes of Lucca and Modena, acceded.

due aux héritiers pendant 40 ans à partir du décès de l'auteur. — La Russie avait précédemment adopté un autre système: les héritiers n'avaient que 25 ans; mais ce dàlai était augmenté de dix ans s'ils publiaient une nouvelle édition dans les cinq dernières années; l'intérêt de la société était ainsi sauvegardé; maintenant depuis l'ukase de 1857 le délai est de 50 ans. — La Suède, suivant le même ordre d'idées, n'a accordé 20 ans aux successeurs de l'auteur que s'ils faisaient une nouvelle édition; et on peut les mettre en demeure de l'exécuter. —En Danemark il existe une règle analogue: si depuis cinq ans l'editeur n'a plus aucun exemplaire de l'œuvre, tout le monde peut publier. — Aux Etats-Unis le délai n'est pour les héritiers que de 28 ans à partir non du décès de l'auteur, mais de la première publication; il est de 14 ans en plus s'il y a une veuve et des enfants. — En Suisse il est aussi réduit à 50 ans à partir de la première publication et non du décès de l'auteur.

Il faut ajouter que dans certains pays en Angleterre, en Autriche, en Bavière, en Saxe, en Grèce le gouvernement peut accorder un privilége plus étendu.

Les sociétiés savantes, les académies, les universitiés, l'Etat, s'ils publient un ouvrage, ont en Portugal, en Prusse, en Russie, en Espagne, en Bavière, en Wurtemberg, en Allemange un droit égal à celui qui est accordé aux héritiers; en Angleterre il est perpétuel, en Autriche de 50 ans au lieu de 30, en Italie de 20 ans au lieu de 40.

Les ouvrages posthumes, c'est-à-dire publiés après le mort de l'auteur, sont également la propriété des héritiers en Angleterre, en Autriche, en Prusse, en Bavière, en Saxe, en Portugal, en Belgique, en Russie, pendant le temps qui leur est accordé pour les autres ouvrages, mais à partir de la première publication; en Espagne et en Danemark à partir du décès de l'auteur, il faut donc se hâter de publier.

En France le décret du 1er germinal an XIII a appliqué, quant aux œuvres posthumes, la même, protection aux héritiers qu'à l'auteur lui-même, à condition de ne pas joindre le nouvel ouvrage aux œuvres complètes; cette disposition est encore en vigueur en Belgique.

Les éditeurs de chants nationaux, proverbes, fables, contes

229. The Dutch law on the subject is somewhat novel. By the law of January 25th, 1819, the kingdom of Holland gives the author copyright for life,

ou de tous autres monuments de l'antiquité nationale, conservés par tradition orale, ont recu dans plusieurs législations une mention spéciale, afin d'encourager les recherches de ce genre; le Portugal leur acccorde trente ans, la Russie les protége pour une édition; en France la jurisprudence s'est prononcée dans un sens opposé et à défaut de disposition législative, on n'a pas cru pouvoir accorder aux amateurs de l'antiquité la protection due à leurs travaux.

Une autre classe d'œuvres, qui méritait une mention spéciale, c'étaient les discours, sermons, cours publics; plusieures législations l'Espagne, la Russie, l'Italie, le Portugal, l'Angleterre, l'Autriche, la Prusse, la Bavière, la Saxe, le Danemark, se sont prononcées pour l'assimilation aux autres œuvres littéraires, mais la Prusse n'empêche les tiers de publier que pendant la vie de l'auteur; l'Angleterre a fait une exception pour les cours des professeurs rétribués, et l'Italie pour les discours prononcés dans les Chambres législatives, ou dans des réunions publiques sur un sujet d'intérêt politique ou administratif.

La Russie seule a réglé la question des lettres intimes, et elle a déclaré qu'elles étaient à la fois la propriété de celui qui les avait envoyées et de celui qui les avait reçues, de sorte qu'elles ne pouvaient être publiées sans leur consentement mutuel; le Portugal a seulement refusé protection aux éditeurs. Nous savons que la Jurisprudence française ne s'est pas encore aussi nettement prononcée sur la question.

Quant aux traductions des œuvres littéraires, peu de législations s'en sont occupées; l'Italie concède à l'auteur le droit exclusif de faire traduire son œuvre pendant dix ans à partir de la première publication; s'il ne l'a point exercé, tout le monde peut traduire, et acquérir sur la traduction des droits d'auteur dans les limites ordinaires. L'Autriche ne donne qu'un an pour publier. Les conventions internationales se sont du reste occupées de cette question, sur laquelle il était indispensable d'être fixé, les traductions se faisant le plus souvent dans les pays étrangers et non dans le pays où l'ouvrage a paru.

La loi Italienne a introduit une innovation assez singulière, c'est l'expropriation pour cause d'utilité publique, prononcée dans les formes ordinaires, le Conseil d'Etat entendu, au profit de l'Etat, des provinces et des communes; l'indemnité est

and to his heirs or representatives for twenty years thereafter. The penalty for infringement of copyright was: I. Confiscation of all unsold pirated copies in

réglée par trois expertes. L'Espagne avait déjà, il est vrai, adopté une disposition à peu près analogue, mais seulement en ce qui concerne les annotations faites d'un ouvrage; si elles sont utiles à la science, l'auteur peut reproduire l'ouvrage moyennant indemnité réglée par experts. En France rien de semblable n'existe encore; la loi du 10 fructidor an IV permet seulement à l'Etat de traiter à l'amiable avec les auteurs pour les ouvrages d'instruction publique.

Avant les traités internationaux, le droit des étrangers était le plus souvent méconnu; nous savons cependant qu'en France, le décret du 28 mars 1852 leur a accordé sans conditions la même protection qu'aux Français; le Chili et la république de Venezuéla ont seuls une disposition semblable. Le Portugal, l'Autriche, la Bavière, la Saxe, le Danemark, la Suède, la Grèce ont établi un droit de réciprocité. En Espagne on ne pouvait, avant les traités, introduire d'ouvrages étrangers sans une autorisation, qui n'était pas donnée pour plus de cinq cents exemplaires.

Comme en France, le dépôt est exigé en Espagne, en Italie, en Portugal, en Belgique, en Hollande, dans les Etats-Romains, aux Etats-Unis, au Chili; en Saxe et en Bavière, s'il n'est pas effectué, il n'y a pas pour cela déchéance du droit de poursuivre en contrefaçon; il n'a pas lieu en Danemark, en Suède, et en Autriche. En Angleterre, en Russie, et en Prusse il est remplacé par un enregistrement de l'œuvre sur un registre spécial.

La contrefaçon est en général un délit qui ne peut être poursuivi d'office sans qu'il y ait plainte de la partie lésée; la contestation est portée devant les tribunaux civils ou correctionnels. En Russie les tribunaux peuvent consulter l'Académie des Beaux-Arts, en Autriche des experts littérateurs ou artistes. — En Angleterre la cour de la chancellerie peut rendre, préalablement au jugement, une injonction pour faire cesser de suite la vente et le préjudice causé.

La contrefaçon est en général punie simplement de peines pécuniaires, sauf en Autriche où il y a emprisonnement en cas d'insolvabilité, en Portugal en cas récidive, et en Russie où la peine du fouet et celle de la déportation peuvent être appliquées.

Œuvres dramatiques. — En ce qul concerne la reproduction des œuvres dramatiques, il suffit de dire qu'elle est partout

the kingdom. II. A fine equivalent to the value of 2,000 copies of the original edition, to the use of the proprietor; and III. A fine of not less than one hundred

assimilée expressément ou tacitement à la reproduction des autres œuvres littéraires.

Quant au droit de représentation il a été souvent réglementé d'une autre façon. Il est, il est vrai, concédé à l'auteur pendant sa vie dans toutes les législations qui ont parle des œuvres dramatiques; mais le délai accordé à ses héritiers est parfois moindre que pour la reproduction; ainsi la Belgique ne leur donne que 10 ans au lieu de 20, l'Autriche, 10 ans au lieu de 30, la Prusse et la Bavière également, la Saxe 7 ans au lieu de 30, l'Espagne 25 ans au lieu de 50.

De plus la Prusse, l'Autriche et la Saxe distinguent si l'œuvre dramatique a été ou non publiée; si l'auteur l'a publiée, ses héritiers n'ont plus aucun droit sur la représentation. La législation italienne va même plus loin; l'auteur lui-même est déchu du droit de pouvoir défendre la représentation de son œuvre s'il l'a publiée; mais en ce cas lui et ses héritiers ont droit à 10 p. c. sur le produit des représentations pendant le temps qui reste à courir pour éteindre leurs droits renfermés, comme nous l'avons vu, dans la limite de deux périodes de 40 ans. Ces solutions dérivent de l'application de cette idée que l'auteur en publiant s'est dessaisi de son œuvre et qu chacun dès lors peut en faire usage; nous avons vu que ce principe est avec raison contesté.

Il existe en Danemark une disposition particulière en cas de cession, c'est que si le concessionnaire a laissé passer cinq ans sans représenter l'œuvre; l'auteur en reprend possession; c'est une sorte de libération de servitude par le non-usage.

Œuvres d'art.—En ce qui concerne les œuvres d'art, plusieures législations les assimilent sans grands détails aux œuvres littéraires. Il n'y a à noter que quelques dispositions particulières.

L'Angleterre accorde aux graveurs, peintres, dessinateurs, photographes vingt-huit ans à partir de la première publication; quant aux héritiers, ils ne font que continuer chaque période de quatorze ans; l'œuvre originale doit être enregistrée au bureau des libraires et chaque exemplaire de gravure doit porter le nom du propriétaire et la date de la première publication.

La Russie suit le même système que pour les œuvres litté

raires. Elle s'occupe aussi du droit, que l'on peut a[illegible]r, d'imiter ou de copier une œuvre originale pou en faire une

or more than one thousand florins to be given to the poor of the district where the offender resides. A second offense disabled the offender from exercising his "trade of printer or bookseller."[1] In Prussia, copyright is for the author's life, and to his heirs for thirty years. The assignment of his work by an author to a publisher only entitles the latter to issue a single edition thereof, of a size optional with himself. (This principle is adopted in Saxony and Bavaria also, the edition in the latter being limited—in the absence of express stipulation—to one thousand copies.) A distinction is made by the Germans between reprints or new issues

autre œuvre originale; ce droit est restreint quand il s'agit d'œuvres de même nature, mais on peut reproduire par la sculpture un sujet de peinture et réciproquement.

L'Italie accorde aux artistes et à leurs héritiers les mêmes délais que pour les œuvres littéraires en ce qui concerne la reproduction faite sur ébauche de l'auteur. Il faut noter que l'auteur peut seul, pendant dix ans, faire de son œuvre une œuvre d'espèce, différente, d'un tableau une statue et reciproquement; après dix ans ce droit ne lui appartient plus exclusivement; cette transformation est assimilée à la traduction d'un ouvrage en langue étrangère.

Le Danemark concède aux héritiers des artistes trente années, comme pour les œuvres littéraires; la photographie et le moulage sont considérés comme œuvres d'art originales; on applique encore cette règle déjà signalée, à savoir que l'œuvre tombe dans le domaine public si l'éditeur ne possède plus depuis cinq ans un seul exemplaite de la dernière édition.

L'Autriche ne laisse à l'auteur le droit exclusif de reproquire son œuvre que s'il le fait dans les deux années qui en suivent la confection; et il faut qu'il se soit réservé ce droit.

L'Espagne ne protégé pas les dessins pour tissus, meubles et autres objets d'un usage commun. En Danemark il existe une disposition analogue, mais le fabricant peut obtenir un privilége de dix ans relativement à sa reproduction.

Les cartes géographiques et les plans sont spécialement protégés en Angleterre, en Espagne, en Danemark, et aux Etats-Unis.

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[1] Lowndes on Copyright, App. 121.

(Auflage) and new editions (Ausgabe).[1] In the case of the former, the publisher may reprint as often as he pleases, by paying to the author, for each new issue, half the sum paid by him for the first. The new edition can only be issued by the author's written consent. This privilege is limited to the author's life, though his children have a claim for an honorarium for each edition issued after his death.[2] Copyright in the kingdom of Greece is for fifteen years from the date of publication.[3] The German confederation of 1837 fixed copyright at ten years, but granted it for a longer period in voluminous and costly works, and in the works of the great German poets.[4] This was changed

Les œuvres d'architecture sont assimilées en Russie et en Portugal aux autres œuvres d'art; la production n'st donc point permise; la jurisprudence française semble aussi se prononcer en ce sens au profit des architects. En Bavière le contraire a été décidé par la loi de 1865. La loi de Danemark de 1864 distingue s'il s'agit d'une façade extérieure ou d'une construction qui n'est pas livrée aux regards du public; la reproduction n'est permise que dans le premier cas.

La cession de l'œuvre dessaisit-elle l'auteur du droit de la reproquire par la gravure, le moulage ou autrement? La Bavière s'est prononcée pour la négative, la Prusse pour l'affirmative; la Russie fait une distinction; l'artiste n'a cédé le droit de reproduction que si la chose n'a pas été faite sur commande ou pour l'Etat. Nous avons vu que la jurisprudence française s'était prononcée dans le sens de la cession complète de la part de l'artiste.

Le dépôt n'est pas ordinairement exigé sauf en Portugal pour toutes œuvres d'art, et en Belgique pour la gravure; en Angleterre il faut faire enregistrer au bureau des libraires.—Flineiux.

[1] "Ausgabe" in the practice of the the trade means either the same book with a fresh cover or title, and not necessarily printed afresh; or: it applies to the size or style of getting up, as 4to-ausgabe, Octav-ausgabe, Pracht-ausgabe, Illustrirte ausgabe, &c.

[2] Copinger on Copyright, p. 241. [3] Id. p. 244.

[4] The works protected were:

Schiller's works for twenty years from November 23, 1838.

by decree of the diet, June 10th, 1845, to a duration for the author's lifetime, and for thirty years thereafter, and the same decree enacted that in the works of all authors deceased before the 9th of November, 1837, a copyright should exist for thirty years beyond that date.[1] In Denmark, copyright is perpetual. It lapses, however, if the work in which it exist remain out of print for five years.[2] In Sweden copyright inures to the author for twenty years, but if he or his author fail to continue the publication, the copyright falls to the state.

230. In the United States, the term of a copyright was fixed, by the act of 1790, at fourteen years, with a right of renewal for fourteen years longer. By the act of 1831, the first term of a copyright was enlarged to twenty-eight years, with a right of renewal, as before, for fourteen years; thus, in effect, creating a protection for forty-two years. And such by sections eighty-seven and eighty-eight of the law of 1870—which repealed all existing laws of copyright—is still the term in this country for which copyright is secured.[3]

Goethe's works for twenty years from April 4, 1840.
Jean Paul's " " October 22, 1840.
Wieland's " " February 11, 1841.
Herder's " " July 23, 1840.

[1] Copinger on Copyright, p. 243. And see "Das Urheberrecht und das Verlagsrecht, nach Deutschen und Ausländischen Gesetzen," &c., von Dr. R. Klostermann.

[2] The 38th section of the ordinance of July 11, 1837, extends the protection of the Danish law to works first published in a foreign state, in the same proportion as works first published in Prussia are protected in that foreign state. Copinger on Copyright, p. 242.

[3] U. S. Revised Statutes, Revision of 1873-4, § 4948. The question as to the expediency of a longer or shorter term of copyright is one upon which much is at present being said and written. The following instructive extract upon the subject is reprinted from the supplement to the Encyclopœdia Britannica:

Congress, however, can grant such exclusive rights for any period, or extend existing terms, as it may see fit; and it has frequently exercised such

"We are now to enter on the grand question, of the 'advantages of a further prolongation of the term of copyright;' —a question that has never yet been brought fully before the public, and which requires a considerable share of previous explanation.

"We shall begin, by examining a very material point,—we mean the dispositions and habits of those with whom authors have principally to deal, and here, from long familiarity with men of business, we entreat the particular attention of our literary brethren; for, however anxious to be instrumental in procuring them relief, we must not hesitate to point out their errors or misconceptions. Of the surprising quantity of publications issuing annually from the press, not a tenth part are the production of writers of established character; the rest proceed from candidates whose reputation is yet to make. In what manner are booksellers to form an estimate of the mass of unknown MSS. thus laid before them? Their own habits are not those of study but of business, and they must consign the task of examination to friends who have been called, not unaptly, 'literary tasters.' Need we wonder that the patience of the critic should be put to a severe test by the mediocrity of the great majority of these performances, and that his report should, in general, be so little decisive, that the bookseller is led into the habit of putting one work on a par with another, and of subjecting them, in the mode of publishing, to the coarse application of a common rule? It has become the avowed practice to decline any other terms for a new work than those of defraying the paper and print in return for the manuscript, and in the understanding that the profit of the edition, if there be any, shall be shared between the bookseller and the author.

"Now, this plan of publishing, however natural in the present state of the law, is replete with mischief to all parties, bringing forth a mass of books which ought never to have seen the light, and which, in truth, would never have been published, could the writer or publisher have foreseen their failure. It is a remarkable fact, disclosed in the inquiries arising from a late parliamentary discussion, that only 'one publication in eight is found to come to the second edition.' (See evidence taken by copyright committee in 1814.) The

power, by special acts, even after the expiration of terms secured under the general law.

234. Having paused for the chronological order

unfortunate limitation of copyright discourages literary men from the labor necessary to produce standard works; and the bookseller, tempted to assail the public by the attraction of novelty, goes on publishing books by the dozen, in the hope that some lucky chance may make up for his past disappointments.

"All this shows that, in the great majority of cases, the contract between an author and a bookseller is made without previous data, and is nothing more nor less than what is commonly termed a blind bargain. Dr. Paley, on finishing the MS. of his 'Moral and Political Philosophy,' tendered the copyright of it to a bookseller for £300, and was offered in return £250, exactly in the way that a cautious purchaser takes care to bid for unknown merchandise. During this negotiation, it happened that a brother of the trade, apprised of the value of Paley's work, came boldly forward and offered £1,000 for the copyright. The author consenting to give the party first in treaty the previous option, the latter now saw the matter in a new light, and ended by paying four times the amount of his original offer.

"No notion is more general among authors than that booksellers make rapid fortunes at their expense. One writer has published, that Jacob Tonson and his nephew died worth £200,000 (D'Israeli's Calamities of Authors, vol. 1, p. 29); and not one reader in twenty will stop to question the accuracy of the allegation. It is our firm belief that such a sum was never possessed by any bookseller, or partnership of booksellers, that ever existed (*sic*). Among them, as in all lines of business, there are examples of considerable capitals, but these are only realized in the case of long-established concerns, and after a progress of acquisition infinitely slower than the angry imagination of a disappointed author allows him to believe. In his eagerness to take for granted that his publishers are getting rich at his expense, he forgets the history of the fathers and grandfathers of the present men, and omits to mark the slow steps by which they paved the way for the eventful rise of their descendants. He fails, likewise, to scrutinize another material point, namely, the quantum which a close calculator would deduct from the estimated fortunes so liberally assigned by current report to booksellers. The latter, like all men in

of the statutes, let us now resume tracing the principles of literary property as they come before the courts for enunciation. The conflicting claims of com-

business, are desirous of passing for affluent; but, if so few publications are found to be successful, must there not necessarily follow a large abatement from the imagined extent of their annual gains? It is, on various accounts, a matter of regret, that the limited profits of the bookselling business should not be better understood by literary men. The discovery of it would remove the film from their eyes, would lessen greatly their habits of complaint, and would lead to cordial co-operation for redress of their common grievances. We may with confidence assert, that a small offer from a bookseller, as in the case of Paley, is indicative, not of a design to overreach, but of an apprehension that, to give more, would be to injure himself. On the other hand, we are by no means disposed to launch out into a penegyric of the liberality either of particular individuals, or of the body at large. Like other men of calculation, they naturally mete out their advances, not by attachment to the writer, but by the extent of the expected return. A large allowance for a finished book, denotes a confidence of extracting a still larger from the public, while the scanty, and apparently niggardly, payment of an unknown author, is a token of the fear and trembling with which a bookseller handles a production of doubtful promise.

"The customary agreement between a bookseller and a new author proceeds as follows: The latter having prepared a work, of which he has high hopes, but in which he has not had either guidance or advice, sets out by making an offer of his MS.; and, after some time taken for consideration, is answered, that his name not being yet known to the public, the publishers can not take on themselves to make him a payment for his labor, but are willing to give it to the world on their joint account. This leads to a compact in terms somewhat like the following:

"'It is agreed between Messrs. Y. and Company, booksellers, and Mr. Z. that Messrs. Y. and Company shall print and publish for their account, jointly with Mr. Z., in two volumes, octavo, his historical work on ———. Mr. Z. supplying the manuscript, and Messrs. Y. and Company taking on themselves the paper, printing, and other publishing charges. The statement of the account to be made up every year at midsummer; and when, after deducting the various publishing expenses, there shall appear a balance of profit, the same to

mon law and statutory rights of authors, we have said, first came before a court in the great case of Millar v. Taylor.[1]

be equally shared between Mr. Z. and Messrs. Y. and Company. The books to be accounted for at the regular trade sale price."

"The publication now takes place, and in a twelve-month after, an account is made up in the following form:

Dr.	History of ———			Cr.		
Printing 60 sheets at 40s..	£120	0	0	750 Copies printed, retail price 21s. the price to the trade 15s. 150 copies sold and delivered in sheets, at 15s.	£112	10	0
Over-running and Corrections.....	9	0	0				
Paper, 90 reams at 30s...	135	0	0				
Advertising.....	30	0	0				
Boards for 25 copies delivered to the author's friends.....	2	10	0	Balance at Dr., carried to next year.....	184	0	0
	£296	10	0		£296	10	0

"Next year the account is considerably shorter, the charges consisting only of advertising and interest of money; but the attraction of novelty having gone off, the sale is also less and does not probably exceed eighty copies, leaving still an adverse balance of £100. The bookseller goes on with mercantile punctuality to render him a further account, but the sale is now in a state of progressive decrease, and does not, for the third year, exceed fifty copies, leaving still an unfavorable balance of £80. The author now loses patience, and entreats the bookseller to relieve him of all responsibility, by taking over the remaining copies, and considering the account closed. Such is the fate of five-sixths of the books, great and small, that come before the public. Composed without the benefit of experience, they are unprofitable to the publisher, uninstructive to the reader, and discouraging to the author. If we are suspected of stating an extreme case, let another be supposed, in which the author is less of a novice, and in which a bookseller, from confidence equally in him and in the subject, ventures to make an advance of money, and to agree to pay a fixed price for the copyright. An arrangement is made for bringing out the work against a given time, and the writer proceeds with all the ardor attendant on a new enterprise. Authors, however, were never remarkable for accurate calculations, or, rather, their undertakings are almost always found to require more time and labor than is anticipated:—

[1] 4 Burr, 2314.

Previous thereto, the property of a book seems to have been considered as permanent as the property of an estate in lands or tenements. The limitation of a

the prescribed time expires, and the bookseller agrees to postpone it for another twelvemonth. This also passes away; the publishing season draws near; the work is still unfinished, but the author is impatient of further labor, and the bookseller thinks it high time to get a return for his money. The work goes to press, and comes out without either a correction or an acknowledgment of its imperfections, unless the author be particularly modest, in which case the public is requested, in a well turned apology, to make allowance for his multiplied avocations and the urgent nature of the subject. This is the case with almost all the better class of our new publications; the sale, in such cases, is somewhat less unfavorable than the specimen given above; but four or five years are requisite to run off a new edition, and, on coming a second time before the public, it is necessary for the author to do what should have been done at first—revise and correct the whole. A second edition comes out, but under considerable disadvantages; the attraction of novelty is gone or greatly impaired; the number of readers is lessened by those who have purchased copies of the first edition, and the character of the book has been estimated, in reviews and elsewhere, by an unfavorable standard. The bookseller is thus curtailed of profit, the author of reputation, yet each has the happy gift of throwing blame off his own shoulders; the publisher attributing the failure to the distraction of the public attention by some unlucky novelty, while the other vents his complaints on the incurable frivolity of the age. In truth, neither of the parties is much to blame; their conduct is the natural result of their situation; the haste of authors and the acquiescence of the booksellers are mainly owing to the short-lived tenure of the fruits of their labor; the habits of the one and the calculations of the other having been all along adapted to this state of things.

"Is there then no remedy for so modifying a state of things? No method of relieving the public from such an unprofitable expenditure of time and attention? Some have been desirous to call in the patronage of government, and have argued, that literature can never, like the coarser objects of industry, find adequate repayment in the fruit of its exertions. It is, indeed, a current subject of complaint among authors, that there should not be a larger proportion of provisions for life appro-

fixed number of years in the act of 1709 seemed to have no practical effect in the matter, and copyright was still considered permanent, by authors, booksellers, priated to literary men. Sed non tali auxilio—whatever be their distress, we beg to deprecate any interference on the part of government. No engine is so formidable as the press in the hands of an arbitrary or artful ruler. Look at the degraded picture exhibited, during a succession of years, by the French press; and you will find men, who, under the auspices of freedom, would have acted an independent part, tempted, threatened, and gradually compelled to become the advocates of a tyrant, and to participate in the guilt of riveting the chains of their countrymen. It is in vain, even for a liberal legislature or a disinterested sovereign, to attempt to make up for the deficient reward of literary labor, by granting pensions or creating places for men of letters. These measures, though apparently beneficial, carry with them all the disadvantages of irregular and unnatural interference. A literary man promoted, as is not unusual in France, to a government employment, is withdrawn from his proper sphere of utility; he becomes lost to general reasoning and liberal views amid the endless details of practical routine. The pension granted to Johnson by Lord Bute was generally approved, both as the fair reward of past industry, and as a seasonable relief to pecuniary difficulty; but what was the consequence? It fostered his natural indolence, prevented the composition of further works, and, by enabling him to live in idleness, rendered him perpetually dissatisfied with himself. Had the property of his literary labor been permanent, he would have received twice as much from the booksellers, and might have continued his proper pursuits under circumstances progressively improving, without incurring the humiliation of dependence, or degrading his name by the composition of party pamphlets.

"It is equally vain for zealous friends to attempt making up for the inadequacy in question, by procuring private subscriptions for a work; for whatever may be the success, in a pecuniary sense, the step is humiliating to the author, is liable to abuse, and is, besides, an interference with the proper business of a bookseller. One of the most splendid of such examples was Pope's translation of Homer; an undertaking where the importance of the task and the talents of the translator called equally for liberal remuneration. Pope was perfectly ready to sacrifice several precious years for the sake of

and the public, no less than by three[1] of the four judges of the king's bench in which that case was first heard.

eventual competency, and he found in his friends, particularly in Swift, most zealous promoters of his views. Proposals were circulated, liberal subscriptions were obtained,and a favorable bargain made with the bookseller; the translation of the Iliad was executed, and will forever remain a proof of the perseverance to which an author may be prompted by the love of fame, when relieved from pecuniary pressure, and enabled to give long-continued labor to his task. So far all was well; but the success of this first undertaking induced Pope to resort to the same method for publishing a translation of the Odyssey, which proved far inferior; being performed either hastily by himself, or by two coadjutors, whose respective contributions, though not altogether concealed, were unfairly represented to the world. Could such an abuse have taken place had sub-

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[1] In the session of 1873-4, this question came decisively before parliament, the booksellers having brought in a bill for declaring copyright perpetual. This bill passed the commons, but was thrown out, after much debate, by the lords. Lord Mansfield, and Willes and Aston JJ., per contra Yates, J. An action for a similar trespass was some time after brought before the court of sessions in Scotland; the London proprietor of a copyright claiming damages for an infraction by a provincial bookseller (Hinton v. Donaldson). Here the majority of the bench were adverse to the opinion formerly delivered by Lord Mansfield, and discharged the defendant with only the dissentient voice of Lord Monboddo.

The booksellers managed, however, to carry their point by means of addenda, which they managed to procure and add to the work at the end of the copyrighted term. Forty years after, in 1814, the extension to twenty-eight years was re-enacted. Gibbon did not scruple to write to his publisher, that a thorough revisal of his history would form "a valuable renewal of the copyright at the end of the term."—Correspondence from Lausanne Memoirs.

Booksellers follow this plan avowedly and habitually; and it is the remark of a very intelligent writer on the subject of copyright, that, unless a change take place, our purest and best authors will become so disfigured by annotation, and increased in price by increased bulk, that the early editions will be called for.—Address to parliament on the claims of authors, 1837.

232. Millar v. Taylor,[1] was an action brought in 1766 for pirating "Thomson's Seasons," in the court of King's Bench, where it was elaborately argued. That

scription been out of the question, and had the remuneration of Pope been proportioned to the eventual sale of his book? The public would, in that case, have had a translation of equal merit with its predecessor, and Pope would have been spared the reproach of a literary imposition. The least exceptionable mode of rewarding literary eminence is by church preferment in the southern part of the kingdom, and by admission to professional chairs in the north. But the extent of both, particularly of the latter, is limited, and does not always place a man in that station where he can be most useful, or in the mode of employment most congenial to his habits. Both besides require more of connection, of interest, and of management, than commonly falls to the lot of a retired student.

The only effectual plan is, to find the means of relief in the prosecution of literature itself; to relieve it from existing shackles, and to allow every writer to reap his reward in the sale of his books, exactly as we do in other kinds of employment. This is all that literature wants, and all that it is good for her to have. She will then make no claims to patronage from government—no appeal to the subscriptions of private friends—nor will appointments in the church, or at universities, be an object of indecent contention; they will be coveted by a smaller number, by those only whose particular habits fit them for such situations. Perpetuity of copyright is as much the right of the author or purchaser of a book, as of the builder or purchaser of a house; and the public will never reap its full harvest of advantage from literary compositions till the law be made to confirm the claim of equity. But, as this opinion is as yet far from general, the true plan is to desist from pressing it to its extent, to demand only the grant of a specific period, and to leave the public to enact perpetuity at a future time, when it shall have had practical and undoubted evidence of the beneficial effect of prolongation."

"La justice, le bon sens et l'équité veulent que la propriété littéraire ne soit plus un mensonge sous forme de concession temporaire. Il faut qu'elle soit une propriété garantie par les lois, inviolate et à toujours; . . . . . Un ouvrage ne prend son essor que des qu'il est delivré des entraves du privilége exclusif. . . . . Est it possible de

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[1] 4 Burr. 2314.

court, in 1769, gave judgment in favor of the subsisting copyright, Lord Mansfield, Mr. Justice Willes, and Mr. Justice Aston, holding that copyright was perpetual by the common law, and not limited by the statute, except as to penalties, and Mr. Justice Yates dissenting from them. In 1774, the question was brought up again in Donaldson v. Beckett, before the lords, when eleven judges delivered their opinions upon it, six of whom thought the copyright limited, while five held it perpetual; Lord Mansfield, who would have made the numbers equal, retaining his opinion, but expressing none. "By this bare majority—against the strong opinion of the Chief Justice of England—was it decided that the statute of Anne substituted a short term in copyright for an estate in fee; and the rights of authors were delivered up to the mercy of succeeding parliaments."[1]

The case of Donaldson v. Beckett[2] and others, before the House of Lords, February 9, 1774, was an appeal from a decree founded upon this judgment in Millar v. Taylor, and it was ordered that the judges be directed to deliver their opinion upon the questions:

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

concilier la liberté du commerce et le droit de l'auteur? Rien n'est plus facile; il ne s'agit pour cela que de changer le privilége exclusif temporaire en un privilege perpétuel sur les réimpressions des ouvrages: . . . . . Déclarez donc l'abolition du privilege exclusif, permettez à tout le monde l'impression des livres quels qu'ils soient, mais sous condition d'un droit à payer chaque fois aux auteurs."—Bossarge.

[1] Speech of Sergeant Talford, in parliament, May 18, 1838.

[2] 4 Burr. 2305.

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

3. If such action would have been at common law, is it taken away by the statute of 8th Anne; and is an author by the said statute precluded from every remedy, except on the foundation of the said statute, and on the terms and conditions prescribed thereby? —Together with the further questions, of which the first three appeared to be conclusive.

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

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

Eleven judges delivered their opinions upon these questions; eight to three were for the affirmative upon the first question; four to seven on the second; and six to five on the third; and the great question was at last laid to rest and decided for thenceforth, that, although an author had by common law an exclusive right to print his works, and did not lose it by the mere act of publication, yet the act of Anne completely deprived him of that right, and substituted the statutory right in its stead. In Scotland this same question had been tried in 1748, twenty-six years earlier, and decided against the author's right.[1]

[1] Midwinter v. Hamilton (Mor. Dict. Dec. 19, 20, 8305), 1 Cr. & St. 488. The same was pronounced in Hinton v. Donaldson, July 28, 1773, Id. 8307; 5 Brown's Sup. 508; Cadell v. Robertson, Dec. 18, 1804; Mor. Dict. of Dec. App. Lib. Prop. 5 (5 Paton, 490). Payne v. Anderson, 1 Mor. Dict. of Dec. 19, 20, p. 836.

233. The question may perhaps be disposed of by saying that statutes of copyright do not seek to alter, abridge, or in any way interfere with the author's personal property at common law in his work, and in his right to use and enjoy the product of his labor;[1] that "where such statutes find it there they leave it;" and that an author may, as before, proceed to sell his manuscript, or publish and sell his book, just as we have seen the Roman author do in the days of Martial.

[1] Palmer v. De Witt, 7 Amer. 480, 47 N. Y. 532. Per contra, however, see Clayton v. Stone, 2 Payne, 382; Wheaton v. Peters, 8 Pet. 662; Dudley v. Mayhen, 3 Coms. 12; Stevens v. Cady, 14 How. 530. This doctrine underwent a learned decision in the court of common pleas, in the case of Lonson v. Collins (1 Bla. Rep. 301, 321), but the point was not determined. It was afterward agitated in Miller v. Taylor (4 Burr. 2303), where three judges, among whom was Lord Mansfield, delivered very elaborate opinions to prove the existence of the right. But Mr. Justice Yates, in a most profound and eloquent opinion, declared that an author had not such a common-law right. The same question arose in Becket v. Donaldson (Bro. P. C. 145; 4 Burr. 2408), when it was decided without discussion in favor of the right, in order that it might immediately be carried by writ of Error into the House of Lords—who held that if the right contended for ever did exist, it had been abrogated by the statute of 8 Anne (Godson's Law of Patents, pp. 203, 205). The question practically can never be of much importance, since no one would be likely to labor to establish a right, and remedy at common law, when so easy and simple a protection is afforded them by statute.

1 De Witt v. Palmer, 7 Amer. 488. The common-law right of authors is expressly recognized by Story in his commentaries. In considering article I., section 8, of the constitution, he says: "This power did not exist under the confederation, and its utility does not seem to have been questioned. The copyright of authors, in their works had, before the revolution, been decided in Great Britain to be a common-law right, and it was regulated and limited under statutes passed by parliament upon that subject" (3 Story, Com. 48). "It was," says Chancellor Kent, "for some time the prevailing and better opinion in England."

But when the modern process of publication by printing not only supersedes the value of the manuscript, but actually and materially destroys the manuscript itself, by tearing it apart, separating it, and distributing it piecemeal among compositors, and in other ways rendering it waste and worthless, while the common-law right of property of its author therein undergoes no change whatever, it becomes practically abrogated by the destruction of the thing in which it inhered, and the author, for whom the process of multiplication of copies by printing has developed a new value in his work, is nothing loth to ignore this right to the paper upon which he wrote, for the sake of his more profitable right to follow the words and thoughts first borne upon it, in their flight beyond him into the open world. Statutes of copyright, then, in theory, have nothing whatever to do with the author's right to his work; they have simply and solely to deal with the multiplication of copies thereof.[1] And the only exception to the rule arises, when a statute like the present copyright act of the United States, contains, as we shall see further on, a provision against the printing of an author's manuscript without his consent.

All his property in his own ideas, indeed, that he has under them, he had before, but the printing press, by making it a property worth pirating, and at the same time furnishing the facility for pirating it, has made him eager to invoke the protection of a new law which will secure him from its infringement. A law no surer than the old, but stronger and more speedy in its relief.

234. In order to secure the protection of this statute, the author must give its price. But it is not

[1] Palmer v. De Witt, 7 Amer. 480, 47 N. Y. 532.

one that it will trouble him to pay. The statute only asks first, that he advertise the fact of his having sought its protection, by appealing to it formally; and second, in case he shall not so formally and notoriously appeal to it, that he shall be deemed to have waived his common-law right—not to his manuscript—but to his ideas and words, and to have dedicated them forever to the use of whomsoever shall choose to employ them for profit after he has published them to the world, and made every individual therein who cares to read them, master of them and of the expressions in which they are clothed (which, as long as he kept them spread upon a manuscript to which he alone had access, were exclusively his own). But once having dedicated them to the public by publication, they are equally at the service of all. They are (if so the case be) at everybody's mouth. He is now only one of many who possess them equally with himself. He has elected that it be so, and there is nothing in the common law that can give him the benefit of his labor beyond the reputation that they earn for him.

If he have preserved the manuscript, whose contents have been printed, it will still be larceny in one who appropriates it, but anybody may appropriate and multiply copies of its contents. To obviate this injustice, statutes of copyright arise and say: You shall have the exclusive profit that arises from your own sentiments, even though you have voluntarily published them to all mankind.[1]

235. If there exist anywhere the right to multiply copies of a work, surely no one can show so perfect a title to the right as the author whose original con-

[1] If a work is published without a copyright being secured, this is a dedication of it to the public, and any one may republish it. Bartlett v. Chittenden, 5 McLean, 37.

ception it was, and who first gave it form and system no less than bodily and physical shape.

In the first instance the work is his, and he may lock it from the eyes of the world—if he will. But the author does not desire to keep forever to his own contemplation the work he had produced, any more than the painter wishes to hold forever for his own enjoyment the picture he has wrought upon canvas, and to exclude the rest of the world from the sight thereof. Works of literature and art tend to improve, cultivate, and refine the race. And, as lord Camden said: glory is the reward of their authors. Their promulgation, therefore, is their life; and the wider their circulation, the vaster their influence and the instruction they diffuse. Now the difference between literary and all other property arises just here. In order that these works shall have their due influence, they must be made the individual property of each reader, be absorbed with his own intellect and his own consciousness, until they are his thoughts and ideas as completely as they ever belonged to their authors. It is by their appropriation that their author and real owner is benefited. A contrivance by which, the more he parts with his works, the more substantially they are his own, must necessarily be a creature of some written law, although the ground upon which it is founded, and which Blackstone calls "title by occupation," is an unwritten and a natural law.

It is the purpose of the author and the painter, not only to achieve glory, but a livelihood—to receive a direct compensation for the instruction, or the pleasure which his works communicate to their neighbors, and the search of the examiner of the law of literature and of art is to discover how this can be done, and

how to find the right, and the substance to which the right may attach.

236. The whole claim of literary property is a claim simply of a right to multiply copies of the author's work, and to part with the same for value. The more completely the ideas and sentiments of the work are appropriated by those before whose eyes these copies may fall, the better the author is satisfied. The more widely it is cited and quoted by contemporary authors, the more widely his reputation is extended. So long as copies of his whole work are not multiplied, without his license, his right is not infringed. If the purchase of a single copy of a work passed to the purchaser, a right to multiply the same for his own profit, the price set upon each copy would of necessity approximate to the value of the original manuscript of the work itself, and thus the laws of copyright, by regulating duties, regulate also prices, and are beneficial to mankind generally, by placing within their access works of literature and art for their instruction and delectation, which without them must of necessity be too costly for any but the wealthiest citizens.

237. Again, the laws of copyright, by securing to the author the sole right of multiplying copies of his work, are a benefit to mankind, since they preserve to them the author's sentiments and knowledge in their purity. If the multiplication were in other hands, there would be no security for the accuracy of such multiplied copies. Since the reputation of the author is dearer to himself than to any one else, and since upon the careful and scrupulous exactness of his published writings his reputation depends, he will certainly sanction no imperfect or interpolated version or copyright of his own work.

238. But why is this right to be limited, if right at all? Why is it ours for twenty-one, or twenty-eight, or thirty-five years, only? Perhaps, say the disappointed authors, "Before we published our work, it was ours perpetually. Now we have benefited mankind by communicating it to them, we are rewarded by having our own bestowed upon us for an arbitrarily prescribed and limited time."

This may, and undoubtedly does seem a hardship. But upon examination, we will find that, since the only profit an author can secure from the labor of his brain, is the profit which arises from the parting with its possession,—from its dedication to the public,—it is a benign law which enacts that, although he part with it, he shall yet retain the profit which arises from it.

And, furthermore, we will find that it is only a following out of the principles which govern all property. Supposing, for instance, that the owner of twelve lots of land, in a certain neighborhood, conceive the idea of donating one of them to the community for a public building, or to a religious society for a church edifice, in order that the improvement of the one lot shall enhance the value of the eleven he still retains. In this case he profits by the alienation and dedication of his land, but he cannot, nor does he expect to retain the twelfth lot, and give it away at the same time. And yet the owner of literary property is enabled by the statutes of copyright —we may almost assert—to give away and profit by the gift, and still to retain the possession and the profits of that which he gives away. Or, to make the analogy perfect, the lawyer or the physician may publish works relating to his profession, and thereby enhance his own reputation and consequent practice, just as the capitalist increases the

value of what he has left by the loss of what he gives away. Only in the latter case of the lawyer or physician, what he gives away he still retains. Moreover, the shortest term for which a copyright is ever granted, far exceeds (such is the mutabilty of all literary tastes) the average life of a literary composition. The number of published works that survive their first copyright, will be found to be exceedingly small.[1]

And lastly, while we see, everywhere, traces of the public policy of nations to encourage authorship,—not only of those immortal productions which add to the national lustre, and whose fame is a portion of the national birthright, but those humbler productions of well-directed labor, through whose elementary simplicity lies the entrance to the whole realm of knowledge,—there is no doubt but that the only means by which the state can protect those to whom it owes so much, is by means of this same limitation. True, it might, instead, protect the author by pains and penalties prescribed for his infringers, but states always prefer to abridge, rather than to extend their penal statutes, and it is hardly to be expected that they should be increased in favor of an exclusive right.

Another reason also exists against a perpetuity to the author, which is understood to have been suggested by no less a statesman than Napoleon the Great. Foremost in legal and political acumen, no less than in arms, the Emperor did not neglect, while shaping the

[1] What is the ordinary course of the business of a great publishing house? A large proportion of the books they send forth pass unnoticed, and hardly defray the paper and print. What loads of unsaleable volumes encumber their warehouse! What a world of expense do they incur for unproductive advertising! The success of the house depends on the very few works of standard merit (perhaps one in forty) which obtain extensive sale, and form a counterpoise to their ill-starred brethren.—Supplement to Enc. Brit. Art. "Copyright."

policy of a continent, to consider the private rights of his subjects. He is reported as having declared "que la perpetuité de la propriété dans les familes des auteurs aurait des incouvéniens. Une propriété littéraire est une propriété incorporelle, qui se trouvant, dans la suite des temps et par le cours des successions, divisée entre une multitude d'individus, finirait, en quelque sort, par ne plus exister pour personne; cas, comment un grand nombre du propriétaires, souvent éloignés les uns des autres, et connaissent à peine, pouvraient-ils s'entendre et contribues pour réimprimer l'ouvrage de leur auteur commun? Cependant, s'ils n'y parviennent pas, et qu'euz seuls aient le droit de le publier, les meilleurs livres desparaitront insensibiblement de la circulation." "Il y aurait un autre inconvenient non moins grave. Le progres des lumieres serait arrété, puisqu'il ne serait plus permis, ni de commenter, ni d'annoter des ouvrages: les gloses, les notes, les commentairs ne pourraient, être siparés d'un texte qu'on n'aurait pas la liberté d'imprimer.

"D'ailleurs, un ouvrage a produit a l'auteur et a ses heritiers tout le bénéfice qu'il, pouvent naturellement en attendre, lorsque le premier a en le droit exclusif de le vendre pendant tout sa vie, et les autres pendent les dix ans qui suivent sa mort.

"Cependant si l'on vent favariser davantage encore la veuvre et les heritiers qu'on porte leur propriété à vingt ans."[1]

That is to say, if perpetual, a copyright might come at last to be partitioned off among so many heirs and representatives of a deceased author that a difficulty might arise, among divers interests, to prevent its publication at all, or its use, in case of an original

[1] Lockré. "Legislation civile de la France, t. ix. pp. 17, 18, 19. Renouard, Droits. D'Auteurs, tom. 1, p. 387.

author, for the purpose of annotation and comment.

To the encouragement of literature, the law owes its own advancement and enlightenment. There need be no fear that it will not, in turn, protect and foster it. Authors have always been extremely tenacious of what they have understood to be their "common-law rights;" yielding with great reluctance to the conviction that a statute of copyright were more to their interest, even though abbreviating the duration while increasing the efficacy of their protection.

239. Nor have the fraternity of authors looked at all with favor upon the tax, in the shape of the contributions to public libraries, which these statutes have imposed. In America two copies, and in England seven copies of the best edition (which in the case of a costly work like Audubon's "Birds of America," might, in the latter country, easily amount to a tax of thousands of pounds), are required for a gratuity to public institutions, and it is not strange that proprietors should complain.[1] But, be that as it may,

[1] For an interesting account of the origin of this impost in favor of the libraries, see Maugham on Literary Property, p. 41, 49. Maugham handled the literary tax with no gentle hand. "Such," says he, "was the origin of this impost, which, it has been contended, is designed for the 'encouragement of learning.' . . . . It was enacted not for the encouragement of learning; not as a consideration for the privileges given by that act, which, though it recognized the titles to copies against intruders (a property which the law of parliament had previously enforced, unalloyed by any such condition, was so far from an act of bounty, that it has ever since been branded with infamy for its usurpation of the free rights of the press), . . . but unquestionably for the purpose of furnishing the ministers of state and the vice-chancellors of the universities with means to put in force the despotic provisions of the act.

Maugham says that the claim for copies to the British Museum and Sion College rests upon public grounds. But that those

while the policy of states may differ as to the measure of taxation, the general right of taxation remains undisputed, and the author, as well as every other citizen, must contribute his per centum of the value of his property to the revenue of his government. It is, if anything, an exception in his favor, which is made in the favor of no other class of citizens, that he is allowed to pay his tax in kind, instead of in coin.

240. In the United States, since the provision of the constitution before cited, there have been eight[1] different acts of congress on the subject of copyright. These eight are now repealed by the further act of July 8th, 1870, which, as amended in some few particulars by the act of June 18th, 1874, is the only statute of copyright now in force in the United States.

The first act on the subject of copyright, as we have seen, was passed in 1790. The fifteenth chapter of that act (designed "for the encouragement of learning by securing the copies of maps, charts, and books, to the

to the universities upon purely private grounds. "This notable plan for the encouragement of literature," says he, "was commenced under Charles I. The pretensions of Oxford were begun by that monarch, and increased by a decree of the star chamber, and by agreement of Sir Thomas Bodley (founder of the Bodleian library), with the Stationers' Company. Henry VIII. granted the pretension to Cambridge. And at the union of Great Britain with Ireland and Scotland, their universities were also empowered to demand copies." Mr. Maugham analyzes each of these rights, and comes to the conclusion that they are all, except possibly the first two, illegal and oppressive.

[1] The acts of February 15, 1819, 3 U. S. Stat. at. L. ch. 19, p. 481; February 3, 1831, 4 U. S. Stat. at L. ch. 16, p. 436; June 30, 1834, 4 U. S. Stat. at L. ch. 157, p. 728; August 18, 1856, 11 U. S. Stat. at L. ch. 169, p. 138; February 5, 1859, 11 U. S. Stat. at L. ch. 22, p. 380; February 18, 1861, 12 U. S. Stat. at L. ch. 37, p. 130; March 3, 1865, 13 U. S. Stat. at L. ch. 126, p. 540; February 18, 1867, 14 U. S. Stat. at L. ch. 43, p. 395.

authors and proprietors of such copies") fixed the term of copyright at fourteen years, with a right of renewal for fourteen years more, if, at the expiration of the first term the author were living, and a citizen of or resident in the United States. This act was repealed by an act passed in 1831, which, amended and enlarged by the subsequent acts of 1834, 1846, 1856, 1859, 1861, 1865, and 1867, continued in force down to July, 1870, when an act was passed to revise, consolidate, and amend the statutes relating to copyrights and patents, repealing the previous enactments on the subject.

The constitution [1] gives to congress, as before stated, "power to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; also to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

The power of congress under this article and section, is limited to authors and inventors only, and does not embrace mere introducers, who are neither authors nor inventors.[2] Though the clause will not be construed to prevent the several states from exercising the power of securing to introducers of useful inventions the exclusive benefit of such inventions for a limited period.[3]

Nor does it take away from the states the power to enlarge, within their jurisdiction, the privilege, by extending the term of the patent or monopoly beyond the term allowed by the acts of congress; nor operate as an exclusion of all state legislation to aid and protect

[1] Art. 1, § 8.
[2] Livingston v. Van Ingen, 9 Johns. 560, 566, 582.
[3] Id.

the rights obtained under the general government, if the power is exercised in harmony with, and in subordination to, the superior power of congress.[1]

Though a state cannot take away from an individual his patent, yet if an author or inventor, instead of resorting to the act of congress, should apply to the legislature of a state for an exclusive right to his production, there is nothing to hinder a state granting it, though the operation of the grant would be confined to the limits of the state.[2]

The power of congress is only to ascertain and define the rights of property in the invention; it does not extend to regulating the use of it. This is exclusively of local cognizance; such property, like every other species, must be used and enjoyed within each state, according to the laws of such state;[3] though, doubtless, the laws of any state granting exclusive rights and privileges in respect to patents and inventions, are inoperative against the laws of the United States with which they come into collision.[4] Though if the author's book or print contains matter injurious to the public morals or peace, or if the inventor's machine or other production will have a pernicious effect upor the public health or safety, a competent authority remains with the states to restrain their use.[5]

Such species of property is likewise subject to taxation, and to the payment of debts, as other personal property.[6]

[1] Livingston v. Van Ingen, 9 Johns. 567, 581.
[2] Id. 581.
[3] Id
[4] Gibbons v. Ogden, 9 Wheat. 186.
[5] See Chapter on Innocence, *ante*, vol. i.
[6] Id. 582.

241. The power of congress to legislate upon the subject of patents and copyrights is plenary; and as there is no restraint upon its exercise, there can be no limitation to the right to modify at pleasure the laws respecting patents, so that they do not take away the rights of property in existing patents.[1] It is no objection to the validity of these laws that they are retrospective in their operation.[2] Congress may pass an act which shall act retrospectively. Such an act is not necessarily unconstitutional. Though no state can impair the obligations of a contract, this inhibition does not apply to the general government.[3]

242. Neither is the power of congress to pass copyright laws exhausted or in any way affected by their passage of such an act, for the purposes of passing any other or further act or law upon the subject,[4] but congress may continue to exercise the power in any way it chooses, either by special acts or by a general system,[5] since one legislature has no power by its acts to bind a subsequent legislature.[6] But all statutes and acts of congress bearing upon the subject are statutes in pari materia, and are to be construed together.[7] Though a particular state cannot take away from an individual the property given him by an act of congress, and though the laws of such state are inoperative as against the laws of the United States with which they may come in collision,[8] yet if an author or

[1] McClurg v. Kingsland, 1 How. 206.
[2] Id.
[3] Bloomer v. Stolley, 5 McLean, 165.
[4] Id.
[5] Id.
[6] Id.
[7] Bloomer v. McQuewan, 14 How. 549, 551.
[8] Gibbons v. Ogden, 9 Wheat. 186.

inventor, instead of resorting to the act of congress, should apply to the legislature of a particular state for an exclusive right to his production, there is nothing to hinder that state granting it, though the operation of such grant would be confined to the limits of the state;[1] and the use of the property is exclusively of local cognizance. Like all other property, it may be used and enjoyed within each state, according to the laws of such state.[2]

The act of congress of July 8th, 1870, which was amended in some few formal particulars by the act of June 18th, 1874, superseded and repealed all preceding acts upon the subject.

These previous acts were eleven in number. The act of May 31st, 1790, chapter 15 (repealed by the act of § 14, 1831); the act of April 29th, 1802, chapter 36 (repealed by the same act), and the various acts of February 15th, 1819, chapter 19; February 3rd, 1801, chapter 16; June 30th, 1834, chapter 157; August 18th, 1856, chapter 169; February 5th, 1859, chapter 22; February 18th, 1861, chapter 37; March 3rd, 1865, chapter 126; and February 18th, 1867, chapter 43. All these statutes are printed in the appendix to this treatise, however, as important to the student in tracing the history and the animus of the American Copyright Law.

243. The present copyright law of the United States consists of a revision and substantial re-enactment of the act of July 8, 1870.[3] That act is entitled "An act to revise, consolidate, and amend the statutes relating to patents and copyright," and the sections relating to copyright are twenty-five, beginning with

[1] Livingston v. Van Ingen, 9 Johns. 581.
[2] Id.
[3] Revised Statutes of the United States, § 4948, et seq.

section eighty-fifth, and including section one hundred and ten.

By this law of July 8, 1870, as amended June 18th, 1874, the laws of the United States respecting copyright were entirely revolutionized.

Among other things, it took from the United States district courts all agency in the matter, and has transferred the same to a bureau at Washington.

The new act placed all records having relation to copyrights under the control of the librarian of congress, and devolved upon him the duty heretofore imposed upon clerks of district courts. It provided that he shall, for performing these duties, receive $4,000 per annum. Heretofore the cost of the service was nothing to the United States.[1]

It was provided by that act that "any citizen of the United States or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns," may secure the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same, and, in case of a dramatic composition, of publicly performing or representing it, and causing it to be performed or represented by others, and authors may reserve the right to dramatize or translate their own works.[2] This exclusive privilege will be granted for twenty-eight years from the day on which the title of such work is

[1] Sec. 85.
[2] Sec. 86.

recorded, and an extension of fourteen years will be granted if a second record be made within six months of the expiration of the original right, and upon publication in at least one newspaper within two months from the date of the renewal for four weeks of a notice of the re-record.[1] Copyrights so received are assignable, but, that any assignment may have validity, it must be recorded with the librarian within sixty days from its date.[2]

As to the manner of securing the right, the law required that the author deposit in the mail a printed copy of the title, addressed to the librarian of congress, and within ten days of the publication of his work; deposit in the post office two copies of his work, the postmaster to receive such matter, it being marked "copyright matter;" if required, to give a receipt for it. He was then to forward it in the mail, free of expense, to the author, but this provision was abrogated by certain of the postal[3] as well as the copyright laws, and copyright matter now forms no exception to the general rule that no official or other matter be conveyed unstamped through the mails. Upon being received at Washington, the librarian was to record the title, and if the party transmitting it so desires, to furnish him with evidence of such record.[4]

For recording and certifying any instrument of writing for the assignment of a copyright, the librarian of congress was, by that act, entitled to receive from the persons to whom the service is rendered, the sum of one dollar, and for every copy of an assignment, one dollar; such fees to cover, in either case, a certi-

[1] Secs. 87, 88.
[2] Sec. 89.
[3] Sec. 90.
[4] See *post*, p. 260 (*n*).

ficate of the record, under seal of the librarian of congress, and to be paid into the treasury of the United States.[1]

Notice that a work is copyrighted was to be given in each issue, and ten days after publication, two complete printed copies of the best edition to be forwarded to the librarian, under penalty of twenty-five dollars.

For the publication of any work not copyrighted that it is so copyrighted, a penalty of one hundred dollars was to be imposed, and violation of a copyright was to forfeit all copies made, and such damages as might be recovered at law. Wrongful representation of a dramatic composition entitled to a recovery of not less than one hundred dollars for the first representation, and fifty dollars for each subsequent one; if one without consent publish the manuscript of another, he might be held accountable in damages; actions for a violation of copyright to be commenced within two years after the cause of action accrued. In such actions the defendant to plead the general issue, and give the special matter in evidence under it. And, of such actions, jurisdiction is given to the United States courts, which may enjoin violations of the rights of authors under the law, and, in all cases where there is a recovery for a violation, forfeiture, or penalty, full costs are to be allowed.

244. Section eighty-fifth (4948[2]) provided that all

[1] Amendment of June 18, 1874, section 2; by the law of 1870, section 92, the fees to be paid for these services were fifty cents for recording, and for a copy under seal of the recorded title, fifty cents, for recording an assigement of a copyright fifteen cents for each one hundred words, and for every copy of such assignment furnished, ten cents for each one hundred words, the proceeds to be accounted for to the treasury.

[2] The figures in brackets in the text refer to the present Revised Statutes of the Uuited States.—Revision of 1873–74.

records and other things relating to copyrights, and required by law to be preserved, shall be under the control of the librarian of congress, and removed to his office from the office of the clerks of the various judicial districts, where the same were previously performable, all formal steps necessary to secure the protection of the act.[1] These provisions are, it seems, directory[2] only, and not mandatory. .

Copyrights recorded prior to July eighth, 1870, in the district clerk's office, do not require re-entry at Washington. But one copy of each book, or other article or thing copyrighted since March fourth, 1865, and up to July eighth, 1870, is required to be deposited in the library of congress, if not already so deposited, and without such deposit, the copyright is void by law.[3]

245. Section eighty-sixth (4952) enumerates the subject-matter in which copyright may be granted. It provides "that any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor[4] of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models and designs intended to be perfected as works of the fine arts, and his executors, administrators, or assigns, shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing completing, copying, executing, finishing, and vending the same; and in the case of a dramatic composition, of publicly performing or representing it, or causing it

[1] Act of February 5, 1859, ch. 22, § 8. And consult acts of February 3, 1831, ch. 16, § 1; August 18, 1856, ch. 169, § 1; March 3, 1865, ch. 126, § 1.

[2] 2 Kent Com. 378 (note).

[3] 13 U. S. Stats. 540.

[4] Carey v. Collier, 56 Niles Reg. 262.

to be performed or represented by others; and authors may reserve the right to dramatize, or to translate their own works."

This section confers copyright only on those who are citizens of the United States, or resident therein.[1] The word "resident" has been interpreted to require that the application for a copyright must in all cases be accompanied by a distinct and accurate statement of the name of the person copyrighting,[2] and his character, whether author, inventor, designer, or proprietor, but no affidavit or formal petition is required. A person, to be entitled to copyright as a "resident" under the corresponding sections of previous copyright laws, and, by inference, under the present, must be a permanent resident of this country. One temporarily residing here, it seems, even though he has declared his intention of becoming a citizen, cannot take or hold a copyright.[3] This was the ruling of Betts, J., in 1839, but it is possible that a more liberal rule might obtain now. In a case twenty years later,[4] Cadwallader, J., added to this statement of those who might obtain copyright, "and proprietors under derivations of title from such authors," but qualified this by continuing, "the assignee of a work composed by a non-resident alien cannot obtain a copyright therefor," and this undoubtedly is the rule to-day, from which our courts will not depart.

The legal assignee of the author may take out the

[1] The illiberality of the rule, which requires permanent residence in order to entitle to copyright, contrasts very disadvantageously with the rule of our (*i. e.*, the English) law on the subject, as laid down in the cases of Jeffreys v. Boosey and Low v. Routledge.—Shortt L. Lit. p. 244.

[2] See this chapter, *post*, practical directions for taking out copyrights.

[3] Carey v. Collier, 26 Niles Reg. 262.

[4] Keane v. Wheatley, 9 Am. Law Reg. 45.

copyright, and it will make no difference whether he holds it as trustee for the benefit of another or not.[1]

The words "author," "inventor," or "designer," are meant to imply and cover the various definitions of primary and secondary authorship heretofore discussed in the chapter on originality.[2] "The phrase design," said Washington, J.,[3] "when used as a term of art means the giving of a visible form to the conceptions of the mind, or, in other words, to the invention." This was decided upon interpreting the word "design," in the first section of the act of 1831, and the derivative "designer," first appears as applied generally to any form of copyrightable matter, in the present act of 1870.

246. A "design," as signifying "any new and original design for a manufacture, bust, statue, alto-relievo, or bas-relief, or for the printing of woolen, silk, cotton, or other fabric, any new and original impression, ornament, pattern, print, or picture, to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; or any new, useful, and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication, may, upon payment of the duty required by law, and other due proceedings had, the same as in cases of inventions or discoveries, obtain a patent therefor.

Up to the year 1870 the only provision for such productions of skill and intellectual labor was by copyrighting them; the acts of 1870, in the portion thereof

[1] Little v. Gould, 2 Blatchf. 366.
[2] Binns v. Woodruff, 4 Wash. 52.
[3] Id.

relating exclusively to patents, made a matter for entry in the patent office.[1]

In the registration of designs which must now be made in the patent office, the originality of design will be more carefully examined into, if anything, than the originality of either a patented or a copyrighted work.

It has been held that the English act for the protection of designs does not extend to designs which have reference to a purpose of utility through the combination of parts, independently of their shape and configuration.[2] Thus, where the design was for a ventilator, consisting of a thin metallic frame occupying the place of one of the panes of the upper sash of a window, containing a whole pane and a half of glass, the one within the other, so as to appear, when the ventilator was closed, to be one single pane; the frame being hinged at the top, so as to open by means of a straight screw, the head of which formed a pulley, over which were passed cords for the purpose of turning it, and so of either opening or shutting the ventilating pane; the half pane of glass being fixed in the lower portion of the frame, in which the ventilating frame moved, in order to prevent a downright draught of cold air; and the registration of the design stated that the part or parts of the design which were not new or original were "all the parts taken per se, and apart from the purposes thereof," and that what was claimed as new was "the general configuration and combination of the parts;" it was held by the court of

[1] "An act to revise, consolidate and amend the statutes relating to patents and copyrights." July 8, 1870, § 71, *et seq.* Revision of 1873–74, § 1.

[2] Reg. v. Russell, 16 Q. B. 810; 20 L. J. 177; M. C., 15 Jur. 773.

Queen's Bench that the design was not for "the shape or configuration" of an article of manufacture within the act, and was, therefore, not the subject of registration. "It appears to me," said the court, "that this invention is not within the meaning of the statute. It is a skillful combination of means for producing an end. But the statute applies only to shape or configuration; and, in producing the end which is here attained, shape and configuration are immaterial. The figure of the pane in the drawing is an oblong rectangle; a square or a circular pane would produce the same result. The screw is straight; a crooked screw would produce the result equally well, perhaps better." "Combination" "is not 'shape.' What the general meaning of 'configuration' is, I cannot exactly define; but the word, must, I think, have been used by the legislature to denote some relation to shape visible to the eye. Here there is nothing peculiar in the shape; all depends upon the way in which the parts are put together; that is, as has been rightly said, upon the general combination."[1]

These designs, although provided for by acts of congress relating to patents, seem, as being works of art and of intellectual labor with pen and pencil, to come logically under the same head as the other productions of which this volume treats. And such has always been their disposition in England, where designs have invariably been the subjects of copyright.[2]

[1] Reg. v. Russell, 16 Q. B. 810; 20 L. J. 177; M. C. 15 Jur. 773.

[2] The older acts of parliament (27 Geo. 3, c. 38; 29 Id. c. 19; 34 Id. c. 23; and 2 & 3 Vict. c. 13), dealing with the copyright in designs, have been repealed by the act of 5 & 6 Vict. c. 100, (*a*) which, amended by subsequent acts (6 & 7 Vict. c. 65; 13 & 14 Id. c. 104; 21 & 22 Id. c. 70; and 24 & 25

The protection of a design by registering it in the Patent Office, was authorized by the statute of August twenty-ninth, 1842,[1] and of March second, 1861,[2] previous to the act now referred to.[3] It is to be noticed that the understanding of the term "designs," under the United States acts, differs substantially from the English idea, as set forth in the case just cited. The idea, with us, seems to be that a design means an ornamental design; a useful design being rather, in the nature of a specification or contrivance for a machine or process patentable under other provisions and acts of congress. "The material upon which the design or configuration is imprinted, or of which it is moulded, will not enter into the patent of a 'design.' If the shape be old, it cannot become a new 'design' by being expressed in new material, or if it be new, it will be patentable, although expressed in old material.[4] It is the appearance to the eye that constitutes, mainly, if not entirely, the contribution to

Id. c. 73) is now the governing statute on this branch of the law relating to copyright.

Before 2 & 3 Vict. c. 13, copyright in designs existed only in the case of linens, cottons, calicoes, and muslins. That act (§ 3) extended the copyright to fabrics composed of wool, silk, or hair, and to mixed fabrics composed of any two or more of the following materials—linen, cotton, wool, silk, or hair.

Copyright in designs is of a twofold character: (1) copyright in the application of designs for ornament; and (2) copyright in the application of designs to some purpose of utility. The latter kind of copyright owes its origin to the stat. 6 & 7 Vict. c. 65.—Shortt, L. Lit. p. 602.

[1] 5th U. S. Stat. at L. p. 543, § 3.

[2] 12 Id. ch. 37, p. 130, § 11.

[3] U. S. Rev. Stats. Revision of 1873-74, p. 962, §§ 4929, 4933.

[4] W. N. Bartholomew, Com. Decisions, Dec. 2, 1869, p. 103; G. H. Sellers, Id. June 8, 1870, p. 58; W. L. Tyler, Id. April 27, 1871, p. 106; Gorham Manufacturing Co. v. White, 14 Wall. 511.

the public which the law deems worthy of recompense; and identity of appearance, or sameness of effect upon the eye, is the main test of substantial identity of design.[1] In treating of these patents for designs, the term "useful," means an adaptation "producing pleasant emotions."[2] It is, therefore, to be considered as settled that these design patent acts are intended to give encouragement to the decorative arts;[3] as independent of the other acts which protect all other contrivances and in no sense included in them or derogatory thereof.

It will be noticed that, while the English construction of the word design practically admits a copyright of matter, which when reduced to the actual physical expression or contrivance would be patentable, our own construction allows the patenting of matter which might, under certain forms, be copyrightable.

247. An American author living abroad, but publishing here, will also be entitled to copyright, and this is also, with regard to English subjects, the effect

[1] Id.

[2] Per Commissioner Leggett, in re Parkinson, Com. Dec. 1871, p. 251; and see Wooster v. Crane.

[3] Fisher, P. C. 583; Gorham Manufacturing Co. v. White, 14 Wall. 511. As to the patenting of designs and their validity, see further, Root v. Ball, 4 McLean, 177; Booth v. Garelly, 1 Blatchf. 277; Clark v. Bonsfield, 10 Wallace, 133; Wooster v. Crane, 2 Fisher's Patent Cases, 583; Gorham M'f'g. Co. v. White, 7 Blatchf. 513 (reversed U. S. Supreme Court, December Term, 1871, 14 Wall. 511); Collender v. Griffith, 11 Blatchf. 212; Higgins v. Sparkman, 1 Blatch. 205; Israel C. May, Commissioner's Decisions, 1870, p. 14; W. N. Bartholomew, Id. 1869, p. 103; Jason Crane, Id. 1869, p. 7; B. L. Solomon, Id. 1869, p. 49; Stuart & Bridge, Id. 1870, p. 15; Geo. H. Sellers, Id. 1870, p. 58; William King, Id. 1870, p. 109; E. W. Sperry, Id. 1870, p. 139; E. R. Fenno, Id. 1871, p. 52; W. L. Tyler, Id. 1870, p. 106; Phillip Weinberg, Id. 1871, p. 244; P.C. Parkinson, Id. 1871, p. 251; W. N. Barthol-

of the English statutes.[1] If, however, the native author have previously published abroad, he can obtain no copyright at home, by the English law,[2] and probably by our own.

Any alien friend residing in the country under whose laws he copyrights, is entitled to their protection[3] in his enjoyment of his innocent and original

omew, Id. 1871, p. 298; William Whyte, Id. 1871, p. 304; J. D. Diffenderfer, Official Gazette, U. S. Patent Office, vol. 2, p. 57; T. B. Doolittle, Id. p. 275; H. W. Collender, Id. p. 360, vol. 3, pp. 91, 267; T. B. Oglesby, Id. vol. 3, p. 211; L. W. Fairchild, Id. p. 323; Alois Kohler, Id. vol. 4, p. 53; F. G. & W. F. Niedringhaus, Id. vol. 7, p. 171; Union Super. Collar Co. v. Leland, Id. vol. 7, p. 221; Henry W. Gould, Id. vol. 5, p. 121; Simonds on Design Patents, p. 173.

[1] Stats. 5 & 6 Vict. c. 45; 7 & 8 Id. c. 12, § 19.

[2] Cocks v. Purday, 5 C. B. 860; Jeffreys v. Boosey, 4 H. L. Cas. 877; D'Almaine v. Boosey, 1 Y. & C. 288; Bentley v. Foster, 10 Sim. 329; Clementi v. Walker, 2 B. & Cr. 861; Chappel v. Purday, 4 Y. & Cal. 495: Boosey v. Purday, 4 Exch. 145; Boosey v. Davidson, 13 Q. B. 257; Delondre v. Shaw, 2 Sim. 240; Ollendorf v. Black, 4 De G. & S. 209; Pisani v. Lawson, 6 Bing. N. C. 90; Routledge v. Low, L. Rep. 3 H. L. Cas. 100; 18 L. T. N. S. 874; 37 L. J. 454, ch.; Low v. Routledge, 35 L. J. 114, ch.; 13 L. T. N. S. 421; Boucicault v. Delafield, 1 H. & M. 597; 9 L. T. N. S. 709; 33 L. J. 38, ch.

[3] A natural born British subject before the Naturalization Act (33 Vict. c. 14) was held to carry his allegiance with him throughout the world, and no change of circumstance, time, or place could free him from it (Calvin's Case, 7 Rep. 66). An English author, therefore, might reside abroad, and yet have his right as an English author upon publication here Residence abroad could not release him from his natural allegiance, and therefore he carried with him also the natural rights of a subject of England wherever he went (Jeffreys v. Boosey, 4 H. L. Cas. 977). Besides this natural and perpetual allegiance, our law also recognizes a local or temporary allegiance which is due from every alien or stranger born for so long a time as he continues within the sovereign's dominion and protection (Calvin's Case, ubi supra), and which he ceases to owe as soon as he transfers himself from this king-

work, published in such country during his residence therein. As to whether an alien friend, not residing in the country whose laws he invokes, the question arising is more difficult.

The burden of authority seems to be that an alien may acquire personal rights, and maintain personal actions in respect of injuries done to him, though he cannot maintain real actions, and that a foreigner resident abroad may acquire copyright in a work first published by him as author or as author's assignee, though residing abroad at the time that the work was first published.[1]

In the English case of Bentley v. Foster,[2] the court said (Shadwell, V.C.) that "if an alien friend wrote a book, whether abroad or in this country, and gave the British public the advantage of his industry and knowledge, by first publishing the work here, he was entitled to the protection of the laws relating to copyright in this country."[3] But in the later case

dem to another (2 Steph. Black, 418). An alien friend temporarily residing here and consequently owing a temporary allegiance, is entitled to copyright in any work which he publishes here whilst so temporarily residing, however short his period of residence may be.

[1] Cocks v. Purday, 5 C. B. 860.

[2] 10 Sim. 329.

[3] And in Chappell v. Purday (4 Y. & Col. 495), Lord Abinger, C.B., had declared himself of opinion that a foreigner, who is the author of a work unpublished abroad, might communicate his right of property therein to a British subject, at least for the period prescribed by the statute of Anne. Another decision in favor of the doctrine that a foreigner, though resident abroad at the time of the publication, may have copyright in this country if the first publication takes place here, was pronounced by the court of Queen's Bench in Boosey v. Davidson (13 Q. B. 257), where an action was brought for infringement of copyright in certain operatic airs composed by a foreigner and alleged to have been first printed and published in England.

of Boosey v. Purday,[1] the court of exchequer refused to hold the same rule in the case of a plaintiff who was the assignee of certain airs of an opera which one Signor Ricordi had purchased from the composer Bellini, where action was brought for an infringement by the defendant of the plaintiff's copyright in the dramatic airs. That court held that a foreign author residing abroad, who composes a work abroad, and sends it to Great Britain, where it is first published under his authority, acquires no copyright therein; neither does a British subject to whom such work is assigned by the foreign author.[2]

248. The law on the subject of the copyright of foreigners, which these conflicting decisions had left in considerable doubt, appeared to be finally determined by the house of lords in the case of Jeffreys v. Boosey, after all the judges had been called on to deliver their opinions. The facts of the case were as follows: Bellini, the celebrated musical composer, an alien

[1] 4 Exch. 145.

[2] Pollock, C.B., in delivering the judgment of the court, said, "We perfectly concur with the court of common pleas, that a foreigner in amity with this country may sue for the infringement of any of his rights, a point which he never doubted; but we thought it clear that a foreigner had no copyright in England by the common law, and that his right must depend wholly upon the construction of the statutes, and if they did not give it to him he could have no right at all. And, with respect to the construction of the statutes, we thought, if there were no binding authorities to the contrary, that the legislature did not mean to confer a copyright on any but British subjects. . . . . Our opinion is that the legislature must be considered prima facie to mean to legislate for its own subjects only, in some sense of that term, which would include subjects by birth or residence, being authors, and the context or subject-matter of the statutes does not call upon us to put a different construction upon them." *Vid.* also Ollendorf v. Black, 4 DeG. & S. 209.

friend, composed, while living at Milan, an operatic work "La Sonnambula," in which, by the laws there in force, he had a certain copyright. He there, on the 19th of February, 1831, by an instrument in writing, bearing date on that day, made an assignment of that copyright to Giovanni Ricordi, which assignment was valid by the laws there in force. Ricordi afterwards came to this country, and on the 9th of June, 1831, by deed assigned, for valuable consideration, the copyright in the said work to Boosey, his executors, administrators, and assigns, but for publication in the United Kingdom only. Boosey printed and published the work in this country before any publication abroad. Then Jeffreys, without any license from Boosey, printed and published the same work in this country. Boosey brought an action against Jeffreys for the infringement of his copyright, and the action was tried before Rolfe, B. (subsequently Lord Cranworth), who directed the jury, in accordance with the decision in Boosey v. Purday, to find a verdict for the defendant Jeffreys. The matter came, on bill of exceptions, before the court of exchequer chamber. That tribunal pronounced the direction given by the judge at the trial, to be wrong. A writ of error was then brought in the House of Lords, where the question was fully and at great length argued, the House finally reversing the decision appealed from and upholding the doctrine of the judge who originally heard the case, that to entitle a foreigner to the copyright in any work first published by him in this country, he must be actually resident here at the time of the publication of such work, and consequently that no assignment by a foreigner, not resident here at the time of publication, can vest in a British subject a

copyright in the work of the foreigner published here by that British subject.[1]

[1] "It may be assumed," said Lord Cranworth, C., "that on the facts thus proved, the right of Bellini, the author (if any), had been effectually transferred to Boosey, the defendant in error; and thus the important question arose, whether Bellini had by our law a copyright which he could transfer through Ricordi to Boosey, so as to entitle the latter to the protection of our laws? . . . . In the first place, it is proper to bear in mind that the right now in question—namely, the copyright claimed by the defendant in error (Boosey)—is not the right to publish or to abstain from publishing a work not yet published at all, but the exclusive right of multiplying copies of a work already published, and first published by the defendant in error (Boosey) in this country. Copyright thus defined, if not the creature, as I believe it to be, of our statute law, is now entirely regulated by it, and, therefore, in determining its limits, we must look exclusively to the statutes on which it depends. . . . The substantial question is whether under the term 'author' (in 8 Anne, c. 19) we are to understand the legislature as referring to British authors only, or to have contemplated all authors of every nation. My opinion is that the statute must be construed as referring to British authors only. Prima facie, the legislature of this country must be taken to make laws for its own subjects exclusively, and where, as in the statute now under consideration, an exclusive privilege is given to a particular class at the expense of the rest of Her Majesty's subjects, the object of giving that privilege must be taken to have been a national object, and the privileged class to be confined to a portion of that community, for the general advantage of which the enactment was made. When I say that the legislature must, prima facie, be taken to legislate only for its own subjects, I must be taken to include under the word 'subjects,' all persons who are within the queen's dominions, and who thus owe to her a temporary allegiance. I do not doubt but that a foreigner resident here, and composing and publishing a book here, is an author within the meaning of the statute—he is within its words and spirit. . . . . Copyright, defined to mean the exclusive right of multiplying copies, commences at the instant of publication; and if the author is at that time in England, and while here he first prints and publishes his work, he is, I ap-

249. If the author reside anywhere in the British dominions,[1] he can have a copyright in England. Accordingly it was held by the court of appeals in

prehend, an author within the meaning of the statute, even though he should have come here solely with a view to the publication. . . . . But if at the time when copyright commences by publication the foreign author is not in this country, he is not, in my opinion, a person whose interests the statute meant to protect. I do not forget the argument that from this view of the law the apparent absurdity results, that a foreigner having composed a work at Calais, gains a British copyright if he crosses to Dover, and there first publishes it, whereas he would have no copyright if he should send it to an agent to publish for him. I own that this does not appear to me to involve any absurdity. It is only one among the thousand instances that happen, not only in law, but in all the daily occurrences of life, showing that whenever it is necessary to draw a line, cases bordering closely on either side of it are so near to each other, that it is difficult to imagine them as belonging to separate classes; and yet our reason tells us they are as completely distinct as if they were immeasurably removed from each other. . . . . If the object of the enactment was to give, at the expense of British subjects, a premium to those who labored, no matter where, in the cause of literature, I see no adequate reason for the exception, which it is admitted on all hands we must introduce, against those who not only compose, but first publish abroad. If we are to read the statute as meaning by the word 'author' to include 'foreign authors living and composing abroad,' why are we not to put a similar extended construction on the words 'first published?' And yet no one contends for such an extended use of these latter words. Some stress was laid on the supposed analogy between copyright and the right of a patentee for a new invention; but the distinction is obvious. The crown, at common law had, or assumed to have, a right of granting to any one, whether native or foreigner, a monopoly for any par-

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[1] The words "British dominions" are defined by 5 & 6 Vict. c. 45, § 2, to mean and include all parts of the United Kingdom of Great Britain and Ireland, the islands of Jersey and Guernsey, all parts of the East and West Indies, and all the colonies, settlements, and possessions of the crown, which now are or hereafter may be acquired.—Shortt, L. Lit. p. 33.

chancery, in the case of Low v. Routledge,[1] that an alien friend (a native of the United States of America) could, by a temporary residence in Canada at the

ticular manufacture. This was claimed as a branch of the royal prerogative, and all which the statute (21 Jac. 1, c. 3, § 6), did was to confine its exercise within certain prescribed limits; but it left the persons to whom it might extend untouched. The analogy, if pursued to its full extent, would tend to show that first publication abroad ought not to interfere with an author's right in this country. For certainly it is no objection to a patent that the subject of it has been in public use in a foreign country. . . . . My opinion is founded on the general doctrine, that a British statute must prima facie be understood to legislate for British subjects only, and that there are no special circumstances in the statute of Anne, relating to authors, leading to the notion that a more extended range was meant to be given to its enactments." The reasons assigned by Lord Brougham were of a similar nature. Lord St. Leonards, in the course of his judgment, said, "I venture to submit to your lordships that it is quite clear, as an abstract proposition, that an act of parliament of this country, having within its view a municipal operation—having, as in this particular case, a territorial operation, and being therefore limited to the kingdom—cannot be considered to provide for foreigners, except as both statute and commom law do provide for foreigners when they become resident here, and owe at least a temporary allegiance to the sovereign, and thereby acquire rights just as other persons do; not because they are foreigners, but because, being here, they are here entitled, in so far as they do not break in upon certain rules, to the general benefit of the law for the protection of their property, in the same way as if they were natural-born subjects. . . . . It has been decided, and it is no longer to be disputed, nor is it attempted to be disputed, that the first publication must take place here; but that is only by implication from the provisions in the act of parliament. Well, then, if the first publication must take place here, must the printing likewise take place here? There is no such actual provision: it is not said so, but I apprehend it is implied; I think it is clearly implied from the provisions of the act, that

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[1] 35 L. J. 114, ch.; 13 L. T. N. S. 421; *vid.* also Low v. Ward, *post*, p. 204.

time of publication in England, acquire a British copyright in the work published here. In that case it was agreed between the plaintiffs and an American authoress, from whom they had purchased the manuscript of a book written by her, that she should go to Montreal and reside there till after the publication of the work in England by the plaintiffs. She resided at Montreal from the 19th of May, 1864, till after the 4th of June, 1864, when the book was published for the first time by the Messrs. Low, in London. An injunction was granted to restrain the defendants from

the printing must take place here. . . . . If it is clear as I apprehend it to be, that, in the first place, a book which is a foreign composition must be first published here, and secondly, that it must be printed here; would it not necessarily and naturally follow that the man himself should be here to superintend that publication. Is it not a natural inference from the act of parliament, which does not expressly provide for either of the foregoing conditions, that it implies that the man shall be here to superintend his publication, seeing that it shall not only be first published here, but that it shall also be printed here? Nothing could be further from the intention of the legislature at the time that this act of parliament was passed than that a foreigner should be enabled to import books printed abroad; but unless you put that construction upon the act of parliament, he would have been able to import books printed abroad, and bringing them here, to have a copyright in their publication. That would plainly be directly contrary to the intention of the legislature. I think, therefore, that gives us an easy means of interposition as to the meaning of the statute, with regard to the residence of the publisher. . . . . If there is no common-law right, which, in my opinion, there clearly is not, and if the statute does not apply to foreigners, *quâ* foreigners (although I entirely, of course, admit, that when a man owes a temporary allegiance, he is entitled to the benefit of it) then there being no common-law right, it would be a new right given by act of parliament, and the foreigner must bring himself within the terms of that act of parliament in order to enjoy it; and to do so, in my apprehension, he must be able to predicate of himself that he is a subject of these realms, at least for the time being."

publishing an edition of the same, which was affirmed on appeal.[1] Under the present international copyright law of England, it is probable that an American author depositing his work in France, can procure a

[1] Lord Justice Turner observed: "It was said for the defendants that the same word 'author,' which is contained in this statute, was also contained in the statute of Anne, the first copyright act, and that strong opinions were expressed by the judges, and by the law lords in the house of lords, in the case of Jeffreys v. Boosey, that the word 'author' in the statute of Anne means an author resident in England at the time of publication, and that the same construction ought to be given to the word 'author' in the Stat. 5 & 6 Vict. c. 45, now under our consideration. But there is no provision in the statute of Anne that the statute shall extend to the colonies, and in the statute we are now considering it is expressly so provided." It was also urged on behalf of the defendants that 5 & 6 Vict. c. 45, did not extend to colonies having legislatures of their own, as Canada; but the lord justice held that the word "colonies,' in the absence of a context to control it, must extend to all colonies. This decision was affirmed by the house of lords. *Vid.* L. Rep. 3 Eng. & Tr. App. 100; 18 L. T. N. S. 874; 37 L. J. 454.

Even if a statute of the colony in which the alien resides at the time of the publication of his work here, prevents an alien acquiring a copyright in a work published by him in the colony during his residence there, that would make no difference as to his title to copyright here. An alien has rights as a subject of the crown whilst residing in one of its colonies, as well as rights as a subject of the colony; and though his civil rights within the colony depend upon the colonial laws, his civil rights beyond the limit of the colony are independent of those laws. "Every alien," said Turner, L.J., in the case last referred to, "coming into a British colony becomes temporarily a subject of the crown, bound by, subject to, and entitled to the benefit of, the laws which affect all British subjects. He has obligations both within and beyond the colony into which he comes. As to his rights within the colony, he may well be bound by its laws; but as to his rights beyond the colony he can not be affected by those laws, for the laws of a colony can not extend beyond its territorial limits."—Shortt, L. Lit. p. 35.

As of peculiar interest, in the absence of an international

copyright for his work in Great Britain. It would be no obstacle to his obtaining such copyright in France that he had formerly copyrighted here—for French copyright appears to be allowed to works

copyright, to American authors, we append the report of Low v. Ward, L. Rep.; 6 Eq. p. 418:

The case of Low v. Ward, came up on a motion for an injunction to restrain the defendants from printing, publishing and selling, any copies of the book called "The Guardian Angel," or any part thereof, other than and except copies printed and published by plaintiffs.

"The Guardian Angel" was written by Professor Oliver Wendell Holmes, of Boston, United States, and was brought out by him in a serial form in the numbers of the "Atlantic Monthly," a magazine published at Boston, commencing January, 1867, and terminating in December, 1867.

In March, 1867, Professor Holmes entered into an agreement with the plaintiff's firm of publishers, in Ludgate Hill, to take the necessary steps for acquiring a British copyright in "The Guardian Angel," it being agreed that the copyright so acquired should be purchased by the plaintiffs. In pursuance of this agreement, Professor Holmes, in October, 1867, went to Montreal, in Canada, and was living there before and at the time of the publication of "The Guardian Angel" by plaintiffs, in London, which took place on the 25th of October. The work was published complete in two volumes, price 16*s*., and on the same day a copy was delivered at the British Museum, pursuant to 5 & 6 Vict. c. 45. At this date the story wanted six chapters for completion in the "Atlantic Monthly."

The defendants who are also publishers in Paternoster Row brought out an edition of "The Guardian Angel," in one volume, price 2*s*. on the 27th of April, 1868. They stated, in their affidavit, that they were ignorant of any claim to copyright for the work in this country, or of the publication of the plaintiff's edition, and that they had not seen a copy of plaintiff's edition, when they (defendants) brought out their edition which was a reprint, from the pages of "The Atlantic Monthly," in the numbers of which, from January to December, 1867, "The Guardian Angel" first appeared. Before bringing out their edition, the defendants had searched the register at Stationers' Hall, which then contained no entry of

already copyrighted in another country, while the international act above alluded to allows an English copyright in cases of all books copyrighted in France.

the work. The entry, it appeared, was not made until the 30th of June, 1868, and was in the following form:

TIME OF MAKING ENTRY.	TITLE OF BOOK.	NAME OF THE PUBLISHER AND PLACE OF PUBLICATION.	NAME AND PLACE OF ABODE OF THE PROPRIETOR OF THE COPYRIGHT.	DATE OF FIRST PUBLICATION.
June 3, 1868.	"The Guardian Angel."	Samson Low, the elder, Samson Low, the younger, and Edward Marston, Milton House, Ludgate Hill, in the City of London.	Dr. Oliver Wendell Holmes, now of the City of Boston, Mass., but at the date of publication, residing at Montreal, in Canada.	October 25, 1867.

On the same day the following entry of the assignment to them of the copyright, was made by plaintiff:

DATE OF ENTRY.	TITLE OF BOOK.	ASSIGNER OF THE COPYRIGHT.	ASSIGNEE OF THE COPYRIGHT.
June 3, 1868.	"The Guardian Angel."	Dr. Oliver Wendell Holmes, now of the City of Boston, Mass., U. S., lately residing at Montreal, in Canada.	Sampson Low, the elder, Sampson Low, the younger, and Edward Marston, of Crown Buildings, No. 188 Fleet Street, all in the City of London.

As soon as the defendant's edition appeared, the plaintiffs wrote to complain, informing the defendants that they had paid a large sum for the copyright, and calling upon them at once to stop the sale of their edition, and to account to them for the profits.

The defendants in reply expressed their surprise at the assertion of any claim for copyright in this country, adding that they had never seen the story in any other form than in "The Atlantic Monthly."

Under these circumstances the bill was filed, and the plaintiffs now moved for an injunction.

Mr. Druce, Q.C., and Mr. Speed, in support of the motion relied upon Low v. Routledge (Law Rep. ch. 1, 42; 3 H. L. 100), as showing that an alien, by residing temporarily in a British colony, and during the time of such residence, pub-

The rule on this subject, which, it seems to us, would equally obtain in this country, was illustrated in a case in the Scotch sessions, where a Scotch pub-

lishing in England a book of which he was the author, would acquire a British copyright in the work.

Mr. Kay, Q.C., and Mr. Westlake, for the defendants.

The plaintiffs are not entitled to copyright in "The Guardian Angel," as the essential condition of a first publication in the United Kingdom of the entire work, has not been complied with. Copyright is incapable of division, and cannot be claimed for a portion of a book only. As in the case of a patent, the monopoly is granted as a recompense for the benefit conferred upon the public by the giving to the world, in a complete form, a new and original work or invention; and unless that benefit has been received by the public, the privilege of the author or inventor cannot be sustained.

So, in this case, as only the last six chapters of "The Guardian Angel" were first published in this country, the public has not received the requisite consideration for granting the author the right of exclusive publication. Even assuming that copyright can be claimed in these last six chapters, the interest is too trifling for protection by interlocutory injunction. Again, it is the peculiar feature of copyright, that, though a monopoly, it disturbs no existing rights, and takes nothing from anyone, and neither in law, policy nor morals, can a copyright which infringes this condition be maintained. But if Holmes, by going to Canada, could acquire a copyright in the first thirty chapters of a work already published by him in America, and consequently open to the defendants, he would be depriving the defendants of their existing right to publish those thirty chapters, and consequently his claim to copyright must fail. In any case Professor Holmes, by his culpable omission to give any notice of his intention to acquire a British copyright by residence in Canada, and the plaintiffs, by not getting their assignment registered until June, 1868, long after publication of the defendant's edition, forfeited any right that they might otherwise have had to relief. On these grounds the motion must be refused.

Sir G. M. Giffard, V.C.—I have not the slightest doubt about this case. It is settled by Low v. Routledge, that an American who chooses to go across the frontier into Canada, and then publishes his work in the United Kingdom, acquires

lisher has brought out an edition of the works of Dr. Channing, previously published here. Various slight alterations and corrections were made, with the assistance of Dr. Channing, for this edition. And the Scotch publisher paid to Dr. Channing a sum of money "in acknowledgment therefor, but not as the result of any contract entered into. The court, however, held that the publisher was not entitled to copyright the edition, and could not, therefore, prevent another from publishing it."[1]

250. Where an author is unknown, the copyright of a book belongs to its publisher. In considering the question whether there must be a known author, by whose life and from whose death the statutory period of copyright is to be determined, the observations of Lord Deas in the Scotch case of Maclean v. Moody,[2] in the year 1858, are deserving of attention. In that case an argument was addressed to the court against the title of the claimants to copyright in a shipping list called "The Clyde Bill of Entry," to the following effect;—that the object of the statute 5 &

exactly the same rights as if he had been a British subject. The only ground on which this motion was resisted, was, that there could not be copyright as to a part of a work only. But there are numerous cases showing that, where the parts of a work can be separated, there may be a copyright in any distinct part of it. I may instance the cases of the last canto of Lord Byron's Childe Harold; Croker's Notes to Boswell's Life of Johnson, and of particular articles in Cyclopædias. There is no analogy, in this respect, between a patent and the case of copyright, as it matters not whether the copyright is for the entire work or for a part only. It was not, in my opinion, incumbent upon Professor Holmes to give notice of his intention to claim copyright in this country, and I see nothing to deprive plaintiffs of their right to an injunction as to the last six chapters of the work.

[1] Hedderwick v. Griffin, 3 Scotch Sess. Cas.: 2 Ser. 383.

[2] Cases in Scotch Court of Sessions, vol. 20, p. 1163.

6 Vict, c. 45, was to encourage literary merit; that intellectual labor constituting authorship is alone thereby protected; that there can be no authorship without an author; that the claimants were not the authors in the present case, nor did they name the authors; that the life of the author affords the only criterion the statute gives for measuring the endurance of the privilege; and that without the statutory means of measuring the privilege, the privilege itself cannot exist. Lord Deas said, "I am humbly of opinion that this argument, although ingenious, is unsound. The act does not confine the privilege to works of literary merit, nor to cases in which there is a known author, whose life shall afford a measure for the endurance of the privilege. A person may find a manuscript in his ancestor's repositories, or get a gift of it and publish it, and he may be entitled to copyright, although he cannot tell who was the author, or whether the author is living or dead. The crown might, I presume, get up a publication and be entitled to copyright, and yet the crown never dies. . . . . That the first publisher may have copyright in the work, although he cannot point out the author, appears to me implied in section sixteen of the statute, which requires the defendant 'if the nature of his defense be that the plaintiff in such action was not the author or first publisher of the book' to give notice of 'the name of the person whom he alleges to have been the author or first publisher.' I think it is here assumed that there may be cases, in which, if the plaintiff be 'the first publisher' he may be entitled to copyright, although no author has been or can be named on either side. In all such cases it is obvious that the endurance of the privilege can have no reference to the author's life, but must be for forty-two years after

the first publication."[1] The question as to the copyright of works posthumously published will be hereafter considered.

[1] With respect to the duration of copyright in books, the English Statute (5 & 6 Vict. c. 45, § 3), enacts "that the copyright in every book which shall after the passing of this act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns: provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns."

In the case of books published before the passing of the act (1st July, 1842), and in which copyright then subsisted, section 4 enacts, "that the copyright which at the time of passing this act shall subsist in any book heretofore published (except as hereinafter mentioned) shall be extended and endure for the full term provided by this act in cases of books thereafter published, and shall be the property of the person who at the time of passing of this act shall be the proprietor of such copyright: provided always, that in all cases in which such copyright shall belong in whole or in part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this act, but shall endure for the term which shall subsist therein at the time of passing of this act, and no longer, unless the author of such book, if he shall be living, or the personal representative of such author, if he shall be dead, and the proprietor of such copyright shall, before the expiration of such term, consent and agree to accept the benefits of this act in respect of such book, and shall cause a minute of such consent in the form in that behalf given in the schedule to this act annexed to be entered in the book of registry hereinafter directed to be kept, in which case such copyright shall endure for the full term by this act provided in cases of books to be published after the passing of

251. There is not, in the United States, any case of which we are aware where the government claims a copyright in any published work. In England the crown and the universities are the owners of certain exclusive copyrights, and entitled therein to the same protection as individual owners of like property.[1] The only analogous right in this country is the right of the people to the publication of all public documents, opinions of judges, &c., &c. A reporter cannot have any copyright in the written opinions of the judges of a court, nor can the judges confer any such right on a reporter. Such decisions are the property of the public, and anybody may print them. Though it has been uniformly held that a reporter may arrange and annotate them, and have a copyright in such arrangement and preparation.[2]

this act, and shall be the property of such person or persons as in such minute shall be expressed."

The copyright, then, in every book published during the author's lifetime is to last, at least, for forty-two years from the time of its first publication, and may last for any longer period that may be covered by the duration of the author's life, with seven more years added. If the book is published after his death, the copyright lasts for forty-two years from first publication. Copyrights subsisting at the time of the passing of the act are extended to the same limits, but not in the case of assignees of the copyright for other consideration than that of natural love and affection, unless with the concurrence of the proprietor and author or his personal representative.

Though the act gives a meaning to the word "book," which includes dramatic and musical compositions, besides reviews, serials, &c., we shall treat in this chapter only of books commonly so called, and reserve for a separate treatment the most important of the other productions which the word is used in the act to include.—Shortt, L. Lit. p. 76.

[1] Wheaton v. Peters, 8 Pet. 688; Little v. Gould, 2 Blatch. 170.

[2] Id. See *post*, chapter on Legal Reports.

The publication of an official report under the direction of congress, and for the benefit of the public, is a dedication of it, and of what is contained in it to the public, and anyone may reprint it.[1]

[1] Heine v. Appletons, 4 Blatch. 125; see *post*, chapter on Legal Reports. The copyright claimed by the English crown extended to the English translation of the Bible, the Book of Common Prayer, the Statutes, orders of the Privy Council, and State Proclamations; also to Almanacs, Lilly's Latin Grammar, the Yearbooks and reports of judicial proceedings. The exclusive right of printing these was held to be vested in the king; and he granted letters patent authorizing others to print and publish them. Some part of this claim has now become obsolete, but a large part still remains unquestioned, and has been recognized in various decisions of courts, both of common law and equity.

Blackstone rests the claim of the crown to copyright in English translations of the Bible, on two grounds: that the translation was made at the expense of the crown, and that the sovereign is the head of the church. Lord Mansfield regarded it as a mere right of property founded on the purchase of the translation by the king in the time of James I. Lord Lyndhurst refers it to another consideration, namely, the character of the duty (carrying with it a corresponding prerogative) imposed on the sovereign as the chief executive officer of the government to superintend the publication of the works upon which the established doctrines of religion are founded, a duty extending to Scotland as well as England. On whatever ground the claim rests, its validity seems now beyond dispute, though the reported cases on the subject are between rival patentees, of whom neither would raise the question of the validity of their patents as against the public in general. An Irish lord chancellor, indeed, in 1794, doubted the right of the crown to grant a monopoly of this kind, and held that a patentee claiming an exclusive right of printing Bibles must establish his patent at law before he could have an injunction in equity. But Lord Eldon, in 1802, granted an injunction to restrain the king's printer in Scotland, who had a patent for the sale of Bibles there, from printing or selling Bibles in England. And in 1828, the house of lords held that the king's printers in Scotland had, by virtue of their patent, a right to prevent the importation from England by others

252. What may be copyrighted under the section we are considering, has been already considered

of Bibles and other works contained in their patent (Manners v. Blair, 3 Bligh, N. S. 402).

The exclusive right of printing and publishing and selling copies of the Bible, New Testament, and Book of Common Prayer, is vested by letters patent of the 13 Eliz. in the universities of Oxford and Cambridge, concurrently with the queen's printer, and no one else may print or publish in England any such copies, or sell in England any other copies of the said books than such as have been printed and published by or for the universities and the queen's printer, or one of them (Universities v. Richardson, 6 Ves. 689).

It seems to be agreed that the Bible may be printed by others than those having the patent right, if it be accompanied by bona fide notes (2 Ev. Stat. p. 19, note 11).

There is no crown copyright in the Hebrew Bible, the Greek Testament, or the Septuagint. They are all common, according to Lord Mansfield; and, said that learned judge, "if any man should turn the Psalms, or the writings of Solomon or Job into verse, the king could not stop the printing or the sale of such a work. It would be the author's work" (4 Burr. 2405).

Nor has any attempt ever been made to prevent any person from publishing a translation of one book, or of a part of the Bible, from the original text, and enjoying a copyright in his production.

The Bible patent of the queen's printer for Scotland expired in 1839. The patent of the queen's printer for England has lately been renewed during pleasure, notwithstanding the recommendation of a committee of the House of Commons that the exclusive privilege of printing and publishing English translations of the Bible should not be renewed.

The claim of the crown to the exclusive publication of the Book of Common Prayer is rested on similar grounds—the duty and prerogative of the sovereign as head of the church and as chief executive magistrate, to superintend the publication of books of divine service. In Manners v. Blair (3 Bligh, N. S. 391) it was contended that as to the Book of Common Prayer the king could not in Scotland confer the exclusive right of printing it on his printer there, as the king was not the supreme head of the Scotch church as he was of the English; and the Scotch court from which the appeal was brought to the House of Lords seems to have been of that opinion.

in the chapter on Originality.[1] The matter treated of in that chapter, however, must be substantial.

Lord Lyndhurst, however, in moving the judgment of the House of Lords, rested the claim of the crown to copyright in the prayer book as well as the Bible on the executive character of the sovereign—a character which he has equally in Scotland and England; and the patent of the king's printer in Scotland was held valid as to the Book of Common Prayer as well as the translation of the Bible. It seems that down to the 34th year of Henry VIII., the different books used in divine service were not printed here, but were imported from abroad. A patent was granted in that year for the sole printing of such books, and in the first year of Elizabeth the exclusive right of printing books of divine service was inserted in the same patent with the right of printing the acts of parliament, which had some time before been granted, and from that time they were regularly enjoyed together by the king's patentee. In 1781, in the case of Eyre v. Carnan (cited 6 Bac. Abr. 509), an injunction was granted to restrain the defendant from printing and publishing a form of prayer which had been ordered to be read in all churches. And in Manners v. Blair, before the House of Lords in 1828, the copyright of the crown was fully recognized.

The queen's printer enjoys the sole right of printing and publishing the Book of Common Prayer.

The claim of the crown, now obsolete, to the copyright in Lilly's Latin Grammar, was founded on the alleged original compilation and publication of the grammar at the king's expense, independently of any idea of prerogative.

Various grounds for the claim of the crown, at one time asserted, to copyright in almanacs have been alleged. In the Stationers' Company v. Seymour (1 Mod. 256) (Temp. Chas. II.), the right to grant the exclusive privilege of printing almanacs was held to vest in the king; first, because an almanac has no certain author, and, therefore, by the rule of our law, the sovereign had the property in it; secondly, because the almanacs made yearly are but applications of the general rules laid down in the almanac prefixed to the Book of Common Prayer which regulates the movable feasts of the church. And the addition of prognostications and other things that are common in almanacs was held not to alter the case, "any more than if a man should claim a property in

[1] *Ante*, vol. i. p. 320.

> There can be no copyright of a mere plan or method of a work, distinct from the work itself, any more than another man's copy, by reason of some inconsiderable additions of his own." Notwithstanding the decision in this case, the court of King's Bench in the case of the Stationers' Company v. Partridge (10 Mod. 105), is strongly inclined against the prerogative right to the printing of almanacs. No judgment, indeed, was given in that case, but it stood over, that the court might see if they could make it like the case of the Book of Common Prayer, and show that the right of the crown had any foundation in property; and it was never moved afterwards. The subject, however, received a positive decision adverse to the claim of the crown in the Stationers' Company v. Carnan (2 W. Bl. 1004). That was a case sent from the court of exchequer for the opinion of the court of common pleas, and that court, after hearing counsel on both sides of the question, certified their opinion "that the crown had not a prerogative or power to make such grant [of almanacs] to the plaintiffs, exclusive of any other or others." In consequence of this, it was enacted by 21 Geo. 3, c. 56, § 10, that £500 a year should be paid to the universities of Oxford and Cambridge severally, out of the duty upon almanacs, as a compensation for the annual sum of £1,000, for which they had demised to the Stationers' Company the privilege of printing almanacs. In 1799, Lord North brought in a bill to revest in the universities and the Stationers' Company the exclusive right of printing almanacs, but the bill was thrown out in the House of Commons after Erskine had been heard at the bar of the house against it. No further assertion of the right of the crown appears to have been made since.
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> With regard to nautical almanacs, section 2, of 9 Geo. 4, c. 66, enacts that "It shall and may be lawful to and for the Lord High Admiral, or the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland for the time being, to cause such nautical almanacs or other useful table or tables which he or they shall from time to time judge necessary and useful, in order to facilitate the method of discovering the longitude at sea, to be constructed, printed, published and vended, . . . and that every person who, without the special license and authority of the Lord High Admiral or Commissioners for executing the office of Lord High Admiral aforesaid, for the time being, to be signified under the hand of the Secretary of the Admiralty, for the time being, shall print, publish, or

than there can be copyright of an abstract idea.[1] The words in which an idea is expressed are a subject

vend, or cause to be printed, published, or vended, any such almanac or almanacs, or other table or tables, shall for every copy of such almanac or table so printed, published, or vended, forfeit and pay the sum of twenty pounds, to be recovered, with costs of suit, by any person to be authorized for that purpose by the Lord High Admiral or Commissioners for executing the office of Lord High Admiral aforesaid (such authority to be signified under the hand of the Secretary of the Admiralty as aforesaid), by action of debt, bill, plaint, or information, in any of His Majesty's Courts of Record at Westminster; and that the proceeds of the said penalty, when recovered, shall be paid and applied to the use of the Royal Hospital for Seamen at Greenwich."

A narrative of a voyage of discovery prepared under the orders of the crown is the property of the crown; but a publisher authorized to publish it by the secretary to the admiralty, the profits remaining at their disposition, was held by Lord Chancellor Thurlow not entitled to restrain a stranger from publishing it (Nicol v. Stockdale, 3 Swans. 637).

By 15 Geo. 3, c. 53, the universities of Oxford and Cambridge, the four universities in Scotland, and the colleges of Eton, Westminster, and Winchester have granted to them forever the sole liberty of printing and reprinting at their respective presses, all such books as had been before the year 1775, or should thereafter at any time "be bequeathed or otherwise given by the author or authors of the same respectively, or the representatives of such author or authors, to or in trust for the said universities, or to or in trust for any college or house of learning within the same, or to or in trust for the said four universities in Scotland, or to or in trust for the said colleges of Eton, Westminster, and Winchester, or any of them, for the purposes mentioned, unless the same should have been bequeathed or given, or should thereafter be bequeathed or given, for any term of years, or other limited term."

Copyright is given only so long as the books or copies belonging to the universities or colleges are printed at their own printing presses within the said universities or colleges respectively, and for their sole benefit and advantage. If they delegate, grant, lease, or sell their copyrights or exclusive

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[1] Story's Heirs v. Holcombe, 4 McLean, 316.

of property, and so is the classification of the subject discussed.[1]

rights of printing the books or any part thereof, or allow, permit, or authorize any person or persons or body corporate to print or reprint the same, then the privileges granted by the act are to become void and of no effect. They may, however, sell such copies so bequeathed or given in like manner as any author or authors may do.

In order that the penalties for piracy may be enforced, it is necessary that every book be entered in the register book at Stationers' Hall within two months after the bequest or gift of it shall have come to the knowledge of the vice-chancellors of the said universities, or heads of houses and colleges of learning, or of the principal of any of the said four universities respectively. The register book may be inspected without fee, and the clerk is to give a certificate of any entry or payment of a fee not exceeding sixpence.

If the clerk refuse to make entry or give certificates of entries, the university or college which owns the copyright (notice being first given of such refusal by an advertisement in the "Gazette") is to have the like benefit as if such entry or certificates had been duly made and given, and the clerk who refuses is for every offense to forfeit £20 to the proprietors of the copyright.

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

The act of 41 Geo. 3, c. 107, § 3, confers on Trinity College, Dublin, a similar copyright and under similar conditions in all books given or bequeathed to it.

5 & 6 Vict. c. 45, which (§ 1) repeals the act of 41 Geo. 3, c. 107, provides (§ 27) that nothing contained therein shall affect or alter the rights of the two universities of Oxford and Cambridge, the colleges or houses of learning within the same, the four universities in Scotland, Trinity College, Dub-

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[1] Story's Heirs v. Holcombe, 4 McLean, 316.

If there could be, then a copyright of a book of German lessons upon the plan or method of Ollendorf, or any elementary teacher, would preclude the publication of a book of French, or Italian, or Spanish lessons, upon a similar one, and thus a discovery of great practical benefit to the public might amount to a great detriment; the invention of an admirable and easily acquired method of teaching young persons one language becoming an actual embargo upon their being taught any other language by a similarly admirably and easily acquired method. If an early dictionary maker could have copyrighted his plan of giving first a word, with its orthography, and then its definition, we could have had but the one, except by a payment of tribute to him for the privilege of publishing other dictionaries of other languages.

253. We have said that an author could not copyright a subject, or a theme such as the moon, or the Atlantic ocean, or a cardinal virtue,—neither can he copyright the name of either of these, so that that name cannot be thereafter used as the title of any copyrighted matter without his consent. The case of Isaacs v. Daly, was where the plaintiff had copyrighted the title "Charity," having written a play by that name. Toward the close of February, 1871, one Daly, proprietor of the Fifth-avenue Theatre, in the city of New York, advertised, for representation at such theatre, a play, written in England, by one Gilbert, also bearing the name of "Charity." There was no pretense that the plays were the same in any particular,—the only fact apparent was, that both were called "Charity," and that plaintiff had already copy-

lin, and the several colleges of Eton, Westminster, and Winchester, in any copyrights theretofore vested or thereafter to be vested in them.

righted that word as a title to a literary production. Said the court:

"The other question as to whether the defendant should be enjoined from performing the play, under the name of 'Charity,' is not free from difficulty. The affidavits fail to satisfy me that the plaintiff would be injured on the ground claimed by him, that Mr. Gilbert's play has been unfavorably received and criticised when played. It is not alleged that there has been any bad faith on either side. The complication appears to be purely accidental. Should the dramatic performance be enjoined because the word 'Charity' is the title of each? No question exists as to any imitation or similitude in Mr. Gilbert's play. It is simply to be considered whether the use of the word 'Charity' in Mr. Isaacs' play, for a title, and his copyrighting the play, gives him the exclusive right to that word as a title, in public performance of plays. Charity is a virtue that has been symbolized and portrayed in every stage and department of art for all ages. Would it be just that an engraver who has copyrighted a design that he entitles 'Charity,' should restrain another engraver from vending to the public a different design which the latter also designated 'Charity,' both being works of art symbolizing the same virtue but differing in plan and execution? If this question is answered in the affirmative, the same principle might be invoked by a publisher who has copyrighted a sermon called 'Charity,' by one person, to enjoin the sale by another publisher of a sermon utterly different in composition, also called 'Charity,' written by some other person. The law favors literature and art; and, while it seeks

[1] New York Superior Court, Curtis, J., unreported, see N. Y. Times, March 3rd, 5th and 6th, 1874.

to protect all in the enjoyment of their property and their rights, it does not limit and abridge the field of occupation and enterprise. The use of the word 'Charity' as a designation for any work of art or literature cannot ordinarily be monopolized by any one person." [1]

254. The thing copyrighted must be something which can properly find protection under no other act. The terms book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, negative, painting, drawing, chromo, statue, statuary, models and designs, will be most liberally construed. But if it shall appear that if any of these may be protected under the patent laws, they will be referred to those statutes. Thus a label used in the sale of an article, it was held in 1829,[2] is not a book within the provisions of the statute respecting copyrights. And similarly in 1871, it was held that a mechanical contrivance used upon the stage, to represent the incident [3] of a draw-bridge, surreptitiously opened in order to precipitate an approaching train of cars into a stream of water running below it, and of its being closed just in time to allow the safe passage of the train, being patentable, could not be protected by a copyright

[1] Although the case of Isaacs v. Daly, never passed beyond the hearings at special term, and hence never was reported, we regard it as being the first of its kind, and as passing upon many very important principles. The remainder of Judge Curtis's opinion, and a full discussion of the other important points passed upon therein as arising more naturally under that head, will be found fully discussed, *post*, in the chapter on Dramatic Copyright.

[2] Coffeen v. Brunton, 4 McLean, 516.

[3] The incident, however, as expressed in words and language is copyrightable, according to the decision of Blatchford, J., in Daly v. Palmer, 6 Blatchf. 257, even though that incident had been borrowed from a romance published in a

of the play in representing which such contrivance was used.[1]

These rulings were made the gist of a special enactment by congress, in the "act to amend the law relating to patents, trademarks, and copyrights," passed June 18, 1874, which provides,[2] "that in the construction of this act, the words 'engraving,' 'cut,' and 'print,' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the patent office." Thus securing to the office of the librarian of congress the entry of only scientific, literary, and artistic matter.

255. Of the above terms, perhaps the word "book" is the only one as to the interpretation of which any serious difficulty could arise. A "book" within the statute[3] need not be a volume made up of many sheets bound together; it may consist of a single sheet, or page of character, as, for instance, the words of a song, or the music accompanying a song.

The words "map" and "chart" are to be understood, of course, as applying to the particular map or chart copyrighted, since the natural objects from which maps and charts are made are open to all.[4]

literary magazine (*Vid. post*, chapter on Dramatic Copyright).

[1] Freligh v. Carroll & McCloskey, MSS., unreported Benedict, J., U. S. Circuit Court, Eastern District of New York, 1871.

[2] Section 3. This section especially charges the commissioner of patents with the supervision and control of the entry of such matters. See Wolfe v. Barnett, 24 La. An. 97: 13 Amer. 111.

[3] Clayton v. Stone, 2 Paine, 383, 391.

[4] Blunt v. Patten, Id. 400, 401.

The decision of Thompson, J.,[1] that a "price current" cannot be considered a book within the sense and meaning of the copyright laws, was not, we think, meant to hold that such a compilation, upon which great care and industry may be expended, would not be deemed worthy of protection in itself. That was the case of a newspaper which published a daily price current, and the learned judge's ruling was made upon the ground—as he stated it—that a daily newspaper was not a literary or scientific work, which could be protected under laws which are passed "for the promotion of science."[2] But, as we have before remarked, if the proprietor of a newspaper should take the trouble to formally copyright, in the proper office, each succeeding impression of such newspaper, there is no reason why such a copyright should not be valid.

If the author wish or intend, by virtue of this section, to reserve a right to translate or to dramatize his work, he should cause to be printed, below the notice of copyright provided to be inserted in each copyrighted work, by section ninety-seven (4952), the words "right of translation reserved," or "right of dramatization reserved," as the case may be; or, in case he shall intend to reserve both, the words "all rights reserved." The librarian of congress should also be notified by the author or person copyrighting in his office, in order that he may enter the reservation or reservations upon his record. In case of books or works published in more than one volume or portion, if issued or sold separately, or of periodicals published in numbers, or of engravings, photographs, or other articles published with variations, a copy-

[1] Clayton v. Stone, *ubi supra.*
[2] Clayton v. Stone, 2 Paine, 392.

right should be taken out separately for each volume, book, or number of the periodical, and for each variety, as to size or description, of the article.

Pictures, whether included under any of the terms of the section we are considering, are protected by copyright thereunder, but a new and peculiar method of manufacturing the picture must be protected by patenting.[1] So a method, for instance, of forming a picture of pieces of birch bark, each piece having the shape of one of the things to be portrayed, and the whole mounted on cardboard and suitably colored and shaded whereby the several articles are brought into relief, is patentable, and will not be protected by a copyrighting of the particular picture so composed.

There is no provision in the American copyright law, providing for the correction of a copyright registry by a bill or information of any party aggrieved by such a registry. By a provision of the English statute,[2] if any person shall deem himself aggrieved by any entry made, under color of this act, in the said book of registry, it shall be lawful for such person to apply by motion to the court of queen's bench, court of common pleas, or court of exchequer, in term time, or to apply by summons to any judge of either of such courts in vacation, for an order that such entry may be expunged or varied; and that upon any such application by motion or summons to either of the said courts, or to a judge as aforesaid, such court or judge shall make such order for expunging, varying, or confirming such entry, either with or without costs, as to such court or judge shall

[1] Joseph B. Sprague's appeal, Official Gazette of the U. S. Patent Office, vol. 6, p. 469.

[2] Id.

[3] 4 & 5 Vict. c. 45, § 14.

seem just; and the officer appointed by the Stationers' Company for the purposes of this act, shall, on the production to him of any such order for expunging or varying any such entry, expunge or vary the same according to the requisitions of such order."[1]

[1] There are not many reported cases of application for relief under this section of the act. A rule absolute to "vary or expunge," at the option of the applicant, an unauthorized entry in the register at Stationers' Hall, was granted by the court of common pleas in ex parte Bastow (14 C. B. 631).

In ex parte Davidson (2 El. & Bl. 577), Robert Cocks brought an action against Davidson for publishing three pieces of music, in which Cocks claimed the copyright. Two of the pieces were registered in the name of Cocks, and the third in the name of a person who had assigned the copyright to him. A rule nisi to expunge or vary the entries was obtained upon an affidavit of Davidson, not asserting a copyright in the airs in himself, but deposing to his belief that the three airs were old, and that the persons who on the entries professed to be the authors were not really the authors. The ground suggested for expunging the entries was that they would be prima facie evidence against Davidson on the trial of the action brought against him. The court declined to expunge the entries, but on the refusal of the counsel for Cocks to consent not to use the entries on the trial, an order was made by the court, proprio vigore, without consent, that the rule should be enlarged till the trial of an issue to determine the question of coyyright, in which Cocks should be plaintiff and Davidson defendant, and on the trial of which the entries should not be used.

The court of common pleas in a subsequent case (18 C. B. 297) in which the same person applied for assistance, distinctly disclaimed the power exercised by the court of queen's bench, in the preceding case, and refused to expunge an entry of proprietorship unless it was clearly shown to be false, or to vary it, unless satisfied by affidavit that in so doing they would make a true entry. The circumstances of the case before the court of common pleas were somewhat peculiar. Mr. Lover, the author of a song called "The Low Back'd Car," being in America, and wishing to secure to himself the copyright in England and in America by a simultaneous publication in both countries, instructed his publishers here to publish it in London on a certain day. This

If an author in the United States shall find upon receipt of his copy of the record at Washington, that an error has occurred therein, his simplest plan would be to prepare a new record and forward it with a second fee, and the first record to be canceled, to the librarian of congress.

256. Sections eighty-seven[1] (4953[2]) eighty-eight (4954[3]),and eighty-nine (4955[4]), regulate the term of a copyright, and of a renewal thereof, and provide for its assignment. In case of the renewal provided for by section eighty-eight, by the widow, heirs, or other personal representatives of a deceased author, the application for such renewal should be accompanied by explicit statements of the relation upon which the applicant depends, and of his claim to the right; and,

was done, and the song was registered at Stationers' Hall, but in the entry the publishers described themselves as the proprietors of the copyright. The song having been published in this country by Davidson, from a copy sent from America, where the publication was alleged to have taken place three days before the publication here, Mr. Lover obtained a judge's order to vary the entry by substituting his name as proprietor, and got an injunction and brought an action for the infringement of his copyright. A rule to expunge or vary the amended entry having been obtained on behalf of Davidson, the court discharged it with costs, considering that no case had been made out for its interference. In Grave's Case (L. R. 4 Q. B. 721; 17 W. R. & H. 20; L. T. N. S. 877), the court said: "That a person to be 'aggrieved' within the meaning of the statute must show that the entry is inconsistent with some right that he sets up in himself or in some other person, or that the entry would really interfere with some intended action on the part of the person making the application."—Shortt, L. Lit. p. 94.

[1] The numbers given in brackets in the text are the numbers of sections in the Revised Statutes of the United States. Revision of 1873–4.

[2] Act of Feb. 3, 1831, ch. 16, § 1

[3] Act of Feb. 3, 1831, ch. 16, §§ 2, 3.

[4] Act of June 30, 1834, ch. 157, § 1.

in any case, an application for an extension should be accompanied by an accurate statement of the date of the original copyright. The term of copyright fixed by virtue thereof, is twenty-eight years from the time of recording the title thereof, with a right of renewal for fourteen years more (thus making the whole term forty-two years), if, at the expiration of the first period, the author, inventor, or designer is still living, and a citizen of the United States, or resident therein. If he has died, leaving a widow or children, the same exclusive right is continued to them for the further term of fourteen years. But, in either case, all the conditions as to recording the title of the work, &c., required in the first instance, must be observed with respect to this renewed copyright within six months before the expiration of the first term. A copy of the record must also, within two months from the date of the renewal, be published in one or more newspapers printed in the United States, for the space of four weeks.[1]

Under the similar clauses in the act of 1831, it was held that the extension provided for, looks entirely to the author and his family, and not to assignees.[2] The taking out a second term of a copyright is not like the strengthening of a defective title, but rather like a new interest, obtained after the general interest has expired.[3] An assignee alone cannot take out the second or extended term, unless he has clearly contracted and paid for it, and is entitled to be protected in it, in equity, rather than according to any mere technical rule of law.[4] The time within which any

[1] Sec. 88, Act of Feb. 3, 1831, ch. 16, §§ 2, 3.
[2] Pierpont v. Fowle, 2 Wood & Min. 23.
[3] Id. 46.
[4] Id. 44.

prospective work thus copyrighted by recording its title, may be issued, is not limited by any law or regulation, if bona fide, but depends wholly upon the discretion of the proprietor. He will not, however, be permitted, by copyrighting a mere title, to obtain a monopoly of such title, against another who may produce a book.

257. By section eighty-nine (4955), copyrights may be assigned in law by any instrument of writing. Such assignment is to be recorded in the office of the librarian of congress within sixty days after its execution; in default of which, it is to be void as against any subsequent purchaser or mortgagee for a valuable consideration without notice.[1]

The assignment of a copyright, therefore, should not, by construction, be extended beyond the first term, unless it seems to be actually meant by the author to be transferred forever, and including any future contingency.[2]

But where, however, it is clear that the author intended to transfer all his interest in the copyright, as well in the extended as in the original term, and the assignment is not in its terms broad enough to cover the second term, a court of equity will direct the contract to be reformed, so as to embrace all the interest.[3]

The assignment of an interest in a copyright must be in writing, but an agreement to assign may be by parol; and such an assignment, although unrecorded, will be valid as between the parties, and as to all persons not claiming under the assignors.

[1] Act of July 8, 1870, ch. 230, § 87; Little v. Hall, 18 How. 165; Webb v. Powers, 2 Wood & M. 495.

[2] Pierpont v. Fowle, 2 Wood & Min. 44.

[3] Cowen v. Banks, MS., Nelson J., N. Y. 1862.; Gould v. Banks, 8 Wend. 565; Webb v. Powers, 2 Wood & Min. 510.

It was held by McLean, J.,[1] in 1855, that under the act of 1834, a formal transfer of a copyright was required to be proved and recorded as deeds for the conveyance of land, and that such a record would operate as notice; but, in a later case,[2] a limited local or other partial assignment, if made for a valuable consideration, was carried into effect, whether it would be effectual in law or not. "For while the statutes of the United States for the protection of authors," said Cadwallader, J., in that case, "do not, like those for the benefit of inventors, sanction transfers of limited local proprietorships of exclusive privileges, ... a writing which is in form a transfer by an author of his exclusive right for a designated portion of the United States operates at law only as a mere license, and is ineffectual as an assignment, except between the parties themselves." The statute provides only the instrument by which such assignment may be made, and the mode of recording it, but does not define what interest may be assigned.[3] "There is no sufficient reason," said Sprague, J.,[4] "for preventing an author conveying a distinct portion of his right;" and he therefore held, in the case of an assignment of an exclusive right of acting and representing a certain drama within the United States, except in certain cities, for the term of one year, that such an assignment was valid.[5]

The assignment of a "copyright," in general terms, will be referred to what was in existence at the date of the assignment, and not to any future contingency;[6]

[1] Little v. Hall, 18 How. 165.
[2] Keene v. Wheatley, 9 Am. Law Reg. 46, 47.
[3] Pierpont v. Fowle, 2 Wood & Minn. 43–45.
[4] Roberts v. Myers, 13 Mo. Law Rep. 401.
[5] Id.
[6] Id.

and it will in no case be construed to operate as an assignment of a second and future renewal or term, unless the author so expressly state it, or unless it seems so actually to be meant by the author, beyond a reasonable doubt;[1] as when the contract of assignment or sale uses language looking beyond the existing copyright; such as referring to all the "interest" in the matter, or to the "manuscript" thereof, or some term in itself more expressive than "copyright."[2]

The absence of the formal part of the transfer; *i. e.*, the recording in the office of the librarian of congress, "within sixty days after its execution," makes the assignment void as against any subsequent purchaser or mortgagee for a valuable consideration without notice.[3]

A claim under a renewal involves the validity of the right under the first, as well as under the second term.[4]

258. By section ninety (4956), no person is "entitled to a copyright," unless, before publication, he deposits in the mail a printed copy of the title of the book, or other article, or a description of the painting, drawing, chromo, statue, statuary, or model or design for a work of the fine arts, for which he desires a copyright, addressed to the librarian of congress; and also, within ten days from the publication, deposits in the mail two copies of such copyright book, or other article; or, in case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of the same, to be addressed to the said librarian of congress.[5]

[1] Pierpont v. Fowle, 2 Wood & Min. 45.

[2] Id.

[3] Wheaton v. Peters, 8 Pet. 663; and see *post*, chapter on Contracts relating to Copyright.

[4] Act of Feb. 3, 1831, ch. 16, § 4.

[5] For the requisites which had to be observed before this

Two complete printed copies of the best edition of every copyright book, or other article, or description or photograph of such article, as before required, must be "mailed" by the proprietor to the librarian of congress, at Washington, within ten days after publication; and also a copy of every subsequent edition in which substantial changes are made, under a penalty of twenty-five dollars.[1] Of course this word "mailed" is to be construed "deposited"; the method by which the deposit is made being quite immaterial. It seems to have been held previously that the failure to make the deposit subjected to the fine only, and did not invalidate the copyright; but a recent case[2] appears to hold the reverse.

Under the similar sections in the act of 1831, the depositing the title-page in the proper clerk's office, publishing a notice according to the act, and delivering a copy of the book, are conditions the performance of which is essential to the title.[3]

Until all the things required by these sections are done, the copyright is not secured; but, by taking the incipient step, a right is acquired, which chancery will

act, see Jollie v. Jacques, 1 Blatchf. 618, 620; Baker v. Taylor, 2 Id. 83.

[1] Secs. 93–94, *rid.* Act of March 3, 1865, ch. 126. §§ 2, 4; and of Feb. 18, 1867, ch. 43, § 1.

[2] The United States Circuit Court for the District of California, in Parkinson v. Lasalle, reported in the "Pacific Law Reporter" for the 23d of April, 1875, held that under sections 4956 and 4952, an author cannot obtain an exclusive right to his work, unless, before publication, he delivers to the librarian of congress, or deposits in the mail, addressed to him, a printed copy of the title of the work or map; and also, within ten days from the publication, delivers to the said librarian, or deposits in the mail, two copies thereof.

[3] Baker v. Taylor, 2 Blach. 83; Jollie v. Jacques, 1 Id. 620; Struve v. Schwedler 4 Id. 23.

protect until the other acts may be done.[1] So that, if the title-page has been duly entered, the author may maintain an action for infringement, if the printed copies were never deposited, and even if the work were never published at all.[2] This was the ruling of Sprague, J., in Massachusetts, in 1860; but Cadwallader, J., in Pennsylvania,[3] in the same year, laid down exactly the opposite rule.

The title-page must be deposited, before publication of the book, in order to entitle the copyright to protection;[4] and the record from the proper office, made in the prescribed form, is prima facie evidence of the deposit.[5]

The number of volumes in which it is stated that a work will be published, may vary in different editions without affecting the record. Such statement is not a part of its title, but may be rejected as mere surplusage;[6] but the process of copyrighting must be gone through with in the case of every volume of a work, separately. Under the corresponding provisions of the act of 1790, it was held that the one requiring the author to publish the title of his book in a newspaper was merely directory, and constituted no part of the essential requisites for securing the copyright,[7] being intended as legal notice merely of the rights secured to the author,[8] necessary only to enable him to sue for

[1] Pulte v. Derby, 5 McLean, 332.
[2] Roberts v. Meyers, 13 Mo. Law Rep. 401.
[3] Keene v. Wheatley, 1 Am. Law Reg. 33.
[4] Baker v. Taylor, 2 Blatch. 84.
[5] Roberts v. Meyers, 3 Month. L. Rep. 401; Baker v. Taylor, 2 Blatchf. 84.
[6] Dwight v. Appletons, 1 N. Y. Leg. Obs. 198–199.
[7] Nichols v. Ruggles, 3 Day, 158; Ewer v. Coxe, 4 Wash. 490.
[8] Nichols v. Ruggles, *ubi supra*.

the forfeitures provided for in the statutes,[1] but unessential, if actual notice is otherwise brought home to an infringer.[2] The interpretation of all similar clauses in previous acts of congress, as to the delivery of the copy to the officer provided by law to receive it, has uniformly been that such requirements were directory merely, and constituted no part of the essential requisites for securing a copyright. "The copy so designed to be delivered to the secretary of state, under the act of 1790," said the court, in Nichols v. Ruggles,[3] "appears to be designed for public purposes and has no connection with the copyright."

"Under this section," said Attorney-General William Wirt,[4] "a copy of a book may be deposited with the department of state after the expiration of six months from the time of its publication, if not done before, and will avail from the time of its being deposited. And where a work consisted of a number of volumes, the delivery to the secretary of state (who was at that date, 1843, the proper officer) of the first volume of a work within six months after its publication, and of the rest of the volumes before the offense complained of was committed, or the action brought, is a sufficient compliance with the law."[5]

In the case of copyright of a painting, statue, model, or design intended to be perfected as a work of the fine arts, the description provided for in this section must be definite and complete, and the photograph must be at least as large as what is technically known in this country as "cabinet size."

[1] Ewer v. Coxe, *ubi supra*.
[2] Nichols v. Ruggles, *ubi supra*.
[3] 3 Day, 158.
[4] Daboll's Case, 1 Op. 532.
[5] Dwight v. Appletons, 1 N. Y. Leg. Obs. 199.

259. Section ninety-one (4957[1]) provides that on the book being sent to the librarian of congress, that officer is to record the name of the copyright book or other article forthwith in a book to be kept for that purpose, in the words following: "Library of Congress, to wit: Be it remembered, that on the —— day of ———, Anno Domini ——, A. B., of ———, hath deposited in this office the title of a book [map, chart, or otherwise, as the case may be, or description of the article], the title or description of which is in the following words, to wit: [here insert the title or description], the right whereof he claims as author, originator [or proprietor, as the case may be], in conformity with the laws of the United States respecting copyrights.—C. D., Librarian of Congress." He is also to give a copy of the title or description, under the seal of the librarian of congress, to the proprietor whenever he requires it.

260. Section ninety-two (4958[2]), as amended, provides that for recording the title or description of any copyright book, or other article, the librarian of congress shall receive, from the person claiming the same, fifty cents; and for every copy under seal actually given to such person, or his assigns, fifty cents; and for recording and certifying any instrument of writing for the assignment of a copyright, one dollar; and for every copy of an assignment, one dollar. Said fees to cover, in either case, a certificate of the record, under seal, of the librarian of congress.

261. Section ninety-seven (4962[3]) enacts that, "to enable the proprietor to maintain an action for

[1] Act of Feb. 3, 1831, ch. 16, § 4.

[2] Acts of Feb. 3, 1831, ch. 16, § 4; June 30, 1834, ch. 157, § 2; Feb. 26, 1853, ch. 80, § 1; July 8, 1870, § 92; June 18, 1874, § 2.

[3] Act of Feb. 3, 1831, ch. 16, § 5.

the infringement of his copyright, a further requisite must be observed. A notice must be given, by inserting in the general copies of every edition published, on the title-page, or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model, or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: 'Entered according to act of congress, in the year ——, by A. B., in the office of the librarian of congress, at Washington,[1] or, at his option, the words, "Copyright, 18 , by A. B."

All the things required to be done by the sections of the various preceding laws for which this provision is now substituted, must, it seems, be done strictly, to secure a copyright.[2]

A photograph, obtained from a glass negative, is not a "print, cut, or engraving," within the provisions of the copyright act of February 3rd, 1831.[3] Section fifth of that act, which requires a copyrighted engraving to have the information that it is copyrighted "impressed on the face thereof," is sufficiently complied with, if such information be engraved on the plate, and printed from it, in such a position as not to be covered when the picture is properly framed

[1] By the amendment of June 18, 1874, § 1, which was passed after the revision (of 1873–74) of the statutes, see United States statutes at large, vol. 18, part 3, chapter 301, p. 78.

[2] Jollie v. Jacques, 1 Blatch. 620.

[3] Struve v. Schwedler, 4 Blatch., Nelson, J., 1857; Baker v. Taylor, 2 Id. 83; Wood v. Abbott, 5 Blatch. 323.

with a reasonable margin.[1] And it is an infringement of an engraving so copyrighted, if copies thereof be taken by the photographic process."[2]

Until these required steps be taken, the copyright is not secured, though, by taking the incipient step, a certain right is doubtless acquired, which chancery will protect until the other steps are taken; and it was so held by McLean, J., in 1852.[3]

Where a work consists of a number of volumes, the insertion of the record on the page next following the title-page of the first volume of the work, is a sufficient compliance with the statute;[4] and the author may insert the same record in another edition, without impairing the copyright.[5]

When a person intended to be designated by the words "and company" was a person who received a fixed sum monthly out of the business, Held, that this did not constitute such person a partner or part proprietor, so as to require his name to appear on a plate or print. But the change in the style of printing an author's or publisher's name, or even a change of publisher's, will not affect the copyrighted title of the book.

The English rule on this subject is very strict. Errors in the name of the person copyrighting or of the date of copyright prevent the author or proprietor from proceeding by action, suit, or otherwise, until such errors have been amended; or invalidate a subsequent assignment under the act.[6] Thus, where "the

[1] Rossiter v. Hall, Id. 362.
[2] Id.
[3] Pulte v. Derby, 5 McLean, 332.
[4] Dwight v. Appletons, 1 N. Y. Leg. Obs. 198.
[5] Ib. 199.
[6] Low v. Routledge, 33 T. J. 717; ch. 10, L. T. N. S. 838; 10 Jur. N. S. 922; 12 W. R. 1069.

time of the first publication" of a book was entered on the registry as the 25th May, 1864, when, in fact, it was first published on the 23d May in that year, this was of itself held fatal to the fact of the registry of proprietorship operating by way of assignment.[1] And where the entry on the registry of the name of the publisher was "Sampson Low, Son, and Marston," whereas the name of the firm was "Sampson Low, Son & Co.," this was held also fatal.[2] The name of a firm, however, will be sufficient, although it may not contain the names of all its members.[3] And this record,

[1] Id.; Matheson v. Harrod, L. R. 7 Eq. 270.

[2] "One almost regrets," said Kindersley, V. C., in the case in which these points were decided, "to be obliged to come to the consideration of points which are so very technical as these which I am obliged to consider; but, at the same time, they are points not only which a defendant or plaintiff has a right to take, but which are of importance with reference to the carrying out of the clearly expressed intention of the legislature, which has thought fit to require, in order to produce certain effects, that certain strict particulars shall be complied with. It is, in point of fact, a concession of a certain means of assignment upon condition; and, in order to acquire the right to that mode of assignment, you must perform the condition which the legislature has required." With respect to the mistake in the entry of the name of the firm, the Vice-Chancellor said: "Though it is probably optional either to enter the name of the firm of publishers, or the names of the individuals composing that firm, if you profess to enter the real name of the firm you must do so. . . . . I am almost ashamed to descend to these minute particulars, but it must be done; and it is sufficient for me to say that in my opinion, either of these inaccuracies is quite sufficient to lead me to hold that the entry of the proprietorship is insufficient, and, upon that ground, that there is no valid assignment effected by the subsequent entry which immediately follows that of the assignment." The errors in the entries at Stationers' Hall were corrected after this decision, and a second bill was filed by the plaintiffs, praying for an injunction to restrain the defendants from printing, publishing, &c., the book in question; and the injunction was granted.

[3] Rock v. Lazarus, L. R. 15 Eq. 104.

so printed, will be prima facie evidence of copyright.[1]

Care should be taken, however, that the record be accurate, for an error will be a fatal defect in the author or proprietor's copyright.[2] Where the title page of a book was deposited in 1846, and the notice of the entering inserted in the volume stated it to have been deposited in 1847, even though the error arose from a mistake, it was held to be fatal to the copyright.[3]

262. By section ninety-eight[4] (4963) a penalty of one hundred dollars (to be recovered by an action in any court of competent jurisdiction) is inflicted on every person inserting or impressing such a notice on any of the articles named, for which he has not obtained a copyright, one moiety of the penalty to go to the person suing for it, and the other to the use of the United States.

This penalty is given by the similar section of the act of 1831, to "the person who shall sue for the same," and it was ruled, under that act, that it could only be sued for by one person, and that a declaration for such penalty in the name of two persons was bad,[5] the court saying, "there is a manifest difference between giving a penalty to a common informer, and imposing one for the benefit of the person aggrieved." In the latter case the term person may be regarded as comprehending every one affected by the injury.[6]

263. Section ninety-nine[7] (4964) provides that if

[1] Roberts v. Meyers, 13 Mo. Law Rep. 398; Baker v. Taylor, 2 Blatch. 82.

[2] Baker v. Taylor, 2 Blatch. 82.

[3] Id.

[4] Feb. 3, 1831, ch. 16, § 11.

[5] Atwill v. Ferrett, 1 Blatch. 154.

[6] Id. 156.

[7] Act of Feb. 3, 1831, ch. 16, § 7.

any person, after the recording the title of any book according to the act, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in the 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, such offender shall forfeit every copy thereof to the said 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. There is a similar provision as to maps, prints, &c.

264. Section one hundred (4965) enacts, "that if any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided in the act, 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, 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 the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article as aforesaid, he shall forfeit to the said proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or which have by him been

sold or exposed for sale; one moiety to go to the proprietor, the other to the United States.

The intent with which a work is reprinted cannot be taken into consideration; it is the act of reprinting that is prohibited by the statute.[1] It will be of no consequence in what form the works of another are used, whether it be a simple reprint, or by incorporating it in some other work, or by taking so much thereof as to impair the value of the original. If his copyright is violated he can maintain an action therefor.[2] The entirety of the copyright is the property of another, and it is no defense to an action that another has appropriated a part of such property, and not the whole.[3] The matter taken will be judged equitably, and the fact of the piracy will not depend upon the quantity taken, but the rule will be as above, as to whether it forms in the pirated shape a substitute or colorable substitute for the original work.[4] If a book infringe in part only, and not in the whole, it will only be deemed piratical in so far as it infringes, and the remedy will not be extended beyond the injury.[5] But a translation of a work is not a piracy of the original.[6]

265. A distinction, however, is to be observed between an action for the piracy and an action for the penalty. The former is either an action in equity for an injunction and an accounting, or at law in an action

[1] Nichols v. Ruggles, 3 Day, 158; Mellett v. Snowden, 1 West. L. Jour. 240; Story's Ex. v. Holcombe, 4 McLean, 309-310; and *vid.* also chapter on Piracy, *post*, p.

[2] Gray v. Russell, 1 Story, 19; Folsom v. Marsh, 2 Story, 115.

[3] Id. 116.

[4] Story's Ex. v. Holcombe, 309-310.

[5] Id. 315.

[6] Stowe v. Thomas, 2 Am. Law Reg. 230.

on the case for damages[1]; and the latter is recoverable by an action for debt.[2]

A piracy, as we have seen, may be a piracy in part, and not in whole, of a work. The penalty, however, can be adjudged only for the printing and publishing of the whole.[3] Congress, it has been said, did not intend to inflict the penalty for a publication of less than the whole of a work.[4] But this may be doubted.

Where any wrong has been committed in respect to a literary work, and the bill does not ask for an injunction to protect the common-law rights of the author, or the violation of his copyright, but only prays for an accounting, the redress must be sought at law, for damages, and not in equity. The asking of an injunction is what constitutes the process equitable.[5]

The words "a copy of a book" as occurring in the corresponding section of the act of 1831, were held to mean a transcript or copy of the whole, and not to include a copy of less than the entire book.[6] And courts will only adjudge such penalty for the copies found in the possession of the defendant.[7]

The penalty for an infringement of copyright in engravings, maps, charts, and the matters set forth in

[1] An action on the case is the proper form of action to recover damages; trespass will not lie. Atwill v. Ferritt, 2 Blatch. 48.

[2] Id.; Dwight v. Appletons, 1 N. Y. Leg. Obs. 198. Where the law gives a penalty without providing a special form of action therefor, it is to be recovered by an action for debt. Broom. Leg. Max. p.

[3] Rogers v. Jewett, 12 Mo. Law Rep. 340.

[4] Id. But see *post*, chapter on Piracy.

[5] Monk v. Harper, 3 Edw. Ch. 110–11.

[6] Rogers v. Jewett, 12 Mo. Law Rep. 340.

[7] Backus v. Gould, 7 How. 811; Dwight v. Appletons, 1 N. Y. Leg. Obs. 198.

section one hundred,[1] is only recoverable according to section one hundred and four, within two years before the action is brought,[2] but every distinct act of printing for sale would be a new infraction for the purpose of the limitation.[3]

We have seen that according to the amendment of June 18, 1874,[4] the words "cut," "print," and "engraving," in the act of 1870, are to be construed as applying only to pictorial illustrations, or works connected with the fine arts, and not to include any prints or labels designed to be used for any other articles of manufacture.

266. Section one hundred and one[5] (4966) provides that any person who publicly performs or represents any dramatic composition for which a copyright has been obtained, and without the consent of the proprietor or his heirs or assigns, is to be liable to damages (recoverable by action in any court of competent jurisdiction), to be assessed in all cases at such sum, not less than 100 dollars for the first, and 50 dollars for every subsequent performance, as to the court shall appear to be just.

This section is undoubtedly intended as a substitute for the act of 1856. That act was passed to give to the authors of dramatic compositions the exclusive right of acting and representing, which they did not enjoy under previous statutes.[6]

"That act," said Sprague, J., in 1860,[7] "assumes the

[1] Act of Feb. 3, 1831, ch. 16 § 13.
[2] Reed v. Carusi, 8 Law Rep. 412; Mellett v. Snowden, 1 West. Law Jour. 240.
[3] Reed v. Carusi, *ubi supra*.
[4] Sec. 3.
[5] Act of Aug. 18, 1856, ch. 169, § 1.
[6] Roberts v. Meyers, 13 Mo. Law Rep. 401.
[7] Id.

doctrine that representation is not publication.[1] The prior acts secured to authors the exclusive right of printing and publication, and it was only because publication did not embrace acting or representation, that this act was passed, superadding that exclusive right to those previously enjoyed."

"The act of 1856," said Cadwallader, J., in the same year, "is the only act which affords redress for unauthorized theatrical representations; but such act only applies to cases in which copyright is effectually secured under the act of 1831." . . . A legislative enactment securing generally to literary proprietors a copyright for a limited period, but containing no special provision as to theatrical representation, does not in the case of a dramatic literary composition include the sole right of representing it.[2]

267. The previous acting or representing a play will not deprive the author of the right afterward to take out a copyright.[3] And an action may be maintained by him upon such copyright although he or his assignee has only filed his title-page, and has not published the work or play.[4] This was the ruling of Curtis, J., in Massachusetts, in 1860.[5] But Cadwallader, J.,[6] in Pennsylvania, in the same year, held directly the reverse, and ruled that where a printed copy of the dramatic work had not been filed by an assignee of a dramatic composition, the copyright was invalid.

An assignee of the exclusive right of performing a

[1] Keene v. Wheatley, 9 Am. Law. Reg. 44.
[2] Id. See *post*, chapter on Dramatic Copyright.
[3] Roberts v. Meyers, 13 Mo. Law Rep. 401.
[4] Id. 401.
[5] Id.
[6] Keene v. Wheatley, 9 Am. Law Reg. 44. See *post*, chapter on Dramatic Copyright.

dramatic composition within certain limits may maintain an action for injunction to restrain its representation and performance within such limits,[1] if he has performed all the acts required by law to secure a copyright.[2] This subject will be further discussed in the following chapter, when we come to consider Dramatic Copyright, or Stageright.

By section one hundred and two (4967[3]), what has been termed copyright before publication, and is generally dependent solely on the common law, is provided for. This section provides that any person who shall print or publish any manuscripts whatever, without the consent[4] of the author or proprietor first obtained (if such author or proprietor be a citizen of the United States or resident therein), shall be liable to said author or proprietor for all damages occasioned by such injury, to be recovered by action on the case in any court of competent jurisdiction.

The similar enactment in the statute of 1831 was held not to take away the right of property which the author possesses at common law in his works before publication, and which he may protect by action at law, or by claiming the aid of a court of chancery, which will be given on general equitable principles.[5]

An author has a common-law right in his manu-

[1] Roberts v. Meyers, 13 Month. Law. Rep. (N. S.) 401.

[2] Keene v. Wheatley, 9 Am. Law Reg. 421; *contra* Roberts v. Meyers, *ubi supra*.

[3] Act of Feb. 3, 1831, ch. 16, § 9.

[4] The act of 1831 (sec. 9) required the consent to be in writing, signed in the presence of two or more credible witnesses.

[5] Wolsey v. Judd, 4 Duer, 385; Wheaton v. Peters, 8 Pet. 657; Jones v. Thorne, 1 N. Y. Leg. Obs. 407; Bartlett v. Crittenden, 4 McLean, 301. Hoyt v. Mackenzie, 3 Barb. Ch. 323.

script until he relinquishes it by contract or some other unequivocal act.[1]

A surreptitious publication of an important part of a manuscript is as much within the statute as if the manuscript were complete; and the whole of a manuscript need not be printed.[2]

The enactment as to unpublished manuscripts operates in favor of a resident of the United States, who has acquired the proprietorship of an unprinted literary composition from a non-resident alien author; but it has been held to give no redress for an unauthorized theatrical representation.[3]

268. In the case of the copyright of a manuscript by a deposit of a printed title thereof, a question has arisen whether the record of registration provided for by section 4967, should be inscribed or printed upon the manuscript itself. It seems to us that it should so appear. True, as long as the manuscript remained in its author's possession, such a memorandum of its registration would be a merely private memorandum, but no more private than the surface upon which it appears; but if the manuscript should be lost or stolen, it might be serviceable as guarding the literary property of its author therein—against a resumé, abridgment, catalogue, or account of its contents—a publication against which this section of the act does not seem to provide. The record of copyright probably should be made in the same manner as the manuscript; that is to say, if written, such record might also be written; if engraved, copperplated, or printed, it

[1] Bartlett v. Crittenden, 5 McLean, 36, 38; Wheaton v. Peters, 8 Pet. 957; Jones v. Thorne, *ubi supra* 409; Little v. Hall, 18 How. 170; Eyre v. Higbee, 32 How. Pr. 198; *vid.* chapter on Manuscripts, *ante*, vol. 1, p. 380 *et seq.*

[2] Bartlett v. Crittenden, 5 McLean, 39–40.

[3] Keene v. Wheatley, 9 Am. Law. Reg. 45.

might also be engraved, copperplated, or printed. But this question does not appear to have ever arisen.[1]

269. Section one hundred and three (4971[2]) provides that nothing contained in the act shall be construed to prohibit the printing, publishing, importation, or sale of any book, map, chart, dramatic, or musical composition, print, cut, engraving, or photograph, written, composed, or made by any person not a citizen of the United States, nor resident therein.

270. Section one hundred and four[3] (4968), as has been already noticed, provides that all actions for forfeitures or penalties under the act shall be commenced within two years from the arising of the cause of action.

Section one hundred and five[4] (4969) provides that in all actions arising under the laws respecting copyrights the defendant may plead the general issue, and give special matter in evidence.

Section one hundred and six[5] (4970) provides that all actions, suits, controversies, and cases are to be originally cognizable, as well in equity as at law, whether civil or penal in their nature, by the circuit courts of the United States, or any district court having the jurisdiction of a circuit court, or in the supreme court of the District of Columbia, or any territory; and the court is empowered, upon bill in equity, filed by any party aggrieved, to grant injunction to prevent the violation of any rights secured by the copyright laws according to the course and principles of courts of equity, on such terms as the court may deem reasonable.

[1] See *ante*, vol. 1, chapter on Manuscripts.
[2] Act of Feb. 3, 1831, ch. 16, § 8.
[3] Act of Feb. 3, 1831, ch. 16, § 13.
[4] Ib. § 10.
[5] Act of Feb. 15, 1819, § 1.

The act of 1819, for which this section is now substituted, looked to the remedy, and not to the right,[1] and—until the act of 1870—was the only law conferring equitable jurisdiction on the United States courts in cases of copyright.[2] Section nine of the act of 1831 supplemented this act by extending that jurisdiction to the case of manuscripts.[3] The equity jurisdiction of the federal courts does not extend to the adjudication of forfeitures, and a decree cannot be entered for the penalties incurred for violation of copyright.[4]

Under the acts of 1790 and 1870 the owners of copyrights do not have redress or relief in any cases, in which they did not, before those acts, have relief in a court either of law or equity.[5] Those acts merely enabled such to prosecute their claims in the circuit courts of the United States, as they had done before in the state courts; the public interest at that time, as now, requiring a uniform construction to be placed, by one tribunal, on all important questions connected with the rights so held.[6]

The jurisdiction of the federal courts, so granted, has not taken away or diminished, however, the original jurisdiction, which, before the acts granting it, was exercisable by state courts, except where the jurisdiction is made exclusive in express terms, or by necessary construction of the federal constitution;[7] and where such jurisdiction is so expressly given, the federal courts will not be ousted thereof by the citizenship of the parties litigant.[8]

[1] Keene v. Wheatley, 9 Am. Law. Reg. 44–5.
[2] Stephens v. Gladding, 17 How. 455.
[3] Id.
[4] Id.
[5] Pierpont v. Fowle, 2 Wood. & M. 27.
[6] Id.
[7] Woolsey v. Judd, 4 Duer. 382.
[8] Keene v. Wheatley, 9 Am. Law Reg. 44–5.

271. By section one hundred and seven,[1] a writ of error or appeal to the supreme court of the United States lay from all such judgments and decrees of any court in the same manner and under the same circumstances as in other judgments and decrees of such courts, without regard to the sum or value in controversy.

272. By section one hundred and eight,[2] in all recoveries, either for damages, forfeitures, or penalties, full costs were to be allowed.

273. By section one hundred and nine and one hundred and ten (4948) the librarian of congress is made chargeable with all the duties pertaining to copyrights required by law. He is to make an annual report to congress of the number and description of copyright publications for which entries have been made during the year (4951), and all copyrightable matter heretofore sent to the clerks' offices of the several federal districts, and to the department of the interior, is to be transferred to his office.

274. The full text of the law of July 8, 1870, which we have been considering, together with the text of the successive laws preceding it and the present laws upon the subject, will be found in the Appendix, together with the English law of copyright.

The main features in which the English law differs from the one we have been considering are, that the English copyright is always for the lifetime of the author, in him, and for seven years more in his personal representatives, except that if the seven years shall terminate before the end of forty-two years from the date of the copyright, the copyright shall continue on until the expiration of such forty-two years. A copyright taken out after the death of an author, also

[1] Act Feb. 18, 1861, ch. .37, § 1.
[2] Act of Feb. 3, 1831, ch. 16, § 12; sections 107, 108, 109, 110.

endures for the term of forty-two years, and is the property of the legal owner of the author's manuscript from which the book is printed. And a complete copy of the best edition, in the best binding in which the book is issued, must be furnished, not only to the British Museum, but, upon demand in writing, within one month of publication, also to the Bodleian Library in Oxford, the public library of Cambridge, the library of the Faculty of Advocates at Edinburgh, and the library of the Holy and Undivided Trinity of Elizabeth at Dublin.[1]

275. Besides providing for the protection of all literary matter, all prints, engravings, photographs, statues, &c., &c., and all other works of science and art, the English statutes of copyright also provide for the protection of designs.[2]

In the United States, however, as we have just seen, these designs are protected by the law of patents, providing that instead of being copyrighted they should be patented.[3] Trade-marks also are by the same section sent to the patent office. A trade-mark is a name or device adopted by a manufacturer, dealer, or proprietor to designate such goods or wares or properties as are manufactured, dealt in, or maintained by him, or such as he guarantees to be what they seem or pretend to be, or to be adequate to the purposes for which they are intended. So the label of a blacking-box is a prima

[1] There is no feature of the English copyright law which calls forth more protest and opposition than this, which in the case of valuable books might amount to a tax of a thousand pounds upon a single edition, as has been demonstrated by Maugham (L. Lit. amendment of June 18, 1874, taking effect August 1, 1874) and others.

[2] 5 & 6 Vict. c. 100; 6 & 7 Vict. c. 65; 13 & 14 Vict. c. 104; 21 & 22 Vict. c. 70; 24 & 25 Vict. c. 73. As to copyright in designs, see Lazarus v. Charles, L. R. 16 Eq. 117.

[3] A trademark registered in the patent office is protect for thirty years. Revision of Statutes, sec. 4941.

facie guaranty that the blacking therein contained is of a certain sort and manufacture. The name of a magazine is a prima facie guaranty that the reading matter contained therein has passed the editorial scrutiny of its conductors.[1] The name and color of an omnibus are prima facie guarantys that that vehicle runs between certain stations, and is under a certain management.[2] And all these are valuable as representing labor, reputation, and good-will.

A trade-mark is, then, first, a mark of origin; and, second, a guaranty of fitness or of quality; and, as it is to the interest of the proprietor of the mark to maintain the character and the confidence of the public in his guaranty, so it is the policy of the law to foster and encourage his interest in so doing, and to interfere to prevent and punish any attempt to derogate from its value, by imitation, or by placing it upon inferior goods, wares, or properties. It is to be noticed that in the word or words, device or devices, used for the trade-marks, in themselves, no property can be acquired; it is only when they are adopted and applied to goods, wares, and properties of a certain sort, kind, and description. If a manufacturer stamps all cloth made by him with the figure of a lion couchant, he may prevent a rival cloth manufactu from stamping his with the figure of a lion couchant, or from any such colorable imitation as will lead the public to confound the cloths of the two manufacturers, because he wishes to be known as making an article of a certain quality, which he recommends the public to buy, and by whose character he must stand or fall; and it would be unfair to oblige him to stand or fall by the

[1] Hogg v. Kirby, 8 Ves. 215; Maxwell v. Hogg, L. R. 2 C. A. 307.

[2] Knott v. Morgan, 2 Keene, 213.

quality of cloth which he does not make, and which bears his trade-mark. But, however, if a manufacturer of soap sees fit to stamp his bars of soap with the identical figure of the lion couchant, the manufacturer of cloth cannot prevent his doing so. The right to trade-marks is, therefore, a right not arising from contract, but a right against the world at large, and, as such, will be construed strictly, and against the individual proprietor. It is a right "which can be said to exist only, and can be tested only by its violation."[1]

A trade-mark, then, is a jus in rem[2]—a right in the thing itself, and in nothing else. This right, it is evident, is founded, not upon contract, but upon property; and the right to prevent or punish its infringement, upon property, and not upon fraud. For where a trade-mark is wrongfully used by one not its owner, the injury arises from the fraud, not upon its proprietor, but upon the public, who are deceived as to his wares by such wrongful use.

The right in the thing cannot be sold separately from the thing itself; and the owner of a trade-mark cannot sell it, except he sell the thing itself, or the authority or faculty of producing that thing, and of imprinting upon it the trade-mark.[3] A trader, who has been a manager or a partner in a firm of established reputation, has a right, on setting up an independent business, to make known to the public that he has been with that firm, but he must take care not to do so in a way calculated to lead the public to

[1] Cranworth, J., in Farina v. Silverlock, 6 De G. & M. & G. 217. And as to any difference between a label and a trade-mark, see Alexius Podellot, 6 Official Gazette of the U. S. Patent Office, p. 641.

[2] Ludlow & Jenkins on Trademarks, p. 5.

[3] *Vid.* Hall v. Barrows, 33 L. J. Ch. 207.

believe that he is still carrying on the business of the old firm, or is in any way connected with it.[1]

The principle which governs all cases of trade-marks, undoubtedly is, that no one is permitted to appropriate the benefit of another's reputation. A trade-mark, though undoubtedly originally signifying a single device or insignia, as in the case of the lion couchant, has come to signify anything that has become in time adopted as the prima facie means of detecting the goods, wares, or properties of certain proprietors; so the name, color, and general appearance of a line of omnibuses;[2] the shape, style, and general contour of a steel pen, and the method of packing the same in small boxes of a certain shape and size; and these, again, in other larger ones of a certain shape and size; which boxes were covered with paper lithographed with certain devices, and lines of printing of certain directions and styles of letters, have been held to be, what is perhaps the best and most comprehensive term which can be used—colorable imitations of each other—and these form infringements upon the jus in rem of a trade-mark.[3]

276. Under the provisions of the amendment to the copyright laws of June 18, 1874, not only labels, but cuts and prints, not designed for book illustrations or fine-art designs, are excluded from copyright in the office of the librarian of congress. The fine arts, as defined in that office, are limited to painting and sculpture; and other pictorial illustrations, to be entitled to copyright, must be such as come clearly

[1] Hookman v. Pottage, L. R. 8 Ch. App. 91.

[2] Knott v. Morgan, 2 Keen. 2-3; Canaham v. Jones, 2 Ves. & B. 218; Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. C. 538.

[3] Washington Medalion Pen Co. v. Esterbrook, N. Y. Times, Feb. 4, 1869.

within the designation of engravings, cuts, chromos, or photographs. And all applicants for protection for medals, scrolls, ornaments, regalia, utensils, emblems, earthenware, &c., will be referred to the patent office. Articles not coming under the descriptions of the articles enumerated in section 4952, or the head of trade-marks, or articles heretofore patented, or which cannot be regarded as designs intended to be perfected as works of the fine arts, are to be protected, if at all, under the law of patents for designs. The fee for registry of "trade-marks" at the patent office is twenty-five dollars.

A mere form of words, device, method, or invention, whether applied to advertising or otherwise, is not protected by the copyright laws, because not coming within the designation of books, prints, or other articles which are the subjects of copyright. Any printed circular or pamphlet would be entered.

277. Under the provisions of sections 77 to 84 of the act of congress of July 8, 1870, "to revise, consolidate, and amend the statutes relating to patents and copyrights, trade-marks were for the first time recognized and made the subjects of protection by the laws of the United States. Being fully provided for by the patent laws, trade-marks, eo nomine, cannot be copyrighted, and, in fact, any supposed protection which was claimed for them under the old law of copyright was of doubtful validity, by reason of the fact that the majority of them do not come within the designation of articles which are lawful subjects of copyright. While prints, cuts, and engravings, as such, are the subjects of copyright, the exclusive right secured by the law will not extend (nor has it ever extended) to the protection of any article of manufacture covered

by the print, cut, or engraving. Such articles can be protected only by a patent, for which all applications are to be made to the commissioner of patents, at Washington.

An analogy has been attempted between a title of a book as required to be copyrighted in the United States previously to the deposit of a copy of the book itself and a trade-mark; and this we have elsewhere discussed.[1] This question can only arise in the United States, all other countries making the copyright concurrent with the deposit of the book, and not with the record of its title.

278. It has been recently held that if a patent is not pronounced valid at law, a picture of that patent could not be copyrighted so as to prevent one using the patent from using the picture thereof. In other words that if the patent was not entitled to protection, neither would the copyright be.[2] The case in which this ruling seems to follow, in principle, Wyatt v. Barnard,[3] where Lord Eldon said, with reference to specifications of patents, that a person who chose to go to the office, copy a specification, and publish it, could not by so doing acquire a right to restrain another from copying it. It is not clear, from the meagre report, whether Lord Eldon intended merely to assert the right of every one to copy the original specification, or to deny altogether the existence of copyright in productions copied from specifications. The reporters, judging from their marginal note, seem to have understood him in the latter sense, but the former was most probably what he intended.

[1] *Post*, chapters on Newspapers and on Dramatic Copyright.

[2] Collender v. Griffith, 11 Blatch. 212; 19 Wall. (U. S.) 212.

[3] 3 Ves. & B. 78.

So where plaintiff brought suit for an infringement of his patent for a design for a billiard table, and another upon a copyright of an engraving exhibiting a view of the same billiard table, with its ornamentation and other features. The court, after holding that billiard tables and designs therefor having the sides and ends bevelled, being old, a patent for a design having a greater bevel is void as presenting no feature of invention or discovery, ruled that a copyright of an engraving of such a patented design could not be used to prevent a person who has the right to make billiard tables in the way he makes them, from advertising them by publishing an engraving of them.[1]

But the principle would hardly be taken to be a general one, and must be interpreted by the circumstances of this case. For, if the plaintiff had added other features to his picture of the billiard table, as, for example, figures of men and women in certain positions playing or watching a game, &c., we think he would have been entitled to protection in the enjoyment of the copyright of his picture.

Of the status of copyright, in the eye of the law, very little more need be said. We have seen that it is in all respects personal, and subject to all the laws regulating the transfer of personal property. It can be levied upon by a sheriff in execution, or be made available in bankruptcy for one's creditors through the assignee.[2] It is only a perfect and effective copyright, however, which can be so seized. A manuscript[3] in the author's hands, or a book half printed or in process

[1] Collender v. Griffith, 11 Blatch. 222.

[2] Longman v. Tripp, 3 New R. 67; Mauman v. Tegg, 2 Russ. R. 385, 392; Keene v. Harris, cited 17 Ves. 338; Curtis on C. p. 231; Maugham Lit. Prop. p. 177.

[3] 1 Bell's Com. 68; 4 Burr. 2311, 2396–7; Godson on Patents & Cop. 2d ed. p. 430; Curtis on C. pp. 85, 218.

of publication[1] could not probably be so taken in assignment. For, before publication, this property is beyond the reach of creditors, is in fact only potentially or formatively in existence, since no man can be forced, by any operation of law, to publish his thoughts for the benefit of his creditors.

Neither will the printer of a book in process of publication be entitled to sell it for his payment,[2] although he undoubtely has a lien upon it, until delivery, against the author or his creditors.[3] Once published, however, the book is a property, and that property is a subject which creditors can attach and sell, and the price unpaid by the bookseller is as completely open to the diligence of creditors as the price of any other commodity or piece of merchandise.[4]

We have just seen that it was not unusual, when copyrights were considered a perpetuity, to make them the subjects of family settlements.[5] There does not appear to be any reported case in which the title to copyright depended upon a bequest, but there can be no doubt that it can be so transferred. A patentee may bequeath his interest in a patent,[6] and if he die intestate, it will be assets in the hands of his administrator. So also the proprietor of a copyright may transfer it by testament, or in the absence of such testament it will pass as does other personal property.[7]

Since the duration of copyright has been limited, such cases are possibly of rare occurrence. The case of Keene v. Harris[8] was more properly one involving the good-will of a work, or the contract or right to publish it, together with the implements and proper-

[1] Maugham, p. 177, note (4).
[2] Bell's Com. p. 68.
[3] Id.
[4] Id.
[5] Maugham Lit. P. p. 16.
[6] Godson, 168.
[7] Maugham Lit. P. p. 176.
[8] Cited 17 Ves. 338.

ties thereof, than the property or copyright in the publication itself.

279. The English and other copyright laws, which give copyright to an author for his lifetime and for a term thereafter, are open to the serious objection that they thus create a property, the exact duration of which it might be impossible to determine. The date when a great author like Wordsworth or Dickens dies is matter of public knowledge and repute, but the vast majority of authors of copyrighted books are comparatively obscure, and in their case, to say nothing of the author of an anonymous volume, it might not unfrequently be impossible to ascertain when copyright in their works determined. Who can point to the hour when a copyright ceased to exist in the "Letters of Junius." Supposing that unknown to have lived to years, which actual instances of longevity prove are not impossible to mortals, such a copyright might, to-day, exist in his native land. The American rule of a fixed term is certainly preferable in this regard.[1]

280. It seems to have been uniformly held that serials, or other publications, if issued or sold separately, require a separate copyright entry for each distinct part or number, in order to protect them against infringement.

[1] 1 & 2 Vict. c. 12, repealed by 7 & 8 Vict. c. 12, amended by 15 Vict. c. 12. The English international copyright act of 1852, requires that, in order to entitle the foreign author to the benefit of the act, a translation sanctioned by the author must be published within three calendar months of the registration of the original work—such a translation must be of the whole work and not a version. And an English version of the French play of Frou Frou, entitled "Like to Like," in which English names and scenes and habits were substituted for the French, was held not to be such a translation as entitles to the benefit of the act. Wood v. Chart, and Wood v. Wood, L. R. 10 Eq. 193.

It is, however, optional with publishers to enter without certificate, in the office of the librarian of congress, at fifty cents each issue, or to take certificates at one dollar, that office holding, that, to entitle any one to use the notice of copyright secured, "Entered according to act of congress," &c., each distinct work or issue bearing such imprint should be actually entered; and that the mere entry of a general title conveys no right to use the copyright imprint beyond one issue of the publication. The provisions and penalties of sections 4959 and 4960 of the copyright law are held to apply to periodicals as well as to books, each issue of a periodical being a book, for the purposes of the act.

281. Of the two copies of each publication now required to be sent to the office of the librarian of congress within ten days after publication, to perfect the copyright, one is in lieu of the one formerly required to be deposited with the copyright records in the office of the district court of the United States; the other is for the library of congress.[1]

[1] The following is a copy of a pamphlet issued by the department:

"Directions for securing copyrights, under the revised act of congress which took effect August 1, 1874:

"A printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or a description of the painting, drawing, chromo, statue, statuary, or model or design for a work of the fine arts, for which copyright is desired, must be sent by mail or otherwise, prepaid, addressed, 'Librarian of Congress, Washington, D. C.' This must be done before publication of the book or other article.

"A fee of fifty cents, for recording the title of each book or other article, must be inclosed with the title as above, and fifty cents in addition (or one dollar in all) for each certificate of copyright under seal of the librarian of congress, which will be transmitted by return mail.

"Within ten days after publication of each book or other

282. Where the copyright of a prospective publication is to be secured, the title required to be sent must be printed; and this, whether the work is intended

article, two complete copies of the best edition issued must be sent, to perfect the copyright, with the address, 'Librarian of Congress, Washington, D. C.'

It is optional with those sending books and other articles to perfect copyright, to send them by mail or express; but, in either case, the charges are to be prepaid by the senders. Without the deposit of copies above required the copyright is void, and a penalty of twenty-five dollars is incurred. No copy is required to be deposited elsewhere.

"No copyright is valid unless notice is given by inserting in every copy published, on the title-page or the page following, if it be a book; or, if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected as a work of the fine arts, by inscribing upon some portion thereof, or on the substance on which the same is mounted, the following words, viz.: 'Entered according to act of congress, in the year ——, by ——————, in the office of the librarian of congress, at Washington;' or, at the option of the person entering the copyright, the words: 'Copyright, 18—, by ——————.'

"The law imposes a penalty of one hundred dollars upon any person who has not obtained copyright, who shall insert the notice, 'Entered according to act of congress,' or 'Copyright,' &c., or words of the same import, in or upon any book or other article.

"Any author may reserve the right to translate or to dramatize his own work. In this case, notice should be given by printing the words, 'Right of translation reserved,' or 'All rights reserved,' below the notice of copyright entry, and notifying the librarian of congress of such reservation, to be entered upon the record.

"Each copyright secures the exclusive right of publishing the book or article copyrighted for the term of twenty-eight years. At the end of that time, the author or designer, or his widow or children, may secure a renewal for the further term of fourteen years, making forty-two years in all. Applications for renewal must be accompanied by explicit statement of ownership, in the case of the author, or of relationship, in the case of his heirs, and must state definitely the date and place of entry of the original copyright.

to be kept in manuscript, as in the case of a dramatic production, to be published by representation only, or is to be published by any mechanical process of multiplying its contents, as printing, engraving, photographing, and the like.

The department is not at liberty to record or issue certificates of copyright upon written titles. The law

"The time within which any work copyrighted may be issued from the press is not limited by any law or regulation. but depends upon the discretion of the proprietor. A copyright may be secured for a projected work as well as for a completed one.

"Any copyright is assignable in law by any instrument of writing, but such assignment must be recorded in the office of the librarian of congress within sixty days from its date. The fee for this record and certificate is one dollar, and for a certified copy of any record of assignment, one dollar.

"A copy of the record (or duplicate certificate) of any copyright entry will be furnished under seal, at the rate of fifty cents each.

"In the case of books published in more than one volume, or of periodicals published in numbers, or of engravings, photographs, or other articles published with variations, a copyright is to be taken out for each volume or part of a book, or number of a periodical, or variety, as to size, title, or inscription, of any other article.

"To secure a copyright for a painting, statue, or model or design intended to be perfected as a work of the fine arts, so as to prevent infringement by copying, engraving, or vending such design, a definite description must accompany the application for copyright, and a photograph of the same, at least as large as 'cabinet size,' must be mailed to the librarian of congress within ten days from the completion of the work.

"Copyrights cannot be granted upon trade-marks, or labels intended to be used with any article of manufacture. If protection for such prints or labels is desired, application must be made to the patent-office, where they are registered at a fee of six dollars for labels, and twenty-five for trade-marks.

"Every applicant for a copyright must state distinctly the name and residence of the claimant, and whether the right is claimed as author, designer, or proprietor. No affidavit or formal application is required."

explicitly requires a printed copy of the title of the book or other article for which a copyright is desired to be sent to the office of the librarian of congress before the author or proprietor can be entitled to receive a copyright. The particular form or style of type is immaterial, it being necessary to print only the precise words of the title.

283. For each change or variation, either of title or of substance, in any publication secured by copyright, a distinct entry should be made, in order to the protection of each variety issued.[1] But the publisher's imprint, place of business, or date of issue may be

[1] Upon receipt of the two printed titles of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or negative thereof (which would be of course the title of the photograph therefrom to be printed), painting, drawing, chromo, statute, statuary, model, or design to be perfected as a work of art (which would be also of course the title of the perfected work), which title should be in every case accompanied by the fees of fifty cents, by a letter to the librarian of congress, stating whether the sender claims his right to the projected work as author or proprietor (and for which letter no particular form is required); the librarian of congress will record the title as copyrighted, and upon receipt of an additional fifty cents will return post paid by mail a record or transcript of the register, in the form and words following:

Librarian of Congress,
Copyright
Office,
United States of America.

Library of Congress,
Copyright Office, Washington.

No. ——

To wit: Be it remembered that on the first day of April, anno domini 187–, John W. Smith, and Henry C. Brown, of New York, have deposited in this office the title of a Dramatic Composition, the title or description of which is in the following words, to wit: "If Wishes were Horses Beggars might Ride," a drama in five acts, by George Evelyn, Esq., New York, 1874; the right whereof they claim as authors and proprietors, in conformity with the laws of the United States respecting copyrights.

A. R. SPOFFORD,
Librarian of Congress.

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The "title" called for by the act should be a literal transcript or fac similie of the title which is to be used if the matter is to be printed with a title page or title at all, though a slight detail, as a change of the publisher's name, or a legend or letters after the author's name, if inadvertently or otherwise omitted, would not be material. *Post*, vol. 1, p. 470.

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Librarian of Congress,
Copyright
Office,
United States of America.

Library of Congress,
Washington, June 1st, 1875.

John W. Smith and Henry C. Brown,
186 Broadway, New York.

The undersigned hereby acknowledges the receipt of two copies of "If Wishes were Horses Beggars might Ride," transmitted to the library in conformity with the laws of the United States respecting copyrights.

Very respectfully,
A. R. Spofford,
Librarian of Congress.

certificate of copyright; no corrections being made, of the nature of amendments of the record, after two weeks have expired. But the change of the name of the publisher of a work would not invalidate the copyright of its author.

284. The copyright on any publication once entered should be announced in the name of the original proprietor until the first term of twenty-eight years have expired, the renewal to be made in the name of the person renewing the same.

Copyrights are[1] assignable "by any instrument of writing," no particular form being prescribed by any law or regulation. A simple transfer, endorsed on the original certificate of copyright, or on a separate paper, and attested by one witness, is sufficient, without other formalities.

To render the assignment valid, it is to be recorded in the office of the librarian of congress within sixty days from its date.

285. The librarian of congress is a ministerial officer only, and has no discretion or authority to refuse any application for a copyright coming within the provisions of the law. No questions as to priority or infringement, or concerning the validity of a copyright, can be determined by any other authority than a United States court. A certificate of copyright is prima facie evidence of an exclusive title, and is highly valuable as the foundation of a legal claim to the property involved in the publication.

286. Previous to the act of congress of 1870, removing all records, or future registrations of copyrights to the one office of the librarian of congress, at Washington, there had been at least sixty distinct offices in the United States where such records were kept and such

[1] Section 4955.

registrations made. Upon the transfer of the entire copyright business of the United States to that office, in 1870, most of these records were found to be without index. The librarian, therefore, will decline to certify whether or not a particular title has ever been copyrighted. All entries since July 8, 1870, however, are indexed under a three-fold heading: 1. By name of author. 2. By name of proprietor (or publisher). 3. By title, or subject-matter. And inquiries since that date are answered immediately.

287. By section 4961 of the present statutes, the postmaster to whom such copyright book, title, or other matter is delivered, is directed, if requested, to give a receipt therefor. And it will be found well in every case where such title is deposited in the post-office, to take such an acknowledgment. For it is submitted that under the new law the vital step towards copyright is taken upon such deposit, and consequently the date of the postmaster's receipt—he being in some sort substituted for the clerk of the district court, who formerly received the copyrightable matter—will be evidence in a court of justice of the actual date of the copyright, if not a conclusive certificate thereof.[1] It is apprehended that if the wrapper containing the matter be not marked "copyright matter," or prepaid, the postmaster would not be authorized to give a receipt for the same, though there

[1] A simple form of such receipt might be:

U. S. Post-Office,
Station D, New York City,
May 31st, 1871.

Received of John W. Smith a pre-paid parcel, marked "copyright matter," and addressed to the librarian of congress, Washington, D. C.

_____,
Postmaster or Superintendent.

is nothing in the section, or in the regulations of the post-office department, to that effect. By sections ninety-five and ninety-six of the act of 1870, it was provided that copyright matter directed to the librarian of congress, should be transported in the mails free of cost to the copyrighter, but under the new post-office regulations such matter, like all other mailable parcels,[1] must pay postage.

288. The thing copyrighted must be something which can properly find protection under no other act. The terms book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, negative, painting, drawing, chromo, statue, statuary, models, and designs will be most liberally construed.

But if it shall appear that any of these may be protected under the patent laws, they will be referred to those statutes. Thus, a label used in the sale of an article, it was held in 1829,[2] is not a book within the provisions of the statute respecting copyrights.

289. Lord Campbell once expressed an opinion that no work ought to be allowed a copyright, unless it had an index; and it is a suggestion well worthy of serious consideration. If the time has not already come when books can no longer be read, but must be merely consulted, it is fast approaching. The presses of the world are manufacturing about forty thousand new volumes yearly,[3] and the end is not yet.

[1] See the present postal laws of the United States, *ante*, vol. i., pp. 489 *et seq.*

[2] Coffeen v. Brunton, 4 McLean, 517.

[3] If we are to credit the estimates of those whose duty it is to collect such statistics, the above rough estimate is not far out of the way. For example, in 1873, there were registered in France (according to the Chronique du Journal General a

l'Impremerie et de la Librarie) . . .	11,530	works.
In the United States, for that year, according to the report of the librarian of congress (these figures only inclusive of new books) .	3,424	"
In Germany (Prussia and Austria) . .	11,351	"
In Great Britain, ...	4,569	"
Grand total of these countries for the year 1873, say, ...	30,874	"

These figures are exclusive of Italy, Russia, Spain, Portugal, Sweden, and Denmark, and the other countries of Europe where literature is constantly on the increase; nor do they accurately show either the proportionate or the actual grand total of publications in the various countries, on account of differences in the laws under which the registration is made. For instance, the registration in France is imperative, and must include everything, from a two-page pamphlet to an encyclopædia, whether the author looks for profit therefrom or not. In Germany the registration is customary, but not compulsory; while in England and America a large proportion of published works are what are known as privately printed or author's books, which may not be registered at all. For further information, see the (London) Athenæum, Dec. 1874, and January, 1875; also, New York Evening Mail, February 17th, 1874.

In the year ending 1872, the total number of works, including books, all works of art, dramatic and musical compositions, maps and charts, copyrighted in the office of the librarian of congress, was 22,140. In the year 1874 there were published in Great Britain 3351, new books, besides 961 editions of older books. In the year 1874 the whole number of copyright entries in the United States was 16,206. In France, in 1874, there were issued 11,917 works in French—new works or fresh editions, no periodical publications being reckoned—2,196 engravings and maps, and 3,841 pieces of music; total, 17,954. In 1869, the most prosperous year in the book-trade of France, there were 17,394 publications registered. In 1870, 8,831, and 10,659 in 1872. The annual averages for the last twenty years of publications of all kinds is 15,000; 10,000 of which belong to the typographical department of production, 3,000 are engravings and photos, and 2,000 music. The Bibliothèque Nationale has since 1853 received one of the two copies of all new works required by law to be left at the depot of the Ministre de l'Intérieur.

CHAPTER III.

OF DRAMATIC COPYRIGHT OR STAGERIGHT.

290. The dramatic[1] form of composition is of great antiquity. The book of Job, in the old Testament, is of this form, and many learned men are of opinion that the Homeric poems were so rendered by their author or authors.

About the year 535 B. C., Thespis, a native of Attica, achieved the idea of separating the performers or renderers of this sort of production from their audience, and, as we are told by Horace,[2] employed a cart for the purposes of a stage, from which his actors might amuse the people, and in which they might also be carried from place to place in the course of their representations.

To the monotony of the Thespian declaimer, for the first actors seem to have been but little more, succeeded presently the stately shows of Æschylus, where noble diction combined itself with music, scenery, and costume. The words were now pronounced by two speakers as a dialogue instead of a monologue. The performers, instead of staining their faces with the juices of vegetables, assumed the masque, and the whole was presented to an orderly and attentive

[1] The Greek word, δραμα, evidently from δραω—to draw—signified a poem accommodated to action and gesture, and conveying its burden or theme to the eye by means of representation.

[2] De Arte Poet. 275.

audience, within the enclosure of a regularly constituted theatre.[1]

To Æschylus succeeded Euripides and Sophocles, and the first distinction between tragedy and comedy made its appearance.[2]

The first comedy of Aristophanes was rendered B. C. 383.[3] Of his comedies eleven have come down to us extant. But for a knowledge of the two hundred comedies of Menander we are indebted solely to his imitator and borrower, Terence.

Dramatic entertainments made their appearance in Rome, in the year of the city 391, when the first one was performed to propitiate certain of the gods, who had sent a grievous plague; before this, the games of the circus had been the only public pastime of the people.[4]

[1] Potter's Ant. Qr., p. 76. Among the Greeks these theatres soon became the popular place for all public gatherings and spectacles, and even among the Romans it was usual to scourge malefactors on the stage. (Sult. Aug. 47; Tac. ii. 80. Sen. Ep. 108, Cic. Flaac. 7.) This the Greeks called *θεατριζειν και παραδειγματιζειν.*

Theatical exhibitions in Rome were called ludi scenici (whence our words scenic and scene), because they were first acted in a shade formed by branches and leaves of trees, or in a tent. So, after theatres were built, the stage where the actors stood was called scena.

[2] Both, says Aristotle, owe their existence to the fruitful genius of Homer, the Iliad and the Odyssey furnishing theme for tragedy, and the "Margites" for comedy. Æschylus himself declares that his tragedies are but scraps from the magnificent repasts of Homer.

[3] Donaldson.

[4] Ov. de Art. Am. i. 105, Suet. Tib. 34, Cic. Planc. 11, Ver. iii. 79. Serv. in Virg. i. 164, Suet. Caes. 84.

A century and a half after the death of Euripides and Sophocles, and after Menander half a century, Livius Andronicus, a slave, produced the first play ever written at Rome. Plays were thereafter adapted from the Greek by Naevius, Plautus, Caecilius, Terence, Afranius, Pacuvius, Accius, and others.

Pantomimes are said to have been the invention of Augustus, though before his time the mimi both spoke and acted.[1]

Through the dark ages a rude drama existed, chiefly founded, as to its incident, on Scriptural themes.

So popular was this form of amusement, even at that early day, that the audience submitted to the rudest and clumsiest devices for scenic effect, and good-naturedly supplied with its own vivid and accommodating imagination all that in these days we have come to demand under the unity of place. Said Sir Philip Sidney: "You shall have Asia of the one side, and Africke of the other, and so many other under Kingdomes, that the Plaier, when he comes in, must ever begin with telling where hee is, or else the tale will not be concieved. Now you shall have three ladies walke to gather flowers, and then we must beleeve the stage to be a garden. By and by we heare news of shipwracke in the same place, then we are to blame if we accepte it not for a rocke . . . . while, in the meantime, two armies flie in, represented with four swordes and bucklers, and then what harde hart will not receve it for a pitched field? Now of time they are much more liberall. For ordinary it is, that two young princes fall in love, after many traverses.

Of these, Naevius, Afrianus, Plautus, Caecilius, and Terence copied chiefly from Menander, the best writ of comedies that ever existed. (Quintillian x. 1.) No Roman tragedies are extant, save a few of Senacas; and of the comedies, we have only a few of Plautus and of Terence, vid. Schlegel's Eighth Lecture, Donaldson, p. 306.

[1] The most celebrated composers of mimical performances were Laberius and Publius Syra, in the days of Julius Cæsar, while under Augustus there were two famous rivals in their representation, Pylades and Bathyllus, in whose behalf their respective admirers often drew blood.—Potter, Greek Ant.

She is got with childe, delivered of a faire boy, hee is lost, groweth a man, falleth in love, and is readie to get another childe; all this in two hours space!"[1]

[1] The Defence of Poesie (ed. 1629, p. 562). Doubtless these enormities were somewhat reduced under Shakespeare. With a few hangings, rude representations of animals, towers, forests, they assisted somewhat the public imagination. But, in fact, in Shakespeare's plays, as in all others, the public imagination is the great contriver; it must lend itself to all, substitute all, accept for a queen a young boy whose beard is beginning to grow, endure in one act twelve changes of place, leap suddenly over twenty years or five hundred miles, take half a dozen supernumeraries for forty thousand men, and to have represented by the rolling of the drums all the battles of Cæsar, Henry V., Coriolanus, Richard III. All this, imagination, being so overflowing and so young, does accept! Recall your own youth! For my part the deepest emotions I have had at a theatre were given to me by an ambling bevy of four young girls, playing comedy and drama on a stage at a coffee-house, when I was eleven years old. So, in this theatre, at this moment, their souls were fresh, as ready to feel everything, as the poet to dare everything.—Taine's English Literature (ed. N. Y. 1871, p. 224).

Let us try, then, to set before our eyes this public, this audience, and this stage, all connected with one another, as in every natural and living work; and if ever there was a natural and a living work, it is here. There were seven theatres in Shakespeare's time, so brisk and universal was the taste for representations. Great and rude contrivances, awkward in their construction, barbarous in their appointments; but a fervid imagination readily supplied all that they lacked, and hardy bodies endured all inconveniences without difficulty. On a dirty site, on the banks of the Thames, rose the principal theatre, a sort of hexagonal tower, surrounded by a muddy ditch, surmounted by a red flag. The common people could enter as well as the rich; there were six-penny, two-penny, even penny seats; but they could not see it without money. If it rained, and it often rains in London, the people in the pit—butchers, mercers, bakers, sailors, apprentices—receive the streaming rain upon their heads. I suppose they did not trouble themselves about it; it was not so long since they began to pave the streets of London; and when men like them have had experience of sewers and puddles, they are not afraid of catching cold. While waiting for the piece, they amuse

And at a still earlier date the "miracle play" and the "morality" appear to have been a favorite diversion with the people.[1]

themselves after their fashion, drink beer, crack nuts, eat fruits, howl, and now and then resort to their fists. They have been known to fall upon the actors, and turn the theatre upside down. At other times they have gone in disgust to the tavern to give the poet a hiding, or toss him in a blanket. They were rude jokers, and there was no month when the cry of "Clubs" did not call them out of their shops to exercise their brawny arms. When the beer took effect, there was a great upturned barrel in the pit, a peculiar receptacle for general use. The smell arises, and then comes the cry, "Burn the juniper!" They burn some in a plate on the stage, and the heavy smoke fills the air. Certainly the folk there assembled could scarcely get disgusted at anything, and cannot have had sensitive noses. In the time of Rabelais there was not much cleanness to speak of. Remember that they were hardly out of the middle age, and that in the middle age man lived on the dung-hill.

Above them, on the stage, were the spectators able to pay a shilling, the elegant people, the gentle folk. These were sheltered from the rain, and if they chose to pay an extra shilling, could have a stool. To this were reduced the prerogatives of rank and the devices of comfort. It often happened that stools were lacking. Then they stretched themselves on the ground; they were not dainty at such times. They play cards, smoke, insult the pit, who give it them back without stinting, and throw apples at them into the bargain. As for the gentle folk, they gesticulate, swear in Italian, French, English; crack aloud jokes in dainty, composite, high-colored words. . . . With such spectators illusions could be produced without much trouble; there were no preparations or perspectives; few or no movable scenes; their imagination took all this upon them. A scroll in big letters announced to the public that they were in London or Constantinople, and that was enough to carry the public to the desired place. There was no trouble about probability. Id. 223.

[1] Mysteries, moralities, farces, sotties, and the like devout spectacles were first introduced by pilgrims returning from the Holy Land, or other consecrated places, who composed canticles of their travels, and amused their religious fancies by interweaving scenes of which Christ, the apostles, and other objects of devotion served as the themes. Menestrier informs us that these pilgrims traveled in troops, and stood in

The historical drama seems to have next succeeded, and to its rendition Shakespeare, amongst others, devoted his most careful study.[1] And to-day the drama

the public streets, where they recited their poems, with their staff in hand, while their chaplets and cloaks, covered with shells and images of various colors, formed a picturesque exhibition, which at length excited the piety of the citizens to erect occasionally a stage on an extensive spot of ground. These spectacles served as the amusement and instruction of the people. So attractive were these gross exhibitions in the dark ages, that they formed one of the principal ornaments of the reception which was given to princes when they entered towns.

When the mysteries were performed at a more improved period, the actors were distinguished characters, and frequently consisted of the ecclesiastics of the neighboring villages, who incorporated themselves under the title of Confréres de la Passion. Their productions were divided, not into acts, but into different days of performance, and they were performed in the open plain. This was at least conformable to the critical precept of that mad knight whose opinion is noticed by Pope. It appears by a MS. in the Harleian library, quoted by Warton, that they were thought to contribute so much to the information and instruction of the people, that one of the popes granted a pardon of one thousand days to every person who resorted peaceably to the plays performed in the Whitsun-week at Chester, beginning with the "Creation," and ending with the "General Judgment." These were performed at the expense of the different corporations of that city, and the reader may smile at the ludicrous combinations. "The Creation" was performed by the drapers; "The Deluge," by the dyers; "Abraham, Melchisedek, and

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[1] Collier's Hist. of Eng. Dramatic Poetry. Drake's Shakespeare and his Times, ii. 205 et seq. The drama proper of England begins with "Ferrex & Perrox," a drama framed upon a Spanish model, which was played before Queen Elizabeth, Jan. 15, 1561, by the gentlemen of the Inner Temple. "It partakes rather of the character of a historical than a classical drama, although more nearly allied to the latter class than to the chronicle plays which at a later day took possession of the stage." English comedy may be considered as beginning with "Gammer Gurton's Needle," acted at Christ Church College, Cambridge, 1575.

not only absorbs a no inconsiderable share of the literature, but, as will be seen, of the law of the land as well.

Lot," by the barbers; "The Purification," by the blacksmiths; "The Last Supper," by the bakers; "The Resurrection," by the skinners; and "The Ascension," by the tailors. In these pieces the actors represented the person of the Almighty, without being sensible of the gross impiety. So unskillful were they in this infancy of the theatrical art, that very serious consequences were produced by their ridiculous blunders and ill-managed machinery. In the "History of the French Theatre," vol. ii. p. 285, the following singular anecdotes are preserved concerning a mystery which took up several days in the performance:

"In the year 1437, when Conrad Bayer, bishop of Metz, caused the mystery of 'The Passion' to be represented on the plain of Veximel, near that city, God was an old gentleman, named Mr. Nicholas Neufchatel, of Touraine, curate of Saint Victory of Metz, and who was very near expiring on the cross had he not been timely assisted. He was so enfeebled, that it was agreed another priest should be placed on the cross the next day, to finish the representation of the person crucified and which was done. At the same time the said Mr. Nicholas undertook to perform 'The Resurrection;' which being a less difficult task, he did it admirably well." Another priest, whose name was Mr. John de Nicey, curate of Metrange, personated Judas; and he had like to have been stifled while he hung on the tree, for his neck slipped. This being at length luckily perceived, he was quickly cut down and recovered."

John Bouchet, in his "Annales d'Aquitaine," a work which contains many curious circumstances of the times, written with that agreeable simplicity which characterizes the old writers, informs us that in 1486 he saw played and exhibited in mysteries, by persons of Potiers, "The Nativity, Passion, and Resurrection of Christ," in great triumph and splendor. There were assembled on this occasion most of the ladies and gentlemen of the neighboring counties.

We will now examine the mysteries themselves. I prefer for this purpose to give a specimen from the French, which are livelier than our own. It is necessary to premise to the reader that my versions being in prose will probably lose much of that quaint expression and vulgar naïvetté which prevail through the originals, written in octosyllabic verses.

One of these mysteries has for its subject the election of an

In England, during the civil wars, and down to the restoration, the theatre was suppressed, actors dispersed, and even followed as objects of political

apostle to supply the place of the traitor Judas. A dignity so awful is conferred in the meanest manner it is possible to conceive. It is done by drawing two straws, of which he who gets the longest becomes the apostle. Louis Chocquet was a favorite composer of these religious performances. When he attempts the pathetic he has constantly recourse to devils; but, as these characters are sustained with little propriety, his pathos succeeds in raising a laugh. In the following dialogue Anne and Caiaphas are introduced conversing about Saint Peter and Saint John:

Anne.—"I remember them once very honest people. They have often brought their fish to my house to sell."

Caiaphas.—"Is this true?"

Anne.—"By God, it is true; my servants remember them very well. To live more at their ease they have left off business; or perhaps they were in want of customers. Since that time they have followed Jesus, that wicked heretic, who has taught them magic. The fellow understands necromancy, and is the greatest magician alive, as far as Rome itself."

Saint John, attacked by the satellites of Domitian, amongst whom the author has placed Longinus and Patroclus, gives regular answers to their insulting interrogatories. Some of these I shall transcribe, but leave to the reader's conjectures the replies of the saint, which are not difficult to anticipate.

Parthemia.—"You tell us strange things, to say there is but one God in three persons."

Longinus.—"Is it anywhere said that we must believe your old prophets (with whom your memory seems overburdened) to be more perfect than our gods?"

Patroclus.—"You must be very cunning to maintain impossibilities. Now listen to me: Is it possible that a virgin can bring forth a child without ceasing to be a virgin?"

Domitian.—"Will you not change these foolish sentiments? Would you pervert us? Will you not convert yourself? Lords! you perceive now very clearly what an obstinate fellow this is! Therefore, let him be stript and put into a great caldron of boiling oil. Let him die at the Latin gate."

Pesart.—"The great devil of hell fetch me, if I don't Latinize him well. Never shall they hear at the Latin Gate any one sing so well as he shall sing.

persecution. The persecution of the stage by the puritans, according to Disraeli,[1] had begun in the reign of Elizabeth, but it was not until they became the

Torneau.—"I dare venture to say he won't complain of being frozen.

Patroclus.—"Frita, run quick; bring wood and coals, and make the caldron ready.

Frita.—"I promise him, if he has the gout or the itch, he will soon get rid of them."

St. John dies a perfect martyr, resigned to the boiling oil and gross jests of Patroclus and Longinus. One is astonished in the present times at the excessive absurdity and indeed blasphemy which the writers of these Moralities permitted themselves, and, what is more extraordinary, were permitted by an audience consisting of a whole town. An extract from the "Mystery of St. Dennis" is in the Duke de la Valliere's "Bibliothèque du Théâtre François depuis son Origine. Dresden, 1768."

The emperor Domitian, irritated against the Christians, persecutes them, and thus addresses one of his courtiers:

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[1] At this epoch a great comic genius, Robert Cox, invented a peculiar sort of dramatic exhibition, suited to the necessities of the time—short pieces, which he mixed with other amusements, that these might disguise the acting. It was under the pretense of rope-dancing that he filled the Red-bull playhouse, which was a large one, with such a confluence that as many went back for want of room as entered. The dramatic contrivance consisted of a combination of the richest comic scenes into one piece, from Shakespeare, Marston, Shirley, &c., concealed under some taking title; and these pieces of plays were called "humors," or "drolleries." These have been collected by Marsh, and reprinted by Kirkman, as put together by Cox, for the use of theatrical booths at the fairs.

The title of this collection is "The Wits, or Sport upon Sport, in select pieces of Drollery, digested into scenes by way of Dialogue. Together with variety of Humors of several nations, fitted for the pleasure and content of all persons, either in Court, City, Country, or Camp. The like never before published. Printed for H. Marsh, 1662." Again printed for F. Kirkman, 1672. To Kirkman's edition is prefixed a curious print representing the inside of a Bartholomew-fair theatre. Several characters are introduced. In the middle of the stage a clown with a fool's cap peeps out of the curtain

government that in 1648 the theatres were suppressed because "stage plaies do not suit with seasons of humiliation." The ordinance of that year being en-

> "Seigneurs Romains, j'ai entendu
> Que d'un crucifix d'un pendu,
> On fait un Dieu par notre empire,
> Sans ce qu'on le nous daigne dire."
>
> Roman lords, I understand
> That of a crucified hanged man
> They make a God in our kingdom,
> Without even deigning to ask our permission.

He then orders an officer to seize on Dennis in France. When this officer arrives at Paris, the inhabitants acquaint him of the rapid and grotesque progress of this future saint:

> "Sire, il preche un Dieu à Paris
> Qui fait tous les mouls et les vauls.
> Il va à cheval sans chevauls.
> Il fait et defait tout ensemble.
> Il vit, il meurt, il sue, il tremble.
> Il pleure, il vit, il veille, et dort.
> Il est jeune et vieux, foible et forte.
> Il fait d'un coq une poulette.
> Il jeue des arts de roulette,
> Ou je ne sçais que ce peut être."

---

with a label from his mouth "Tu quoque," which perhaps was a cant expression used by clowns or fools. Then a changeling, a simpleton, a French dancing-master, Clause the beggar, Sir John Falstaff and hostess. Our notion of Falstaff by this print seems very different from that of our ancestors. Their Falstaff is no extravaganza of obesity, and he seems not to have required, to be Falstaff, so much "stuffing" as ours does.

The argument prefixed to each piece serves as its plot; and, drawn as most are from some of our dramas, these "drolleries" may still be read with great amusement, and offer, seen altogether, an extraordinary specimen of our national humor. The price this collection obtains among book-collectors is excessive. In "The Bouncing Knight, or the Robbers Robbed," we recognize our old friend Falstaff, and his celebrated adventure. "The Equal Match" is made out of "Rule a Wife and Have a Wife;" and thus most. There are, however, some original pieces, by Cox himself, which were the most popular favorites; being characters created by himself, for himself, from ancient farces. Such were, "The Humors of John Swabber, Simpleton the Smith," &c. These remind us of the

titled "An act for the suppression of all stage plaies, and for the taking down all their boxes, stages and seats whatsoever, that so there might be no more plaies

> Sir he preaches a God at Paris
> Who has made mountain and valley.
> He goes a horseback without horses.
> He does and undoes at once.
> He lives, he dies, he sweats, he trembles.
> He weeps, he laughs, he wakes, and sleeps.
> He is young and old, weak and strong.
> He turns a cock into a hen.
> He knows how to conjure with cup and ball,
> Or I do not know who this can be.

Another of these admirers says, evidently alluding to the rite of baptism,—

> "Sire, oyez que fait ce fol prestre:
> Il prend de l'yaue en une escuele,
> Et gete aux gens sur la cervele,
> Et dit que partant, sont sauvés!"
>
> Sir, hear what this mad priest does:
> He takes water out of a ladle,
> And, throwing it at people's heads,
> He says that when they depart, they are saved!

This piece then proceeds to entertain the spectators with

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extempore comedy and the pantomimical characters of Italy, invented by actors of genius. This Cox was the delight of the city, the country, and the universities. Assisted by the greatest actors of the time, expelled from the theatre, it was he who still preserved alive, as it were by stealth, the suppressed spirit of the drama. That he merited the distinctive epithet of "the incomparable Robert Cox," as Kirkman calls him, we can only judge by the memorial of our mimetic genius, which will be best given in Kirkman's words: "As meanly as you may now think of these drolls, they were then acted by the best comedians; and I may say, by some that then exceeded all now living—the incomparable Robert Cox, who was not only the principal actor, but also the contriver and author of most of these farces. How I have heard him cried up for his John Swabber and Simpleton the Smith; in which he being to appear with a large piece of bread and butter, I have frequently known several of the female spectators and auditors to long for it; and once that well-known natural Jack Adams, of Clerkenwell, seeing him with bread and butter on the

acted." But, as the laws for the licensing of books produced exactly the reverse effect to the one sought, so the suppression went to increase the public appetite

the tortures of St. Denis, and at length, when more than dead, they mercifully behead him:—the saint, after his decapitation, rises very quietly, takes his head under his arm, and walks off the stage in all the dignity of martyrdom.

These wretched representations, while they prohibited the people from meditating on the sacred history in the book which contains it in all its purity and truth, permitted them to see it on the theatre sullied with a thousand gross inventions, which were expressed in the most vulgar manner, and in a farcical style. Warton observes: "To those who are accus-

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stage, and knowing him, cried out, 'Cuz! Cuz! give me some!' to the great pleasure of the audience. And so naturally did he act the smith's part, that being at a fair in a country town, and that farce being presented, the only master-smith of the town came to him, saying, 'Well, although your father speaks so ill of you, yet when the fair is done, if you will come and work with me, I will give you twelve pence a week more than I give any other journeyman.' Thus was he taken for a smith bred, that was, indeed, as much of any trade."

At this period, though deprived of a theatre, the taste for the drama was, perhaps, the more lively among its lovers; for, besides the performances already noticed, sometimes contrived at, and sometimes protected by bribery, in Oliver's time they stole into a practice of privately acting at noblemen's houses, particularly at Holland-house, at Kensington: and "Alexander Goffe, the woman-actor, was the jackall, to give notice of time and place to the lovers of the drama," according to the writer of "Historia Histrionica." The players, urged by their necessities, published several excellent manuscript plays, which they had hoarded in their dramatic exchequers, as the sole property of their respective companies. In one year appeared fifty of these new plays. Of these dramas many have, no doubt, perished; for numerous titles are recorded, but the plays are not known; yet some may still remain in their manuscript state, in hands not capable of valuing them. All our old plays were the property of the actors, who bought them for their own companies. The immortal works of Shakespeare had not descended to us, had Heminge and Condell felt no sympathy for the fame of their friend.—Diraeli, Curiosities of Literature, p. 283.

for dramatic amusement, and contributed to make it an institution which has claimed its recognition in the law, as well as in literature and in society.

tomed to contemplate the great picture of human follies which the unpolished ages of Europe hold up to our view, it will not appear surprising that the people who were forbidden to read the events of the sacred history in the Bible, in which they are faithfully and beautifully related, should at the same time be permitted to see them represented on the stage, disgraced with the grossest improprieties, corrupted with inventions and additions of the most ridiculous kind, sullied with impurities, and expressed in the language and gesticulations of the lowest farce." . . . However, they had their use; "not only teaching the great truths of scripture to men who could not read the Bible, but in abolishing the barbarous attachment to military games and the bloody contentions of the tournament, which had so long prevailed as the sole species of popular amusement. Rude, and even ridiculous as they were, they softened the manners of the people by diverting the public attention to spectacles in which the mind was concerned, and by creating a regard for other arts than those of bodily strength and savage valor."

Mysteries are to be distinguished from Moralities, and Farces, and Sotties. Moralities are dialogues where the interlocutors represented feigned or allegorical personages. Farces were more exactly what their title indicates; obscene, gross, and dissolute representations, where both the actions and words are alike reprehensible.

The Sotties were more farcical than farce, and frequently had the licentiousness of pasquinades. An ingenious specimen of one of these moralities is entitled, "The Condemnation of Feasts, to the Praise of Diet and Sobriety for the Benefit of the Human Body."

The perils of gorging form the present subject. Towards the close is a trial between Feasting and Supper. They are summoned before Experience, the Lord Chief Justice! Feasting and Supper are accused of having murdered four persons by force of gorging them. Experience condemns Feasting to the gallows, and his executioner is Diet. Feasting asks for a father confessor, and makes a public confession of so many crimes, such numerous convulsions, apoplexies, head-aches, stomach-qualms, &c., which he has occasioned, that his executioner, Diet, in a rage stops his mouth, puts the cord about his neck, and strangles him. Supper is only condemned to load

291. Literary matter designed for dramatic representation, appears, from the earliest times, to have been a shining prey for imitators and plagiarists.

his hands with a certain quantity of lead, to hinder him from putting too many dishes on table; he is also bound over not to approach dinner too near, and to be placed at the distance of six hours' walking under pain of death. Supper felicitates himself on his escape, and swears to observe with scrupulous exactness the mitigated sentence.

The Moralities were allegorical dramas, whose tediousness seems to have delighted a barbarous people not yet accustomed to perceive that what was obvious might be omitted to great advantage: like children, everything must be told in such an age; their own unexercised imagination cannot supply anything.

Of the farces the licentiousness is extreme, but their pleasantry and their humor are not contemptible. The "Village Lawyer," which is never exhibited on our stage without producing the broadest mirth, originates among these ancient drolleries. The humorous incident of the shepherd, who, having stolen his master's sheep, is advised by his lawyer only to reply to his judge by mimicking the bleating of a sheep, and when the lawyer in return claims his fee, pays him by no other coin, is discovered in these ancient farces. Bruyès got up the ancient farce of the "Patelin" in 1702, and we borrowed it from him.

They had another species of drama still broader than Farce, and more strongly featured by the grossness, the severity, and personality of satire. These were called Sotties, of which the following one I find in the Duke de la Vallière's "Bibliothèque du Théâtre François."

The actors come on the stage with their fool's-caps each wanting the right ear, and begin with stringing satirical proverbs, till, after drinking freely, they discover that their fool's-caps want the right ear. They call on their old grandmother, Sottie (or Folly), who advises them to take up some trade. She introduces this progeny of her fools to the World, who takes them into his service. The World tries their skill, and is much displeased with their work. The Cobbler-fool pinches his feet by making the shoes too small; the Tailor-fool hangs his coat too loose or too tight about him; the Priest-fool says his masses either too short or too tedious. They all agree that the World does not know what he wants, and must be sick, and prevail upon him to get some advice from a physician. The World obligingly sends what is required to an Urine-

Terence, in the prologue[1] to one of his plays, complains of a rival:

> Qui bene hortendo et easdem scribendo male
> Ex Græcis bonis Latinas fecit non bonas.
> Idem Menandri Phasma nunc nuper dedit,
> Atque in Thesaurio scripsit, causam dicere
> Prius unde in patrium auro qua resit suam,
> Quam illic qui petit, unde is sit Thesaurius sibi.

doctor, who instantly pronounces that "the World is as mad as a March hare!" He comes to visit his patient, and puts a great many questions on his unhappy state. The World replies, "that what most troubles his head is the idea of a new deluge by fire, which must one day consume him to a powder; on which the Physician gives this answer:

> "Et te troubles-tu pour cela?
> Monde, tu ne te troubles pas
> De voir ce larrons attrapars
> Vendre et acheter benefices;
> Les enfans en bras des Nourices
> Estre Abbés, Eveques, Prieurs,
> Chevaucher très bien les dieux sœurs,
> Tuer les gens pour leurs plaisirs,
> Jouer le leur, l'autrui saisir,
> Donner aux flatteurs audience,
> Faire la guerre à toute outrance
> Pour un rien entre les Chrestiens!"

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[1] Prol. in Eunuch. 7. "Who by translating plays verbally, and writing them in bad Latin, has made out of good Greek plays Latin ones by no means as good; just as of late he has published the Phasma of Menander, and has described (in the Thesaurus) him of whom the gold is demanded as pleading his cause why it should be deemed his own. . . . . After the Ædiles had purchased the Eunuch of Menander—the play which we are about to perform—he menaged to get an opportunity of viewing it," &c., &c. The Roman play-right, it appears, "borrowed" from the Greek, just as the English do from the French, and the Americans from the English.

The advertisement by the Latin author that he had "adapted" from the Greek, seems to have increased rather than diminished its reputation. Terence, at least, is not ashamed to confess it.

Non negat personas translutîsse in Eununchum suam Ex Graceâ, sed has fabulas faetas prius Latinas.

Doubtless, because of their greater immediate value, which, without necessitating their printing and publishing through the press, renders them in

> And you really trouble yourself about this?
> Oh World! you do not trouble yourself about
> Seeing those impudent rascals
> Selling and buying livings;
> Children in the arms of their nurses
> Made Abbotts, Bishops, and Priors,
> Intriguing with girls,
> Killing people for their pleasures,
> Minding their own interests, and seizing on what belongs to another,
> Lending their ears to flatterers,
> Making war, exterminating war,
> For a bubble, among Christians!

The World takes leave of his physician, but retains his advice; and to cure his fits of melancholy gives himself up entirely to the direction of his fools. In a word, the World dresses himself in the coat and cap of Folly, and he becomes as gay and as ridiculous as the rest of the fools.

This Sottie was represented in the year 1524.

Such was the rage for Mysteries, that René d'Anjou, King of Naples and Sicily, and Count of Provence, had them represented with all possible magnificence, and made them a very serious occupation. Being in Provence, and having received letters from his son, the Prince of Calabria, who asked him for an immediate aid of men, he replied, that he had a very different matter in hand, for he was fully employed in settling the order of a mystery—in honor of God.

Mr. Strutt, in his "Manners and Customs of the English," has given a description of the stage in England when Mysteries were the only theatrical performances. Vol. iii., p. 130:

"In the early dawn of literature, and when the sacred Mysteries were the only theatrical performances, what is now called the stage did then consist of three several platforms, or stages raised one above another. On the uppermost sat the Pater Cœlestis, surrounded with his Angels; on the second appeared the Holy Saints, and glorified men; and the last and lowest was occupied by mere men who had not yet passed from this transitory life to the regions of eternity. On one side of this lowest platform was the resemblance of a dark, pitchy cavern, from whence issued appearance of fire and flames; and when it was necessary, the audience were treated

modern times, possibly the most lucrative of literary productions, the rights and privileges of dramatic production have latterly engrossed much attention of

with hideous yellings and noises as imitative of the howlings and cries of the wretched souls tormented by the relentless demons. From this yawning cave the devils themselves constantly ascended to delight and to instruct the spectators—to delight, because they were usually the greatest jesters and buffoons that then appeared; and to instruct, for that they treated the wretched mortals who were delivered to them with the utmost cruelty, warning thereby all men carefully to avoid the falling into the clutches of such hardened and remorseless spirits." An anecdote relating to an English mystery presents a curious specimen of the manners of our country, which then could admit of such a representation. The simplicity if not the libertinism of the age was great. A play was acted in one of the principal cities of England, under the direction of the trading companies of that city, before a numerous assembly of both sexes, wherein Adam and Eve appeared on the stage entirely naked, and performed their whole part in the representation of Eden, to the serpent's temptation, to the eating of the forbidden fruit, the perceiving of and conversing about their nakedness, and to the supplying of fig-leaves to cover it. Warton observes they had the authority of scripture for such a representation, and they gave matters just as they found them in the third chapter of Genesis.

One of the most elegant moralities was composed by Louise L'Abé, the Aspasia of Lyons in 1550, adored by her cotemporaries. With no extraordinary beauty, she however displayed the fascination of classical learning, and a vein of vernacular poetry, refined and fanciful. To accomplishments so various she added the singular one of distinguishing herself by a military spirit, and was nicknamed Captain Louise. She was a fine rider and a fine lutanist. She presided in the assemblies of persons of literature and distinction. Married to a rope-manufacturer, she was called La belle Cordière, and her name is still perpetuated by that of the street she lived in. Her anagram was Belle à Soy. But she was belle also for others. Her morals in one point were not correct, but her taste was never gross. The ashes of her perishable graces may preserve themselves sacred from our severity, but the productions of her genius may still delight.

Her morality entitled "Débat de Folie et D'Amour—The

courts and legislative bodies.[1] We have already remarked that, whereas the value of other literary productions depends upon the ability of its author or

contest of Love and Folly," is divided into five parts, and contains six mythological or allegorical personages. This division resembles our five acts, which, soon after the publication of this morality, became generally practiced.

In the first part, Love and Folly arrive at the same moment at the gate of Jupiter's palace, to a festival to which he had invited the gods. Folly observing Love just going to step in at the hall of the festival, pushes him away and enters in first. Love is enraged, but Folly insists on her precedency. Love, perceiving there was no reasoning with Folly, bends his bow and shoots an arrow; but she baffled his attempt by rendering herself invisible. She in her turn becomes furious, falls on the boy, tearing out his eyes, and then covers them with a bandage, which could not be taken off.

In the second part, Love, in despair for having lost his sight, implores the assistance of his mother; she tries in vain to undo the magic fillet; the knots are never to be untied.

In the third part, Venus presents herself at the foot of the throne of Jupiter to complain of the outrage committed by Folly on her son. Jupiter commands Folly to appear. She replies, that though she has reasons to justify herself, she will not venture to plead her cause, as she is apt to speak too much, or to omit what is material. Folly asks for a counsellor, and chooses Mercury; Apollo is selected by Venus. The fourth part consists of a long dissertation between Jupiter and Love, on the manner of loving. Love advises Jupiter, if he wishes to taste of truest happiness, to descend on earth, to lay down all his majesty and pomp, and, in the figure of a mere mortal, to seek to give pleasure to some beautiful maiden: "Then wilt thou feel quite another contentment than that thou hast hitherto enjoyed: instead of a single pleasure, it will be doubled; for there is as much pleasure to be loved, as to love." Jupiter agrees that this may be true, but he thinks that to attain to this, it requires too much time, too much trouble, too many attentions—and that after all it is not worth them.

In the fifth part, Apollo, the advocate for Venus, in a long pleading demands justice against Folly. The gods, seduced by his eloquence, show by their indignation that they would

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[1] Vid. Collier, "Annals of the Stage," iii., p. 427.

proprietor to multiply copies, the value of a dramatic work consists wholly in his power to prevent such a multiplication.

292. Nor will the author's composition, by being in a dramatic form, lose any of its literary character. Besides all the privileges which attach to it as literary property, its proprietor has the additional and

condemn Folly without hearing her advocate Mercury. But Jupiter commands silence, and Mercury replies. His pleading is as long as the adverse party's, and his arguments in favor of Folly are so plausible, that when he concludes his address, the gods are divided in opinion; some espouse the cause of Love, and some that of Folly. Jupiter, after trying in vain to make them agree together, pronounces this award:

"On account of the difficulty and importance of your disputes, and the diversity of your opinions, we have suspended your contest from this day to three times seven times nine centuries. In the meantime we command you to live amicably together, without injuring one another. Folly shall lead Love, and take him whithersoever he pleases: and when restored to his sight, after consulting the Fates, sentence shall be pronounced."

Many beautiful conceptions are scattered in this elegant Morality. It has given birth to subsequent imitations; it was too original and playful an idea not to be appropriated by the poets. To this Morality we perhaps owe the panegyric of Folly by Erasmus, and the Love and Folly of La Fontaine. Disraeli's Curiosities of Literature, p. 131.

The "Chester Mysteries" were performed during the mayoralty of John Arneway, who was incumbent at Chester from 1268 to 1276. The first speaking drama "Della Passione di nostro Signor Jesù Christo," was written in Italy, by Guilliano Dati, Bishop of San Leo, about 1445. And in France the Miracle Play of "Un Jeu" is assigned by M. Legrand to the thirteenth century.

To the Mysteries succeeded the Moralities, a species of drama involving more art and skill and more suited to public presentation than the Miracle Plays, which were mere parodies of sacred subjects, and which were not unlike the old comedy of the Greeks. These, it seems, were more political than religious. Sir David Lindsay wrote, in 1539, a Morality entitled "The Satire of the Three Estates."

further privileges which its dramatic character bestows. This second right which arises in addition to copyright, in favor of the dramatic author, has, not inaptly, been termed Stageright, and it would be correct therefore to speak of an author of a romantic work, as in reality possessing three rights in his work, namely, his common-law right, his copyright, and his stageright. For, as we shall presently see, the tendency of two very recent decisions[1] in the United States is to resurrect a great portion of the first right, in the absence of the second, while the present copyright law permits authors to reserve the right to dramatize their own works, in which case the third right would obtain.

293. Dramatic Copyright or Stageright was, chronologically, the last right of authors to be recognized by statute. From the passing of the English copyright act of Anne, in 1710,[2] the authors of dramatic as well as of other literary composition could indeed enjoy a copyright in their work, could prevent the publication of their manuscripts, or multiplication of copies thereof;[3] but whoever became possessed of their productions, and chose thereafter to transcribe it for representation upon the stage, could seemingly do so with perfect impunity.[4] It was not until the statute of William, known as Sir Bulwer Lytton's act,[5] that the author or the assignee of the author of any tragedy, comedy, farce, or any other dramatic piece or entertainments composed, and not printed or published,

[1] Palmer v. De Witt, 47 N. Y. 532; 7 Amer. 480; Crowe v. Aiken, 2 Bish. 208.

[2] 8 Anne, ch. 9.

[3] Macklin v. Richardson, Amb. 694.

[4] Coleman v. Mathews, 5 T. R. (D. & E.) 245; Crowe v. Aiken, 2 Biss. 208.

[5] 3 & 4 William iv. c. 15.

had the sole right, in British dominions, to the profits of his own labor.

In the United States, the copyright act of 1831 was silent as to dramatic composition, and it was not until 1856[1] that the right of the dramatic author was completely recognized and protected.

The present copyright law,[2] after reciting the various individuals and kinds and sorts of works to whom its protection is extended, adds, "And in the case of a dramatic composition the author shall have the sole liberty of publicly performing or representing it, or causing it to be performed or represented by others."

294. The only publication known in the case of the literary compositions we have been considering is a multiplication of copies by mechanical process. With dramatic composition, however, the publicity sought is one by means of representation upon the stage. The dramatic author, therefore, enjoys the privilege extended to the author of no other class of composition, of copyrighting his manuscript, and thenceforward to prevent its piracy by a multiplication, not of copies, but of representations of its contents, a privilege we have seen in addition to and not in diminution of any of the other privileges to which, as an author, he is entitled.[3]

295. The copyright of a manuscript play may be made to consist in the entry of its title[4] in the office of the librarian of congress. If the play should ever be printed, it seems probable that two copies thereof should be forwarded to that office; at any rate, it would

[1] Act of 1856, ii. Stat. at L. 138.
[2] Sec. 86, Laws of 1870. See Revision of 1873–74, § 4952.
[3] See 1 Shortt, L. L., p. 114.
[4] Vid. also Boucicault v. Ward, 2 Biss. 34.

be safe to do so, though the authorities do not appear to be clear as to whether it is absolutely necessary, privately printed matter occupying, as we have seen, the status of manuscripts before the law. If such deposit were necessary at all, it would probably be on the ground that the copyright laws invariably require copies of the "best edition" of a work to be deposited. If the play be actually published, of course, the mere previous registration of its title would not be sufficient, but the two copies must be forwarded, a neglect to do so involving a liability upon the part of its proprietor, as we have already seen, to a fine of twenty-five dollars, to be recovered by the librarian of congress in an action of debt, but not invalidating any of the author's rights in his manuscript. But as between a manuscript and a printed copy, the latter would be the "best edition." This, however, has never been expressly decided.

296. In the consideration of dramatic copyright it may be convenient to inquire:

I. What may be a subject of protection as a dramatic work;

II. What constitutes a publication, and what a dedication of such work;

III. What adjuncts, incidents, circumstances, and accompaniments of the composition or representation will be protected by the copyright;

IV. What will constitute an infringement upon or a piracy of a dramatic composition; and

V. Who will be liable for such infringement or piracy.

297. I. A dramatic production is a production intended to be publicly performed or represented upon a stage, and before an audience for profit. Such a production may be a play, a piece of music which is

rendered by an artist, a pantomime, or a trick, or a written introduction[1] to any of these.

It was decided in England, in Bach v. Longman,[2] long previous to the dramatic copyright act,[3] that written music was within the copyright of Anne; but up to the time of the passing of 5 & 6 Victoria, chapter 45, the author was unable to restrain the unauthorized public performance of his compositions by others. Lord Mansfield, in the case which decided that music was within the act of Anne, said: "A person may use the copy by playing it; but he has no right to rob the author of the profit by multiplying copies, and disposing of them to his own use." The author is now placed on a level, in this respect, with the author of dramatic pieces commonly so called.

An introduction to a pantomime, which is the only written part of such an entertainment, is a dramatic piece within the protection of this act.[4] It is not correct to say that such an introduction is not an entire and complete piece.[5]

Where a person is employed by another, to write, for reward paid to him, a musical composition, to be used as part of the representation of a dramatic piece, and as a mere accessory to such dramatic piece, the composer of the musical accessory has no copyright therein. The property in music so composed, becomes vested in the employer, and he does not require the consent of the composer in order to rep-

[1] Lee v. Simpson, 3 C. B. 871.
[2] Cowp. 623.
[3] 3 & 4 Wil. iv. c. 15.
[4] Lee v. Simpson, 3 C. B. 871.
[5] 3 C. B. 881, 882. And as to what is a dramatic entertainment within 6 & 7 Vict. c. 68, which extended the provisions of Sir Bulwer Lytton's act to musical compositions, vid. Day v. Simpson, 18 C. B. N. S. 680.

resent it. This was decided in the case of Hatton v. Kean,[1] where the plaintiff had been employed by the defendant to compose certain music to be performed during and as a part of the representation of three of Shakespeare's plays. The musical composition was held to have become the property of Mr. Kean, and the plaintiff was held never to have been, within the language of the statute, the owner or proprietor thereof. This case was followed and approved in Wallenstein v. Herbert,[2] where the composer of the musical accessories was employed to find an orchestral band, to procure and pay all the musical performers, and furnish all the musical instruments, to provide, lead, and perform overtures and entr'acte music, and the music incidental to the dramatic performances. In performance of his duties under this engagement, he composed the music for a drama called "Lady Audley's Secret," and it was held that he had no copyright in such music.[3]

A pianoforte score of an opera is an independent musical composition, separate and distinct from the opera itself; and where such pianoforte score has been arranged by a person other than the composer of the opera, it is incorrect to register the score as the composition of the composer of the opera.[4]

[1] 7 C. B. N. S. 268; 29 L. J. 20, C. P.; 1 L. T. N. S. 10.

[2] 16 L. T. N. S. 435. 15 W. R. 838.

[3] So in Keene v. Wheatley (9 Amer. Law Reg. 47), where A., in the general theatrical employment of B., was engaged in the office of assisting in the adaptation of a play for representation, and B. was held to be the proprietor of the alterations so made, as products of his intellectual exertions in a particular service in his employment; on the principle that where an inventor, in the course of his experimental essays, employs an assistant who suggests and adapts a subordinate improvement, it is in law an incident or part of the employer's main invention. See *ante*, vol. I. p. 374.

[4] Per Cockburn, C. J., in Wool v. Boosey (L. Rep. 2 Q. B.

Whether a pianoforte arrangement of the score of an opera executed without the consent of the composer of the opera would be an infringement of his copyright therein, has not been in England expressly decided. In Wood v. Boosey, Kelly, C. B., on appeal,[1] says, "No doubt it is a piracy of the opera, and the composer may maintain an action against the adapter or the publisher of the adaptation;" but it was not necessary to decide the point in that case.

It was the question also in Russel v. Smith whether[2] the term "dramatic production" could properly be extended to the case of a song relating to the burning of a ship at sea, and the escape of those on board, and describing their feelings in vehement language—sometimes expressing them in the supposed words of the suffering parties. The court held that it did: that the act,[3] while declaring that a "dramatic piece" includes "tragedy, comedy, play, opera, farce, or" any other scenic, musical, or dramatic entertainment, "comprehends 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 the regular drama, and which constitute the entertainment of the audience, and that the absence of scenes and appropriate dresses and a regular theatre has been urged for the defendant. But we should take away a part of the protection conferred on authors if we held

340; 7 B. & S. 86; 15 L. T. N. S. 530; 36 L. J. 103, Q. B.; affirmed on appeal, L. Rep. 3 Q. B. 223; 9 B. & S. 175; 37 L. T. 31 Q. B.; 18 L. T. N. S. 105). See also D'Almaine v. Boosey, 1 T. & C. 288.

[1] 18 L. T. N. S. 108, L. Rep. 3 Q. B. 223; 37 T. J. 84 Q. B. 16 W. R. 485. Vid. also D'Almaine v. Boosey, 1 T. & C. 288.

[2] 12 Q. B. 217.

[3] Sect. 2 of 5 & 6 Vict. c. 45.

that there could be no public representation without these accompaniments."[1]

The whole question is simplified, however, in the United States by the present copyright act, which expressly enumerates, among the works entitled to copyright,[2] a musical composition. Delivered lectures, not being enumerated, must be relegated, for their protection, to the common-law and statutory rights now possessed by authors in their manuscripts.[3] And this, probably, whether the lecture be delivered for profit or not, or whether a fee in the form of a stated price of admission, or of a collection or subscription; and that a lecturer using his lecture as a means of extending his reputation or his professional practice, will be as much entitled to legitimate protection if he makes his lectures free, as if he demanded a fee per capitum, at the door.

298. As in all other cases of copyrightable matter, the dramatic composition must be innocent in its nature.

The cases of Martinetti v. Maguire, and Maguire v. Martinetti,[4] had regard to the somewhat famous spectacular drama known as "The Black Crook." The bill of Martinetti in the suit in which he was complainant, charged that on the 17th day of October, 1866, in the city of New York, one James Schonberg composed and copyrighted a dramatic composi-

[1] A song was held to be a dramatic production also, in Clark v. Bishop, 1872, Ex. 25 L. T. 907; Planché v. Braham, 1 Jur. 823; 8 C. & P. 68; 4 Bing. (N. S.) 17; De Penna v. Pal-hill, 8 C. & P. 78. So also music, Wallerstein v. Herbert, 16 L. T. N. S. 453; 15 W. R. 835; Storace v. Longman, note to Clementi v. Golding, 2 Camp. 27.

[2] U. S. States Revision of 1873–4, § 4952.

[3] See ante, vol. I., pp. 393 *et seq.*

[4] Deady's R. 216.

tion called "The Black Rook," which was then and there assigned to the complainant, proprietor of the Metropolitan Theatre, in the city of San Francisco; that the defendants surreptitiously procured a manuscript copy of one of complainant's employees, and changing the name of the drama from "The Black Crook" to "The Black Rook," and making various slight alterations in its dialogues and incidents, and changing the names of the characters, produced the same at Maguire's Opera House, in the same city, just as complainants were about to bring out the same at their (the Metropolitan) theatre.

The cross-bill of Maguire and others, charged, on the other hand, that one Charles M. Barras, in the city of New York, composed a play, about July 1, 1866, which he called "The Black Crook." That the said play was exhibited at Niblo's Theatre, in that city, in September of that year, and for a long time continuously thereafter, and that about March 25, 1867, the right to perform the said play in the state of California was assigned or conveyed to said Maguire and others. It further charged that the James Schonberg mentioned in the first bill was employed by the defendants Martinetti and others to attend the exhibition of "The Black Crook" at Niblo's, and take down the play in short-hand from the mouths of the actors, and that the defendants Martinetti and others were about to exhibit the same under the name of "The Black Rook," in the city of San Francisco, to complainant's damage, &c.

The question, being principally one of fact, as to which was original and which imitation, is hardly of moment to our present examination; but the decision of the California circuit is valuable as to other points.

The court held that "The Black Rook" was a

colorable imitation of "The Black Crook," and that the injunction prayed in the cross-bill, under ordinary circumstances, would have been granted, although, had Martinetti have become possessed by legal methods of his copy of the play, his possession being prior to the assignment to Maguire, he (Martinetti) would have had the legal right to represent and produce the same.

But it appearing that the Black Crook was merely a spectacle, with a scant and meaningless dialogue, "a sort of verbal machinery tacked on to a succession of ballet and tableaux," that "the principal part and attraction of the spectacle" was "the exhibition of women in novel dress or no dress, and in attractive attitudes or action,"[1] the court (Deady, J.) held that such spectacle was not a "dramatic composition" within the meaning of the act of congress.[2] "To call such a spectacle a dramatic composition, is an abuse of language," said the court, "and an insult to the English drama; a menagerie of wild beasts or an exhibition of model artistes, might as justly be called a dramatic composition."

The court also held that the spectacle in question was not "suited for public representation within the meaning of those words, in the act providing that a dramatic composition, to be entitled to be copyrighted, should have this qualification." "I do not for a moment suppose or pretend," said the court, "that congress has power to interfere directly and prescribe a standard of good morals on this subject." But the benefit of copyright is a privilege conferred

[1] "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." Opinion of Deady, J., Deady's R. p. 221.

[2] 4 Stat. 436; 11 Stat. 138.

by congress, in pursuance of the constitution of the United States. In conferring this privilege or monopoly upon authors or inventors, I suppose that it is both proper and constitutional for congress so to legislate as to encourage virtue, and to discourage immorality. It is the solicitude of congress to secure the morality of the citizen. In order to be naturalized under the laws of congress, the applicant is obliged to prove that for five years prior to such application "he has behaved as a man of g od moral character;"[1] besides, the power to pass what are called copyright and patent laws is expressly conferred upon congress, to enable it to promote the progress of science and useful arts.[2] And, it appearing, in the above case, that the drama known as "The Black Crook" was one "only attractive in so far as it pandered to a prurient curiosity or an obscene imagination by very questionable exhibitions and attitudes of the female person," the court held that it was entitled to no protection under the statutes of copyright. And so, too, equity will interfere to enjoin the representation of a play which is libellous in its nature.[3]

299. II. Simultaneously with the inquiry as to what will constitute the publication of dramatic composition, it will be found convenient to examine what has been very recently held in two cases[4] to be the common-law rights of dramatic authors in the United States.

Under the English and American statutes of copyright the publication of a dramatic work consists in its public representation for profit. If not preceded

[1] 2 U. S. Stat. 154.

[2] Cons. U. S., art. 158, subd. 8; and see ante, vol. i. pp. 35–47.

[3] Stageright, by John Coryton, App. p. viii; and see ante, vol. i. p. 202.

[4] Palmer v. DeWitt, 47 N. Y. 532; 7 Amer. 480; Crowe v. Aiken, 2 Biss. R. 208.

by the formal registration of its title, such publication, if made with the author's consent, is undoubtedly a dedication to the public.[1]

The sale of a play to parties, with a view to its public representation, makes the seller a participant in causing the play to be publicly represented.[2]

In Toole v. Young,[3] which arose in England, under the statute 3 & 4 Will. 4, c. 15, sections 1 and 2, one H. wrote and published a novel, which he afterwards dramatized, subsequently assigning the resulting drama, which was never printed, published, or represented upon the stage, to the plaintiff. Thereafter one G., in ignorance of H.'s drama, also dramatized the novel in a different form, and assigned his drama to the defendant, who represented it on the stage. Upon the plaintiff's seeking to recover for the representation, it was held that A. having published his novel, any one might dramatize it; and, although the two dramas were founded upon the novel written by H., the representation upon the stage of the drama written by G. was not a representation of the drama written by H. and that plaintiff could not restrain or recover for such representation.

The fact that a play has been performed in a public theatre before it is offered for registration in the proper office, will not affect the validity of the copyright.[4] Nor does the performance 'constitute such a publication as will make a deposit of the copies, required by law to be made within a given time, necessary.[5]

In England, in Boucicault v. Delafield,[6] where

[1] Daly v. Palmer, 6 Blatchf. 257.

[2] L. R. 9 Q. B. 523.

[3] Boucicault v. Delafield, 9 Jur. N. S. 1282; 33 L. J. 38 ch. 12 N. R. 101.

[4] Roberts v. Myers, 13 Month. Law Rep. (N. S.) 396.

[5] Id. [6] *Ubi supra.*

the plaintiff sought to restrain the unauthorized representation of a dramatic piece—"The Colleen Bawn"—composed by him and first performed in New York, but duly registered at Stationers' Hall on the day of its first representation in England, it was held, that if the plaintiff had been an American, and had first represented his piece in England, he would have been entitled to the benefit of the provisions of the dramatic copyright act; that if any person chooses to publish his performance in a country which has not entered into any treaty or made any such arrangement with regard to copyright with England, then that country has nothing more to say to him; he must be taken to have elected under which of the two statutes with regard to copyright he wishes to come, by performing his work in one country instead of the other, and he is thereby excluded from all advantage of publishing in the other. "I cannot see," said the court, "anything to justify me in restricting the provision, or to enable me to say that it applies to foreigners and does not apply to British subjects. The object of the legislature seems to have been in these cases to secure in this country the benefit of the first publication, and if it extended to any other country the same benefit, it was only to be on certain conditions, namely, that reciprocity should be afforded, and that the representation should take place for the first time in England. I am bound, therefore, to hold that Mr. Boucicault's right fails."

300. But a late case in the United States is more generous. All rights of action, at law and in equity, conferred by the copyright laws of the United States, it was there held, may accrue before actual publication of the work,[1] and the provisions, in the various

[1] Boucicault v. Wood. 2 Biss. 34.

statutes of copyright, to the effect that no person shall be entitled to their protection, unless he gives information of his copyright by causing to be inserted in each copy of each edition of his work a notice to that effect, cannot be construed as depriving an author of his right to copyright his manuscript, or of his action for injury previous to publication.[1]

According to the two very recent cases before alluded to, it appears, first, that an alien dramatic author in the United States practically and in effect receives precisely the same protection in his literary property as the citizen can receive in his; and, second, that by neglecting to comply with our copyright laws the alien dramatic author can actually enjoy greater privileges of protection in his literary property than he could by complying with them.

Such, at least, would seem to be the practical effect of two recent decisions—the one in the court of appeals of the state of New York, and the other in the United States circuit court for the seventh judicial circuit.

The first of the above decisions was in Palmer v. De Witt.[2] In that case it appeared that, previous to 1868, one T. W. Robertson, a resident of London, and a citizen of Great Britain, composed a drama called "Play," of which he assigned, on the 1st day of February in that year, one Palmer, theatrical manager of the city of New York, by instrument in writing, "the exclusive right of printing, publishing, performing, enacting, representing, and producing," &c., "throughout the United States." On and after the 15th day of February, 1868, the drama of "Play" was publicly performed in London at the

[1] Boucicault v. Wood, 2 Biss. 34.
[2] 47 N. Y. 532; 7 Amer. 480.

Prince of Wales theatre, and subsequently at the Fifth-avenue theatre, in the city of New York. On the 25th day of March, 1868, one De Witt, a publisher in the city of New York, printed and sold copies of the drama in question, not obtaining or pretending to have obtained the same of or through the memory of one who had witnessed its public performance; it appeared to be, so far, settled that one may memorize a performance, and afterwards make any use of it he pleases.[1]

Upon this state of facts the court of appeals held: First, that the resident American assignee was the literary proprietor of the composition; second, that its representation upon the stage in this country was not a waiver of his rights as such; and third, that—it never having been published in print by its assignee—the publication by De Witt was an infringement, for which the assignee could recover.

The court did not pass upon the question whether De Witt might not have represented the uncopyrighted drama upon the stage, that question not being before it. But in Crowe v. Aiken,[2] the question as to the representation did fairly and distinctly present itself. In that case, the play "Mary Warner," also the composition of an alien author, which had been written for a British actress, and performed upon a British stage, appears to have been assigned to the plaintiff, an alien, who came to the United States for the sole purpose of producing it, having obtained, in addition to the assignment, "license to perform the same in the United States for the term of five years." Meantime,

[1] Macklin v. Richardson, Amb. 694; Wallack v. Barney Williams, MS. N. Y. S. C., 1867. See this rule doubted, *post*, this chapter.

[2] 2 Biss. R. 208.

however, the publisher De Witt, before mentioned, had procured and printed "Mary Warner," as he had previously procured and printed "Play," and had sold a copy thereof to the defendant Aiken, the proprietor of a theatre in the city of Chicago, who had caused it to be publicly performed therein. Held, that its production by Aiken was an infringement upon the common-law right of the assignee to his literary property.

Now, the effect of these two decisions, taken together—since, according to the first, the composition cannot be printed and sold, and, according to the second, it cannot be represented on a stage without its proprietor's permission—is, undoubtedly, that an alien dramatic author in this country receives precisely the same protection in his literary property as the citizen receives in his.

Previously, in 1860, had occurred the case of Keene v. Wheatley.[1] This was the case of the comedy "Our American Cousin," originally composed (as were the others) in London, for representation at a London theatre. But, upon its being assigned to Miss Laura Keene, she, unfortunately for herself, proceeded to copyright the manuscript play, under the act of congress, before producing it on the stage. Upon its proving a success, other and rival establishments to Miss Keene's managed to procure and produce versions of the comedy, which establishments she brought various suits to enjoin, among them being the one entitled as above.

Now, upon this state of facts, precisely the same as in the cases we have just been examining—except that Miss Keene complied with the copyright laws of the United States where the others did not—the court

[1] 9 Am. Law Reg. 33.

held that a resident alien could not copyright the works of a non-resident alien, and, therefore, that Miss Keene could not restrain, on that ground, any one who wished to do so from performing the comedy "Our American Cousin," which she had purchased, and for which she had paid. Miss Keene, indeed, prevailed in the case against Wheatley, upon her common-law rights; but her copyright was ignored. It seems to follow, therefore, that since that the citizen dramatic author is obliged to pay a nominal fee to the office of the librarian of congress to obtain the protection for his play, which the alien dramatic author thus receives without the payment of any fee at all (for so far as his protection goes "it makes no difference whether he does or does not comply with our copyright laws"), by neglecting to comply with our copyright laws, he (*i. e.* the alien author, or his assignee, who stands in his place) can actually enjoy greater privileges of protection in his literary property than he could by complying with them. It is difficult to see how an alien could obtain anything more than a perfect protection in his literary property, even though he obtain it through an assignee, and not personally. He is a poor author, indeed, who cannot procure an assignee.[1]

[1] In the London Athenæum of October 3rd, 1874, and the New York Herald of December 8th, of the same year, and in the Forum Law Review, January, 1875, this writer, in commenting upon this rather startling result of the decisions in the cases alluded to in the text, ventured the following reflections:

"The absence of a treaty of international copyright between the two English-reading and English-speaking nations of the world—Great Britain and the United States—and of any mutual legislation whereby the literary property of citizens of either can be protected in the other, has given rise to an inconsistency in the practical working of the common

301. The general rule that a composition, to be protected, must be original, applies to dramatic as to all other classes of composition. It has been seen that law, when called upon to pronounce concerning the interests involved.

"In the United States, this inconsistency appears to take the form of a discrimination against the citizen, and in favor of the alien, and may, for convenience sake, be stated in two propositions.

"These propositions are—first, that an alien dramatic author in this country, practically and in effect, receives precisely the same protection in his literary property as the citizen receives in his; and, second, that by neglecting to comply with our copyright laws he can actually enjoy greater privileges of protection in his literary property than he could by complying with them.

"Whatever may be thought of this law as law—and it is difficult to see how it could well be otherwise than as it is—and whatever may be thought of our statutes of copyright, it is not surprising that the above paradoxical and anomalous condition of things—namely, a law which gives to an alien, as of course and freely, what it denies to the citizen, except upon his compliance with certain formulæ and upon payment by him of a certain fee, and a law which rewards its own breach rather than its own observance (a condition of things arising, be it remembered, from the construction of those statutes, by application of principles of common law), should lead a lay newspaper (N. Y. Express, Nov. 11, 1874) to exclaim that they were 'a stultification' and 'a curiosity;' for it cannot well be public policy for a nation to discriminate against its own citizens; and where it can be shown that, by declining to pass a certain law or laws, statute or statutes, or to negotiate a certain treaty or treaties, a nation is in effect putting a premium upon alienage, and a discouragement and a penalty upon citizenship—it would seem to prove, or at least to suggest very strongly, that such laws, statutes, and treaties were desirable, expedient, and necessary." In those three papers he contended that the remedy for this state of things lies, and lies only, in the negotiation by the Congress of the United States and the Crown of Great Britain of a treaty of, or by otherwise securing an international copyright. And it was difficult to see how any other legislation would meet the case; and urged, besides, a number of reasons why it seemed to him that such a policy was unquestionably to the interest of both nations."

an original work is one which is the bona fide product of original mental labor, either primarily, in the compositions of the imagination, fancy, reason, or research; or secondarily in the form of translation, re-arrangement, abridgment, annotation, or commentary, of or upon, the composition of a predecessor.

In the case of dramatic composition there is but one variation of this rule. The dramatic arranging of another man's composition involves, undoubtedly, original mental labor as well as a knowledge of the usages and requirements of the stage. But it would be manifestly unfair to allow an author's romance or fiction to be deliberately appropriated by another author merely because the second happens to be a writer of plays. It is a question whether imaginative material, any more than such historical and scientific, can ever be publici juris, but at all events, the common law having preserved silence upon this point, the statute has stepped in and declared that an author may reserve to himself the right to dramatize his own work, and impliedly that if he does not so reserve it, it will become publici juris, the property of the public.

302. In another view, the works of the dramatic author are not to be too strictly judged by the rule. A palpable following of the plot of a story, with only colorable variations, is not to be tolerated in this case any more than in any other. But the law will be very chary of its injunction in a case where only the outline of a plot or incident be followed. The case of Daly v. Palmer,[1] which we shall consider further on, only went so far as to hold that the fact that the leading incident of a story had been copied into a drama did not make that drama publici juris to such an extent that it could be itself copied at will; but the question

[1] 6. Blatchf. 256.

whether the drama itself was a piracy of the story was not before the court. There is scarcely a play of Shakespeare, of which the plot is not taken bodily from some tale or history extant and popular in his day. Thus his King John, Richard II., Henry IV., V., VIII., are taken from Holinshed's Chronicles; incidents in King John, Henry IV. and V. being taken from still earlier plays of the same name. Henry VI. is taken from Hall's Chronicle, Macbeth from Holinshed's History of Scotland, while King Lear is taken partly from Holinshed historically, while the literary matter and incident is arranged from an older play of the same name—from Sidney's Arcadia, and from Higgins' Queen Cordila, in the Mirror for Magistrates, and so on.[1]

In Reade v. Lacy,[2] the plaintiff sued to restrain publication of the play, "Never too Late to Mend," an alleged dramatization of his novel of that name. But the pure question of dramatic originality was not presented to the court, it appearing that the plaintiff, before composing his novel, had used the incident employed in it in a play called "Gold," and it was held that, even if the play, "Never too Late to Mend," was a fair adaptation of the novel of that name, it was an infringement on the copyright in the plaintiff's play of "Gold."[3]

303. In an action for piracy of a romantic work by dramatization, the animus furendi of the subsequent author, would undoubtedly be taken into view,[3] though to what extent—in the case of this class of composi-

[1] "Shakespeare's Library," Collier, London, 1843.

[2] J. & H. 524.

[3] Trusler v. Murray, 1 East. 363; Jeffreys v. Baldwin, Barb. 164; Jerrold v. Houlston, 3 K. T. J. 716, 3 Jur. (N. S.) 1051; Reade v. Lacy, 1 J. & H. 524. *Vid.* chapters on Originality and on Piracy, in this work.

tions—other or further than has been already shown to be the rule in the case of all other literary productions, has not yet particularly appeared.

304. III. As to what adjuncts, incidents, accompaniments, and circumstances are protected by the copyright of a play:

Whether the copyright will cover the title of the play, there appears to be as yet some doubt. A title is more of the nature of a trade-mark than of copyright. In the case of the mere copyright of a title, whether bona fide or not, where no further steps are taken to publish the thing so entitled, the subsequent use of that title by an actual publication we do not think would be held to be an infringement. Such was the rule laid down in Isaacs v. Daly,[2] where the plaintiff had copyrighted the title "Charity," alleging that he was about to produce a play of that name; and the defendant unknowingly did thereafter actually produce a drama so entitled.[3]

In Leech v. Freligh, the bill prayed for an injunction restraining the defendant from causing to be represented at the Bowery Theatre, in the city of New York, a drama under the title of "Around the World in 80 Days," which plaintiffs claimed was an infringement of a composition of the plaintiffs, of which he had copyrighted—as had the plaintiff in Isaacs v. Daly—a title, "Round the World in 80 Days," the title-page of the last-named drama having been duly filed in the office of the librarian of congress, under copyright law. It was admitted in the argument that both dramas were adaptations from the

[1] Reported in N. Y. Times, March 3d, 4th, and 5th, 1874. And see *ante*, vol. II. pp. 219, *et seq.*; p. 228, § 256. *Vid.* also Upman v. Elkan, 20 W. R. 131; S. R. 12 Eq. 140; 19 W. R. 367.

French of Jules Verne's work styled "Le Tour du Monde dans Quatre Vingt Jours:" held, that no injunction would lie.[1]

305. In Isaacs v. Daly,[2] the plaintiff had copyrighted in the office of the librarian of congress the title of a play written or to be written by him, which title consisted of the single word "Charity." Subsequently to this, the defendant, proprietor of the Fifth Avenue Theatre, in the city of New York, purchased or otherwise procured from one W. S. Gilbert—the author of a play also called "Charity," at that time being represented at a theatre in the city of London—the right to produce, at his Fifth Avenue Theatre, the play "Charity." Accordingly, it was announced in the New York newspapers for a certain night, advertised by posters, and the usual preparations of scenery, effects, and the like, went on at Mr. Daly's theatre. But on the day upon the evening of which the first representation was to have been given, a motion was made by Isaacs, who, without claiming that the "Charity" of Mr. Gilbert was a copy of any infringement upon his "Charity," alleged his previous copyright of the name.

As we have already seen,[3] the court held that the name of an abstract virtue, which was publici juris, could not be so exclusively copyrighted by a dramatic author, that another proprietor of dramatic matter could not affix the same name to his work, if in good faith he chose to do so.

"There may be," said Curtis, J., "occasions when a title is made use of in bad faith, or to promote some

[1] Unreported motion for a temporary injunction, April 14, 1875, U. S. Circuit Court for the Southern District of New York, decided by Judge Shipman, April 22, 1875.

[2] See *ante*, this volume, p. 219.

[3] *Ante*, this volume, p. 219.

imposition, or to inflict a wrong, when a court of justice should interfere to prevent its use, or to compensate a party who has in consequence sustained an injury. But the present case does not appear to be one where the court is called upon to interfere for any of these reasons. Both parties having acted in good faith, it would be inequitable to subject the defendant to loss, who has prepared for representation, and advertised Mr. Gilbert's play under the name of 'Charity.'"

"Nothing is shown by which it appears that the plaintiff would sustain a loss by changing the name of his play, if he desired to do so; and I do not find any case where the court has granted a plaintiff, under the circumstances appearing in the papers, the relief he seeks by the present application. The motion for an injunction must be denied, with costs."

The rule was thus laid down in Isaacs v. Daly, that a mere title could not be copyrighted so as to entitle the copyrighter to an injunction against the publication of a literary or dramatic work by that name; and that where one writes and copyrights a play, but neglects, or is unable to secure its representation upon the stage, and meanwhile another play by the same name is written, copyrighted, and represented, that the latter play will not be deemed an infringement of the former, from the mere coincidence in the names. But in that case the name chosen in both cases was "Charity." It might possibly have made a difference if the name had been one peculiar and unusual, such as would not be likely to occur from a mere coincidence; as for instance, if each had called his play "Arrah na Pogue," or "London Assurance," or "Meg's Diversion." This rule might be said to be sound in law for another reason, namely, that where

each of two individual rights are equally valid, the right of the public must control. And so, even if each party had equal right to the name of the play, the one who should first make that name valuable to the public by producing his play should, on grounds of public policy, prevail.

A like principle obtains in the law of patents. In Hart v. Little,[1] it was held that alleged sketches of an invention, not preserved or accounted for, and not followed up by a reduction of the invention to practice, are not sufficient to establish priority of invention. Where one is first to conceive of an invention, but throws aside all evidence of the conception, makes no effort to complete, or introduce the invention to the public, and delays making application for a patent for nearly four years, he has no standing as an inventor. He who first reduces an invention to practice, and first puts it upon the market, is prima facie the inventor.[2]

[1] Official Gazette of the U. S. Patent Office, vol. 7, p. 962. And see Rees v. Bullock, Id. 39.

[2] William S. Carr, 5 Id. 30; Clark and Osborne, 5 Id. 667. The opinion of the court in Osgood v. Allen (U. S. Official Gazette, &c., vol. 3, p. 124) is very conclusive as to the question of titles. Said Shepley, J.: The complainants are the proprietors and publishers of an illustrated magazine for boys and girls, entitled "Our Young Folks," which has been published monthly, in the city of Boston, under the same title, since December, 1864. Previous to the publication of the first number, the publishers duly entered the title of their magazine for securing the copyright thereof. The publication and sale have been continued in regular monthly numbers by the firm of Ticknor & Fields and their successors, including the complainants, and the copyright of each number was taken out and secured according to law, previous to its publication. Complainants allege that when the copyright of the first number was taken out, the title, "Our Young Folks," had not been adopted and was not in use for any other similar publication, and has not been used for any other similar publication since,

And again, it is not difficult to see that, were the rule otherwise, the provision in our law allowing copyright of the name of a literary work,

except by the defendant; that they have expended large sums of money in publishing and selling the same; that by reason of their expenditure and the care and skill by them bestowed, the magazine has acquired an extensive and valuable reputation throughout the United States and elsewhere as a publication for young people, under the title of "Our Young Folks," and was a source of profit to complainants.

The respondent, a publisher at Augusta, Maine, announced by advertisements and otherwise that he would publish on the first and fifteenth days of each month, commencing October 1, 1871, an illustrated publication for young people, under the title "Our Young Folks' Illustrated Paper."

It is admitted that he accordingly did issue a very large edition of his illustrated publication, a copy of which is filed with the proofs in the case, and that, upon demand by the complainants before publication, he refused, and still refuses, to withdraw the announcement of the publication or to change the title, and has published and sold large numbers under said title. The complainants claim that they are entitled to a remedy under the law of copyright, and also that they have a right to the exclusive use of the name "Our Young Folks," as indicating a periodical, according to the doctrine of trade-marks as applied to the protection of literary publications. It is apparent upon inspection, and not disputed, that the publications of the complainants and the respondent are in no respect the same or even similar, except in the use by both of the words "Our Young Folks" as a part of the title. The title of the one on the title page is "Our Young Folks: an Illustrated Magazine for Boys and Girls;" of the other, "Our Young Folks' Illustrated Paper." Both are illustrated periodicals for the young. The reading matter and the illustrations are not the same or similar.

Copyright laws are designed for the encouragement of learning by securing to authors and their representatives the exclusive right to the publication of their literary compositions, as patent laws secure to inventors certain exclusive rights in their discoveries. The constitution conferred upon congress the power to promote the progress of science and the useful arts "by securing for limited times to authors and inventors the exclusive rights to their respective writings and

might become a license for bad faith, trickery, and blackmail. In such a case, one learning that a play or novel was in course of preparation in England or discoveries." Accordingly, in 1790, congress passed an act for the encouragement of learning by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned.

This act provided that the author and authors of any map, chart, book, or books . . . "shall have the sole right and liberty of printing, reprinting, publishing, and vending such map, chart, book, or books for fourteen years from the time of recording the title thereof." The remedy provided by this statute was a right of action given to the proprietor of the copyright against any person who, without his consent, should publish, sell, or expose to sale, or cause to be published, sold, or exposed to sale, any copy of such map, chart, book, or books.

The act of 1870, "to revise, consolidate, and amend the statutes relating to patents and copyrights," provides that the author . . . or proprietors of any books, &c., shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same.

The nineteenth section provides that no person shall be entitled to the benefit of the act unless he shall, before publication, deposit in the mail for the librarian of congress a printed copy of the title of such book, and shall, within ten days after publication, mail to the librarian two copies of such copyright book. The remedy of the author or proprietor under this statute is against the person who, without the consent in writing of the proprietor of the copyright, shall 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.

By the plain terms of the statute, the copyright protected is the copyright in "the book," the word "book" being used to describe any literary composition. Although a printed copy of the title of such book is required before the publication to be sent to the librarian of congress, yet this is only as a designation of the book to be copyrighted, and the right is not perfected under the statute until the required copies of such copyright book are, after publication, also sent. It is only as a part of the book, and as the title to that particular literary

France, for example, to bear a certain title, might hastily prepare and print a title-page of a supposititious play, with that same title; register it in the office of

composition, that the title is embraced within the provision of the act. It may possibly be necessary in some cases, in order to protect the copyrighted literary composition, for courts to secure the title from piracy, as well as the other productions of the mind of the author in the book. The right secured by the act, however, is the property in the literary composition, the product of the mind and genius of the author, and not in the name or title given to it. The title does not necessarily involve any literary composition; it may not be, and certainly the statute does not require, that it should be the product of the author's mind. It is not necessary that it should be novel or original. It is a mere appendage, which only identifies and frequently does not in any way describe the literary composition itself, or represent its character. By publishing, in accordance with the requirements of the copyright law, a book under the title of the life of any distinguished statesman, jurist, or author, the publisher could not prevent any other author from publishing an entirely different and original biography under the same title. When the title itself is original and the product of the author's own mind, and is appropriated by the infringement, as well as the whole or a part of the literary composition itself, in protecting the other portions of the literary compositions courts would probably also protect the title. But no case can be found, either in England or this country, in which, under the law of copyright, courts have protected the title alone separate from the book which it is used to designate. In Jollie v. Jacques, 1 Blatchford, 627, Mr. Justice Nelson says: "The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it as certainly as the principal carries with it the incident." The only doubt expressed by Mr. Justice Nelson in that case is how the question might be decided in case of a valid copyright of a book and an infringement of the title by the defendant. While expressing no opinion upon this question, the reasoning by which he arrives at the conclusion that when the book fails to be protected the title goes with it would seem clearly to point to a similar result in a case of alleged infringement of copyright of the book, namely, that if there was no piracy of the copyrighted book, there could be no remedy under the

the librarian of congress, at Washington; and thenceforth, without ever having written a play of that name, prevent the representation of the French or English act for the use of a title which could not be copyrighted independently of the book. The injunction granted in the case of Hogg v. Kirby, 8 Vesey, 215, was not founded on copyright, but on the power a court of equity has to restrain one person from carrying on a trade or from publishing a work under a fraudulent representation that such trade or work is that of another. The chancellor (Lord Eldon) in the opinion in that case says: "In this case, protesting against the argument that a man is not at liberty to do anything which affects the sale of another work of this kind, and that because the sale if affected, therefore there is an injury (for if there is a fair competition by another original work really new, be the loss what it may, there is no damage or injury), I shall state the question to be, not whether this work is the same, but in a question between these parties whether the defendant has not represented it to be the same; and whether the injury to the plaintiff is not as great and the loss accruing ought not to be regarded in equity upon the same principles between them as if it was in fact the same work. Upon the point whether the work was in fact meant to be represented to the public as the same, I do not say that it is not a question proper for a jury." In the case of Jollie v. Jacques, Mr. Justice Nelson declined to consider the question whether the court will interfere to prevent the use of a title in fraud of the plaintiff upon principles relating to the good-will of trades, because, in the case before him, both parties were residents, and, for aught that appeared in the case, citizens, of New York, and therefore independently of copyright, the court had no jurisdiction in the case.

In the case before this court the bill is filed by complainants as citizens of the commonwealth of Massachusetts, against the defendant, a citizen of Maine. Relief is sought not only under the law of copyright, but upon the general ground of equity as related to the good-will of trades and the doctrine of trade-marks. It becomes necessary for the court to determine, in this case, how far the complainants are entitled to a remedy upon these grounds of equity jurisdiction, and upon the general principles governing courts of equity jurisdiction. Property in the use of a trade-mark or name has very little analogy to that which exists in copyrights or

play in this country. The absence of good faith in such a case might be very difficult to prove, and equity perhaps powerless to interfere.'

patents for inventions. In all cases where rights to the exclusive use of a trade-mark are invaded, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another. It is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. Canal Company v. Clark, 13 Wallace, 311, 322; words or devices may be adopted as trade-marks, which are not original inventions of the one who adopts and uses them. Words in common use may be adopted, if, at the time of adoption, they were not used to designate the same or similar articles of production. A generic name, or a name merely descriptive of an article of trade, or its qualities or ingredients, cannot be adopted as a trade-mark so as to give a right to the exclusive use of it. The office of a trade-mark is to point distinctively to the origin or ownership of the article to which it is affixed. Marks which only indicate the names or qualities of products cannot become the subjects of exclusive use, for from the nature of the case any other producer may employ, with equal truth and the same right, the same marks for like products. Geographical names which point out only the plan of production, and not the producer, cannot be appropriated exclusively, so as to prevent others from using them and selling articles produced in the districts they describe under these appellations. In the case of Brooklyn White Lead Company v. Masury, 25 Barbour, 416, the court said, that as both plaintiff and defendant dealt in the same article, and both manufactured it at Brooklyn, each had the same right to describe it as Brooklyn white lead.

Lord Langdale, master of the rolls, well expresses the whole law of trade-marks by names in the case of The Collins Company v. Cowen, 3 Kay & Johns. 428. He says: "There is no such thing as property in a trade-mark as an abstract name. It is the right which a person has to use a certain name for articles which he has manufactured, so that he may prevent another person from using it, because the mark or name denotes that articles so marked were manufactured by a

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[1] See *post*, chapters on Newspapers and Dramatic Copyright.

306. As in other cases, the main question will be as to the good faith. If the defendant, in the suit we have been just examining, had taken the title "Charity" for the purpose of deceiving the public, we cannot doubt that the ruling would have been a different one. So in the case of Daly v. Hooley,[1] decided by the United States circuit and district judges in San Francisco: the plaintiff Daly had produced at the Fifth

certain person, and no one else can have the right to put the same name upon his goods and then represent them to have been manufactured by the person whose mark it is. Applying these principles to the case before the court, the question presented on this branch of the case is whether the defendant has so simulated the mark of the complainant as to deceive the public, so that the public will naturally mistake his publication for that of the complainant."

Complainants aver that defendant, fraudulently designing to procure the custom and trade of persons who are in the habit of buying their magazine, and to induce them and the public to believe that his publication is in fact the complainants', and in order to obtain for himself the benefit of the reputation of complainants' publication, advertises, prints, and offers for sale his publication under that title, and alleges thereby the public will be deceived by the title, and led to purchase respondent's publication under the belief that it is the magazine of the complainants. The agreed statement of facts is silent on the question whether the public are deceived or are in danger of being deceived as alleged. And whether the customers of the complainants or the public are induced to believe, or are in danger of being induced to believe, that respondent's publication is in fact the complainants' and thereby led to purchase the respondent's magazine under the belief that it is the complainants'.

The case will therefore be referred to a master to ascertain and report the fact upon the foregoing questions to the court, and further proceedings in the case will be stayed until the coming in of the master's report.

[1] Unreported as yet. See Wilkes' Spirit of the Times (New York). June 12, 1875. See also the case of a play concerning the title, "Bertha, the Sewing Machine Girl," or imitations thereof, Foster v. Wood, decided in Philadelphia, but unreported.

Avenue theatre, in the city of New York, a dramatic piece called "The Big Bonanza," a free adaption—not a translation—of a German play "Ultimo." Daly, first of all, claimed the title, which he had first applied to a dramatic work, and had duly copyrighted. The principal feature of the play, as represented in New York, was that its characters were more or less interested in the stock exchange, and used upon the stage the jargon or dialect of that institution, which up to that time had not been done upon the stage. The defendant in San Francisco subsequently imitated it, calling his play at different times "Bonanza," "Buying Bonanza," "Ultimo, or The Big Bonanza," "Ultimo the Original of The Big Bonanza;" but the court sustained the plaintiff in his copyright title, as a designation peculiar to his play.

Secondly, the plaintiff claimed to have copyrighted his own original idea of adapting "Ultimo" to American life and manners. For example, there is no Big Bonanza in the German Ultimo; no New York; no San Francisco; none of the argot of the New York exchange; no miners' talk; none, as he claimed, of those popular elements which made the success of the play at the plaintiff's theatre. Entirely original scenes, besides, were written in by the plaintiff. There does not appear to be any authorized report of this case, but if, as it is asserted, the California court held that the idea, even of making a German piece American, can be copyrighted and held as a property, it is indeed a long stride in advance of the preceding decisions, and indicative of the existing tendency, to which we have before alluded, to make the protection accorded to authors absolute.

307. The question as to copyright of titles of

prospective works has been already examined.[1] A person copyrighting the title of a drama not original with himself, cannot obtain a right to that title to the exclusion of others who have previously, and before the date of his copyright, applied the same title to a dramatic composition founded on the same romance or story.[2] Benn v. Le Clerc, decided in 1873, was a suit in equity to restrain defendants from the infringement of plaintiffs' copyright, by representing a play called "The New Magdalen." The title of the play copyrighted by the plaintiffs was in these words: "The New Magdalen, a drama in a prologue and three acts, adapted from Wilkie Collins's celebrated novel of the above title, by Walter Benn, author of sundry Dramatic Works, with Directions, Cast of Characters, &c." It appeared, in defense, that Wilkie Collins, an English author, had made and published a novel with the title of "The New Magdalen," and it was alleged that at the time of the deposit of title by the plaintiff, Mr. Benn, he had composed a drama under the same title, partly adapted from the novel so far as it was published, and partly anticipating the novel, when the novel should be published. It was proved that, before the deposit of the title by Benn, Mr. Collins was himself engaged in a dramatization of his own novel.

Said the court (Shipley, J.): "In this case a bill in equity was brought to enforce rights claimed by the plaintiff, Mr. Benn, under a copyright. On the 28th of February, 1873, he deposited with the librarian of Congress the title of a drama substantially in these words: 'The New Magdalen, a Drama in a Prologue and

[1] *Ante*, and see *post*, chapter on Newspapers.

[2] Benn v. Le Clerc, 18 Int. Rev. Record, 93, May 17, 1873.

Three Acts, adapted from Wilkie Collins's celebrated Novel of the above title, by Walter Benn, author of sundry Dramatic works, and with Directions, Cast of Characters, &c.' This is the title. It is not 'The New Magdalen' alone, but it is the whole title as filed and recorded. By this deposit, undoubtedly, Mr. Benn would have secured the dramatic composition bearing the title he had deposited, so far as it was original with him, provided he subsequently complied with the other provisions of the statute requisite to be performed to perfect the copyright. But, in securing this product of his mind, the dramatic composition of which he is the author, he secures that only. And the rule applied in this court in numerous cases, applies here also. He secures only that which was his own. He cannot prevent others from composing or publishing a similar book on the same subject, provided that they do not pirate from his copyrighted book, but rely on their own intellect and mental power.

"The rule is familiar, and the present case forms no exception to it. The complaint sets forth that defendant not only acts and represents a drama with the same title, but that it contains the same cast of characters, and that this cast is secured to him by the copyright. There is no evidence of this, for there is no evidence of the cast of characters of the complainant's play, and no evidence that complainant's play has ever been performed at any place where defendants could have seen and copied it.

"It appears in defense, that Wilkie Collins, a celebrated English author, has made and published a novel under the title of 'The New Magdalen.' And, at the time of the deposit of title by Mr. Benn, it is claimed that he had composed a drama under the same title, partly adapted from the novel so far as it was pub-