THE LAW OF COPYRIGHT.

THE LAW
OF
COPYRIGHT

INCLUDING

THE COPYRIGHT ACT, 1911

THE UNREPEALED SECTIONS OF THE FINE ARTS COPYRIGHT ACT, 1862

THE MUSICAL (SUMMARY PROCEEDINGS) COPYRIGHT ACT, 1902

THE MUSICAL COPYRIGHT ACT, 1906

AND

THE UNITED STATES OF AMERICA COPYRIGHT ACT, 1909

AND

THE BERLIN AND BERNE CONVENTIONS AND TABLES OF THE LAWS, TREATIES AND CONVENTIONS IN FOREIGN COUNTRIES

BY

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PREFACE.

THE Law of Copyright has hitherto been an extensive, difficult, and imperfectly developed department of our legal system, and there have been numerous attempts at codification. With the Berlin Convention of 1908, however, it became absolutely necessary, if Great Britain were to remain a member of the Copyright Union, that previously existing confusion should be swept away, and that the law should be placed upon an intelligible and systematic footing. The present Act, based upon that Convention, is one of the most interesting as well as important legislative efforts during recent years.

The Act is the outcome of much compromise, and a comparison between the Copyright Bill as first introduced in 1910, with that reintroduced in 1911 and finally passed, illustrates the difficulty of framing a code at once international, and at the same time acceptable to all the vested interests concerned. It is no longer the complete code it was intended to be, for the Musical Copyright Acts of 1902 and of 1906 remain, while the remedies provided by those Acts are refused to owners of other copyright property. Moreover, the many exceptions affecting the different kinds of copyright property intended to safeguard public interests, as well as the doubtful system of compulsory licences secured by the efforts of the manufacturers of mechanical instruments, in spite of the report by the Copyright Committee that such a system should not be adopted, have somewhat marred the symmetry of the Act.

This work includes not only the British Consolidating Act, the Musical Copyright Acts of 1902 and 1906, and those sections of the Fine Arts Copyright Act, 1862, which have not been repealed, but also, what is of considerable importance to British authors, the

recent Statute of 1909, consolidating the Law of Copyright in the United States together with the rules and regulations made under it.

In form the work is a commentary on the British Act, and each section is annotated with reference to decided cases which are in point so far as the law remains unaltered. Each case has been tested with reference to the Act itself, and is law where it is a correct deduction from the language of the Act. Where new matter for copyright protection has been introduced, notably in the case of architecture, foreign decisions are quoted, and frequent reference has been made to that invaluable authority *le Droit d'Auteur*, published by the Office of the International Union established under the Berne Convention. To facilitate reference, the whole Act is reprinted *in extenso* in an Appendix, with cross references to the annotated sections.

The Act does not come into operation until July 1, 1912, or such earlier date as may be fixed by Order in Council, and there are numerous and important rules to be made by the Board of Trade, both with regard to the reproduction of any work upon payment of royalties, after the expiration of twenty-five years from the death of the author, and as regards compulsory licences to mechanical instrument manufacturers. These rules and regulations will probably be issued some time prior to July, 1912. The adoption of the Berlin Convention, and the issue of Orders in Council affecting international relations may also be expected at an early date. While there is every reason to believe that as the outcome of the unanimous decision arrived at during the Colonial Copyright Conference of 1910, the self-governing dominions will either adopt the new Act or introduce legislation substantially identical with it. At the present moment there is a new Australian Copyright Act before the Commonwealth Parliament.

The Berlin Convention collated with the Berne Convention, and the Additional Act of Paris, as well as tables showing the laws in force in certain foreign countries, and a list of the various treaties and conventions between them, have been included in an Appendix. The author, who has had the advantage of attending

the Committee stages of the Bill, has endeavoured to present the law in a brief and, at the same time, convenient form, with no more detailed consideration than is necessary to provide a complete code of Copyright Law, and to make the work ready for reference to the decided cases. He trusts that he has attained that object at least in some measure, and that the work may prove practically useful to all interested in the Law of Copyright.

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11, New Square,
Lincoln's Inn.
21st December, 1911.

TABLE OF CONTENTS.

TABLE OF STATUTES.

UNITED STATES OF AMERICA—STATUTES

TABLE OF CASES.

A.

B.

C.

D.

E.

F.

G.

H.

I.

J.

K.

L.

M.

N.

O.

P.

Q.

R.

S.

T.

U.

W.

Y.

UNITED STATES OF AMERICA—CASES.

CANADIAN CASES.

MISCELLANEOUS CASES.

PART I.

COPYRIGHT ACT, 1911.

INTRODUCTION.

THE Act recently passed consolidating the Law of Copyright is the result of a long series of attempts to reduce the previously existing law to an intelligible and systematic form. It is the immediate result of the Report of the Copyright Committee appointed in 1909, to examine and report upon the Berlin Convention. Hitherto the outstanding feature of the Law of Copyright has been one of confusion and complexity. The Royal Commissioners of 1878, at the commencement of their report say : " The first observation which a study of the existing law suggests is that its form, as distinguished from its substance, seems to us bad. The law is wholly destitute of any sort of arrangement, incomplete, often obscure, and even when it is intelligible upon long study, it is in many parts so ill-expressed that no one who does not give such study to it can expect to understand it." While the late Committee refer to it in these terms— " there seems little doubt but that its present state has been reached through what at the present day would probably be considered inadequate recognition of the principles which should regulate the rights of persons in the products of their brains," and they go on, " It would be a great advantage if the British law were placed on a plain and uniform basis, and that basis were one which is common so far as practicable to the nations which join in the (Berne) Convention."

An Imperial Copyright Conference was held in 1910 under the chairmanship of Mr. Buxton, the President of

the Board of Trade, at which the various self-governing Dominions were represented. The unanimous decision come to was that the Berlin Convention should be ratified with as few modifications as possible, and that there should be as great uniformity throughout the Empire as possible.

"The delegates were very emphatic on the line of uniformity of Copyright throughout the Empire. In order to attain this object an Imperial Act should be passed expressly to extend to all the British Dominions, and any self-governing Dominion who desired could either adopt the Act in its entirety or adopt it in substantially identical terms, subject to modifications and additions relating principally to procedure and remedies, etc., necessary to adopt the Act to the particular circumstances of the Dominion, and such a Dominion would then come under the general operations of the Act. If a Dominion did not adopt the Act or give substantially identical rights to British authors, it would not by right enjoy the benefits of the Imperial Act, but by an order in Council if it gives reciprocal treatment to British authors it would be able to obtain the benefits of the Imperial Act. The basis of the Imperial Conference, and the Bill founded on its deliberations is that while we leave to the self-governing Dominions liberty to legislate for themselves, we offer them the greatest possible inducement to accept the Imperial Act as a model, and to differ from it as little as possible, by offering reciprocal advantages." (*a*).

The intention of the present Act is, therefore, to form an Imperial code so that if the self-governing Dominions accept it, the law of the Empire will be brought into line with the signatories to the Berlin Convention of 1908.

How far the Act succeeds is open to question. Not only has there been a considerable enlargement of the law by adding new matter for Copyright protection—

(*a*) Mr. Buxton. The debate on the second reading. House of Commons Debates, vol. 23, p. 2594.

architecture, works of artistic craftsmanship, pieces for recitation, choreographic works, cinematograph productions, records, perforated rolls, and other contrivances for mechanical performance being included for the first time—but all the different kinds of Copyright are dealt with in a single section, and Copyright is to subsist in every original literary, dramatic, musical, and artistic work. The practical utility of this method is very doubtful.

As regards the new matter—the inclusion of architecture is perhaps the most important innovation. There has been considerable controversy upon this head, and it may be recalled that the Royal Commission of 1878 did not consider it practicable. It was recommended by the Berlin Convention, however, and by a large majority the recent Committee also recommended its introduction both for the sake of unity, and because it deserved to be protected as presenting no difference in principle from the sister arts, the intention being to protect architectural works of original and artistic character, and not works of common type. Translations, lectures, original adaptations, dramatic records, and novelized dramas also come within the provisions of the Act. Special clauses deal with joint authorship, posthumous and collective works, and the composer is in the future protected against unauthorized reproduction by mechanical means.

The object of the Act is "to bring the same terms and the same obligations and the same remedies and the same advantages" (*b*), to all the various classes of works. Copyright at Common Law is abolished, and can now only exist under the Act. Another fundamental change is the abolition of all formalities in the matter of registration. This is in accordance with the Berlin Convention, and was recommended by the late Committee, which described the requirements as to registration as

(*b*) House of Commons Debates, vol. 23, p. 2595. Mr. Buxton on Second reading.

"anomalous, uncertain, and productive of great disadvantage and annoyance to authors, with little or no advantage to the public," and as "particularly onerous in the case of foreign authors." The result is that an author no longer has to *obtain* Copyright—Copyright subsists in the work provided that the author is a British subject, or resident as defined by the Act, if the work is unpublished, while as regards a published work Copyright subsists by virtue of first publication within the British Dominions to which the Act extends, or by simultaneous publication in another country. Moreover, the privileges of Copyright under the Act can be extended by Order in Council to those other countries that give reciprocal rights to British authors. Where adequate protection is not given by the foreign country the privileges can be withheld. For greater uniformity Great Britain is also adopting the foreign interpretation of "publication" as "the issue of copies to the public."

The term for which Copyright is to subsist has been fixed at a life and fifty years thereafter, with a provision for reproduction after a period of twenty-five years, or in the case of a work in which Copyright subsists at the passing of the Act—thirty years—upon payment of certain royalties to the owner of the Copyright.

As regards unpublished works, the date of publication as the time from which Copyright is to run is abandoned, and in such cases Copyright runs from "*the date of the making*" of the work until publication, and thereafter for the life of the author and fifty years after his death. Should, however, the work be still unpublished at the date of the death of the author, then Copyright subsists until publication, and for a period of fifty years from such publication, it being deemed that the author died at the date of publication. The date of publication, therefore, is very material in the case of works unpublished at the date of the death of the author. It is to be observed that

this provision does not apply to artistic works, except engravings.

It is a serious objection that the new term, "the date of the making" of a work is left undefined. As regards published works, however, the advantage of adopting a uniform period from the death of the author is obvious. It was recommended by the Royal Commissioners of 1878 and the Committee of 1909. It is the principle of the Berlin Convention, and is the system that has been adopted by nearly all other countries. As a result all an author's works fall out of Copyright at the same time, and the disadvantage of first editions of an author's works falling out of Copyright before the subsequent editions is avoided. Further, the difficulty of knowing whether a particular work is or is not out of Copyright is removed, it being a comparatively simple matter to discover the date of the death of the author.

As regards ownership the Act provides that the author shall be the first owner; that is to say, the Copyright vests in the actual creator of the work, except if the work is done on commission, when it belongs to the person ordering the work; while if the work is done in the ordinary course of employment, it belongs to the employer.

The remedies open to a person whose work has been infringed have been made uniform. In some cases they have been strengthened, in other cases made less stringent.

There are certain defects in arrangement arising from the attempt to treat the different kinds of Copyright in one section, which in many cases make it difficult to find the provisions with respect to any particular class of work; while the length and complexity of some of the sections make construction difficult. On the whole, however, the Act, as a consolidating statute, is perhaps as free from faults as might be expected, when it is remembered that there is a repeal of some twenty different Acts extending back to 1734.

The form of this work is hardly a matter of choice. A Codifying Act attempts, so far as is possible, to leave the law in its existing state; and in the present case such revision as has been necessary has been undertaken with a view to give effect to the revised Berne Convention. Decisions therefore under the repealed Acts are material, and remain law so far as they are consistent with the form of the Act, and there is ample scope for reference to the decided cases.

It was well said by Mr. Justice Blackburn in *The Mersey Dock Case*, 11 H. L. C. at p. 480, "where an Act of Parliament has received a judicial construction putting a certain meaning on its words, and the Legislature in a subsequent Act *in pari materia* uses the same words, there is a presumption that the legislature used those words intending to express the meaning which it knew has been put upon the same words before; and unless there is something to rebut the presumption the Act should be so construed, even if the words were such that they might originally have been construed otherwise."

An attempt has been made by a careful selection of decided cases to interpret the Act where it appears doubtful, and to provide as complete a text-book upon the law relating to Copyright as is possible within a small compass.

THE LAW OF COPYRIGHT.

THE COPYRIGHT ACT, 1911.

An Act to Amend and Consolidate the Law relating to Copyright. [A.D. 1911.

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

PART I.

IMPERIAL COPYRIGHT.

Rights.

Sect. 1. COPYRIGHT.

1.—(1) Subject to the provisions of this Act, copyright (*a*) shall subsist throughout the parts of His Majesty's dominions to which this Act extends (*b*) for the term hereinafter mentioned (*c*) in every (*d*) original (*e*) literary (*f*), dramatic (*g*) musical (*h*) and artistic (*i*) work, if—

(*a*) in the case of a published (*k*) work, the work was

(*a*) See definition sub-s. (2), p. 8, and notes thereon, p. 9.
(*b*) See s. 25, p. 133, and notes thereon.
(*c*) See s. (3), p. 60, and notes, p. 62.
(*d*) Page 12.
(*e*) Page 13.
(*f*) Page 15.
(*g*) Page 25.
(*h*) Page 27.
(*i*) Page 28.
(*k*) Page 38.

Sect. 1.

COPYRIGHT.

first published within such parts of His Majesty's dominions as aforesaid; and,

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

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

(2) For the purposes of this Act, "copyright" means the sole right to produce or reproduce (*q*) the work or any substantial part (*r*) thereof in any material form whatsoever (*s*), to perform (*t*), or in the case of a lecture to deliver (*u*), the work or any substantial part thereof in public (*x*); if the work is unpublished, to publish (*y*) the work or any substantial part thereof; and shall include the sole right:—

(*a*) to produce, reproduce, perform, or publish any translation of the work (*z*);

(*b*) in the case of a dramatic work, to convert it into a novel or other non-dramatic work (*a*);

(*c*) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise (*b*);

(*d*) in the case of a literary, dramatic, or musical work,

(*l*) Page 33.
(*m*) Page 34.
(*n*) See s. 35, sub-s. (5), where a person is deemed to be a resident in the British Dominions if he is domiciled there.
(*o*) See s. 26, p. 134.
(*p*) See s. 29, p. 138.
(*q*) Page 34.
(*r*) Page 35.
(*s*) Page 44.
(*t*) Page 36.
(*u*) Page 36.
(*x*) Page 38.
(*y*) Page 38.
(*z*) Page 40.
(*a*) The case of the Conversion of a dramatic work into a novel does not appear to have arisen in the English Courts. See notes on dramatization, p. 42.
(*b*) Page 42.

to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered (*c*);

and to authorize (*d*) any such acts as aforesaid.

(3) For the purposes of this Act publication (*e*) in relation to any work, means the issue of copies (*f*) of the work to the public (*g*), and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art (*h*), but for the purposes of this provision the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works (*i*).

NOTES ON SECTION 1.

Under the old law, Copyright depended in part upon Common law and in part upon a series of Statutes dealing with the various subject-matter of copyright. Unpublished works were protected at common law, and authors had protection in such works for ever. Published works were protected for varying periods under numerous statutes. The present Act substitutes a standard law in all cases, and the common law rights are abrogated, section 31 providing that copyright or other similar right in any literary, dramatic, musical or artistic work, published or unpublished, shall only be enjoyed under the provisions of this Act or other Act in force. Unpublished works, therefore, become entitled to protection by statute.

Sub-section (1) of this section differentiates published from unpublished works, and it is, therefore, necessary to consider copyright as defined in sub-section (2) with respect to them separately.

(*c*) Page 42.

(*d*) It does not appear that the authorization need be in writing.

(*e*) Page 38.

(*f*) Page 43.

(*g*) Page 39.

(*h*) This proviso brings the British law into line with the Berlin Convention. See p. 38, *ante* (*a*).

(*i*) Page 38.

Sect. 1.

PUBLISHED WORKS.

Published works (*k*).—To obtain copyright the work must be "first published" in those parts of His Majesty's dominions to which the Act extends, that is to say, throughout the United Kingdom and any other dominion, but not the self-governing dominions, unless the Act is adopted by such dominions (*l*). Where publication of a work takes place simultaneously (*m*) in some other place, that is to say, when the time between the two publications is not more than fourteen days (*n*), the work is still deemed to be first published in the British Dominions, and it is immaterial where the work was written (*o*). But it has been held that it did not constitute simultaneous publication to post copies of a work to English subscribers on the day of publication of the work in Canada (*p*). A receipt given on the sale of a copy is *primâ facie* evidence of first publication. But it has been held that the date on the title page of an American book was not conclusive evidence of the time of publication (*q*).

First Publication outside the British Dominions disqualifies the work for copyright, except where under Order in Council the privilege of copyright is extended to works first published in foreign countries (*r*). But neither nationality nor residence affect the question of copyright so long as the requirement of first publication is complied with. A foreign author, therefore, equally with a British author, acquires copyright by first publication within the British Dominions. The case is different, however, with respect to unpublished works.

Unpublished works.—The copyright in these works formerly existed only at common law, and the author of an unpublished work had protection for ever. The common law rights have been abrogated by the present Act (*s*), and the rights of an author of an unpublished work subsist until publication, and thereafter as in the case of a published work for the period of the author's life and fifty years after his death, provided that the first publication took place within the British Dominions. If the work, however, which may be a literary, dramatic or musical work or an engraving, but not any other artistic work, remains unpublished during the author's life, and is one in which the copyright subsisted at the date of the author's death, then the copyright is governed by the section relating to posthumous works (*t*), and subsists until publication, and for a term of

(*k*) Publication means the issue of Copies to the public. See p. 38.

(*l*) S. 25.

(*m*) *Lock* v. *Purday* (1848), 5 C.B. 860.

(*n*) S. 35, sub-s. 3.

(*o*) *Buxton* v. *James* (1851), 5 De G. & S. 80.

(*p*) *Grossman* v. *Canada Cycle Co.*, [1902] 5 Ont. L. R. 55.

(*q*) *Lever* v. *Davidson* (1856), 1 C. B. (N. S.) 182.

(*r*) S. 29.

(*s*) S. 31.

(*t*) S. 17.

Sect. 1. — UNPUBLISHED WORKS.

fifty years from the date of such publication in two periods of twenty-five years each, it being deemed that the author died at the date of such publication (*u*).

The two periods are—

(i) Twenty-five years unrestricted copyright; and

(ii) Twenty-five years restricted copyright, in the sense that any person may publish the work upon payment of royalties (*x*).

Copyright in the work may therefore be perpetual if the work, being a posthumous work, is never published since the Copyright subsists until publication and for fifty years thereafter.

That an author may have Copyright in his unpublished work, he must be at the "date of the making" (*y*) of the work—

(i) A British subject; or

(ii) A resident within the British Dominions, that is to say, domiciled there (*z*).

The mere presence of an author on British soil at the time of the making of the work is, therefore, not sufficient (*a*). Thus, an author who is not a British subject, or who is not domiciled within the British Dominions to which the Act extends at the date of the making of the work, has no Copyright in his unpublished work, unless protection under the Act is extended by Order in Council to such foreign works (*b*).

As regards the different kinds of property in which Copyright shall subsist this section gives effect to Articles 1, 2, and 3 of the Berlin Convention of 1908, under which the contracting States are constituted into a union for the protection of authors' rights in their literary and artistic work. Article 2 defines "literary and artistic works," and further sets out certain works that are to be included as original works (*c*).

Article 2.—The expression "literary and artistic works" shall include any production in the literary, scientific, or

(*u*) S. 17. The exclusion of artistic works other than engravings should be observed.

(*x*) S. 3.

(*y*) For meaning of the date of the making of the work, see p. 34.

(*z*) S. 35, sub-s. 5.

(*a*) See s. 35, sub-s. 4, where the making of the work has extended over a considerable period copyright in the unpublished work will subsist if the author was a British subject or resident during any substantial part of that period.

(*b*) S. 29 deals with International Copyright, see p. 138. The full privileges given to British authors under the Act are to be extended to such other countries as give adequate protection and reciprocal advantages, which will mean to the Union Countries which are signatories to the Berlin Convention and to such non-Union Countries as grant adequate safeguards for the rights of British authors in their countries.

(*c*) In setting out the Articles of the Revised Convention of 1908, the provisions which differ from those of the Berne Convention of 1886 and the Additional Act of Paris are shown in Clarendon type.

Sect. 1. — UNPUBLISHED WORKS.

artistic domain, whatever may be the mode or form of its reproduction, such as books, pamphlets, and other writings; dramatic or dramatico-musical works, **choreographic works and pantomimes, the acting form of which is fixed in writing or otherwise**; musical compositions with or without words, works of design, painting, **architecture**, sculpture, engraving and lithography; illustrations, geographical charts, plans, sketches, and plastic works relative to geography, topography. architecture, or science.

Translations, **adaptations, arrangements of music, and other reproductions in an altered form of a literary or artistic work, as well as collections of different works,** shall be protected as original works, **without prejudice to the rights of the author of the original work.**

The contracting countries shall be bound to make provision for the protection of the above-mentioned works.

Works of art applied to industrial purposes shall be protected so far as the domestic legislation of each country allows.

Article 3.—**The present Convention shall apply** to photographic works and to works produced by a process analogous to photography. **The contracting countries shall be bound to make provision for their protection.**

These Articles are therefore adopted, and protection given to the works therein mentioned with the possible exception, that adaptations in so far as they are new and original works, are protected even as against the original author, which does not appear to be the case under the second paragraph of Article 2 (*d*).

Every.—This word must not be taken in its widest sense. Under the old Acts, books unfit for sale because they were blasphemous (*e*), immoral (*f*), libellous (*g*),

(*d*) See p. 17, notes on Abridgments.

(*e*) *Lawrence* v. *Smith*, 1 Jac. 471; where an injunction to restrain infringement of copyright was refused, as it appeared doubtful whether the work did or did not impugn the doctrines of the scriptures. This case has never been disapproved, and it was there said that the law does not give protection to those who contradict the scriptures. At the present day a very strong case would be required, and there can be no doubt that no injunction would be granted restraining the publication of a book impugning religious doctrines in decent and moderate language. *Murray* v. *Benbow* (1822), 1 Jac. 474; a motion to restrain the publication of a pirated edition of Lord Byron's "Cain" refused. *Cowan* v. *Milbourne* (1861), L. R. 2 Ex. 230.

(*f*) *Byron* v. *Dugdale* (1823), 1 L. T. (o. s.) Ch. 239; certain cantos of "Don Juan." The Court refused to maintain an *ex parte* injunction but left the plaintiff to bring his action at law; *Poplett* v. *Stockdale* (1825), 2 Ex. 198; the life of a prostitute; *Stockdale* v. *Onwhyn* (1826), 5 B. & C. 123; a work professedly an account of the amours of a Courtezan, some parts highlyindecent,other parts libellous.

(*g*) *Hime* v. *Dale* (1803), cited 2

seditious (*h*), or fraudulent, containing false statements intended to deceive (*i*), were not protected. The present Act does not refer to such works in terms; but there can be no doubt that the principle founded on grounds of public policy still holds and will be extended to all works of a like nature otherwise protected by the Act (*k*). The general nature and tenor of the work in its different parts must be looked at.

Original.—The work must be individual in the sense that it can be distinguished from other works of a like nature. A work of an original character has been defined as "being a work of imagination or invention on the part of the author, or original in respect of its being a work treating of a subject common to mankind, such as history, or other branches of knowledge varying much in their mode of treatment, and in which the hand of the artist will be readily discerned" (*l*). "The matter must be original, it must be a composition of the author, something which has grown up in his mind, the

Camp. 27, n.; "If the composition appeared on the face of it to be a libel so gross as to affect the public morals, I should advise the jury to give no damages. I know the Court of Chancery on such an occasion would grant no injunction," *per* Lord ELLENBOROUGH, at p. 30. *Southey* v. *Sherwood* (1817), 7 Mer. 435.

(*h*) *Dr. Priestley's Case*, cited 2 Mer. 437.

(*i*) *Seeley* v. *Fisher* (1841), 11 Sim. 581, where there are two rival works, the proprietor of one of them will be restrained from advertising it in terms calculated to induce the public to believe that it is the other work; *Wright* v. *Tallis* (1845), 1 C. B. 893, protection refused to a book published with intent to deceive the public, purporting to be a translation of an original work in German of a well-known author whose works were much valued; *Slingsby* v. *Bradford Patent Truck and Trolley Co.*, [1905] W. N. 122, a catalogue containing false statements calculated to deceive the public.

(*k*) *Fores* v. *Johnes* (1802), 4 Esp. 97, immoral artistic works. See also *Du Bost* v. *Beresford* (1810), 2 Camp. 511; *Austrian Emperor* v. *Day and Kossuth* (1861), 4 L. T. 494; as to destruction of such works; *Baschet* v. *London Illustrated Standard Co.*, [1900] 1 Ch. 73, indecent pictures.

(*l*) *Spiers* v. *Brown* (1858), 6 W. R. 352, *per* WOOD, V.C., where a compiler of a dictionary was held to have used another work, but to have bestowed such mental work upon it as to make it original; tests as to what constitute the legitimate use of preceding works. "No doubt he had struck out an enormous quantity of the plaintiff's meanings, etc. The mere striking out of a certain quantity of the plaintiff's words would not entitle the defendant to publish such abridgment of the previous work, and if he had stopped there, the piracy would have been made out;" and see *Bramwell* v. *Halcomb* (1836), 3 My. and Cr. 737, whether an illegitimate use has been made of authors' work does not necessarily depend upon the quantity quoted but also upon the value; *Jarrold* v. *Houston* (1857), 3 K. & J. 708; a guide to science in the form of questions and answers; *Cooper* v. *Stephens*, [1895] 1 Ch. 567; illustrations reproduced and published; *Marshall & Co., Ltd.* v. *John Bull, Ltd.* (1901), 85 L. T. 77, a catalogue containing 8 out of 12 illustrations reproduced.

Sect. 1.
ORIGINAL.

product of something which, if it were applied to patent rights would be called invention" (*m*).

When there are common sources of information, these are open to all, and the likeness in the results obtained does not prevent copyright so long as independent labour has been bestowed (*n*). An author who originates a work in the same general form as another must do so from his own resources. and make the work so originated, a work of his own, by his own labour and industry (*o*).

"In the case of a dictionary, map, guide-book, or directory, when there are certain common objects of information, which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In case of a road-book, he must count the milestones for himself. In the case of a map of a newly-discovered island, he must go through the whole process of triangulation, just as if he had never seen any former map, and, generally, he is not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a former publication is to verify his own calculations and results when obtained" (*p*).

Thus, copyright in a Gazetteer which contained work partly copied and partly original, was refused as to the portion copied, and it has been said, "Whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves for their own profit of other men's works" (*q*). The intent of the copyist and the nature of the work must be considered (*r*).

(*m*) *Dicks* v. *Yates*, 18 Ch. D. 76, *per* LUSH, L.J., at p. 92.

(*n*) *Kelly* v. *Morris*, L. R. 1 Eq. 687, the Imperial Directory of London found to be a copy of the Post Office London Directory which had involved no independent research; *Pike* v. *Nicholas*, L. R. 5 Ch. 251, an author led by a former author to refer to older writers may use the same passages in the older writers used by the former author; *Morris* v. *Wright*, L. R. 5 Ch. 279; *Leslie* v. *Young*, L. R., [1894] A. C. 335, an abridgment of information of a useful description, viz.: information of train services in connection with circular tours of a particular locality, and as such entitled to protection.

(*o*) *Jarrold* v. *Houston* (1857), 3 K. & J. 708.

(*p*) *Kelly* v. *Morris*, L. R. 1 Eq. 697. at p. 701.

(*q*) *Lewis* v. *Fullerton* (1839), 2 Beav. 6, *per* LANGDALE, M.R., at p. 8, where a work consisting partly of compilations and selections from former works and partly of original compositions was protected.

(*r*) *Bradbury* v. *Hotten*, L. R. 8 Ex. 1, certain cartoons from *Punch* reproduced in a reduced form held to be an infringement.

See also *Cooper* v. *Stevens*, [1895] 1 Ch. 567.

Sect. 1.
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LITERARY.

Literary.—Copyright extends to almost all written forms of expression with reference to literary composition (*s*), composition consisting in new matter or new arrangement (*t*). Copyright has nothing to do with merit or originality (*u*), and does not extend to ideas, methods, schemes or systems (*x*). Nor is there copyright in an opinion, though there may be in the language in which the opinion is expressed (*y*). The Act does not define what amounts to a literary composition, but a "*literary work*" includes "maps, charts, plans and tables, and compilations" (*z*). A literary work, it has been said, is one intended to afford either information, instruction or pleasure in the form of literary enjoyment (*a*), but the Courts have always refused to define the word "literary" in general terms (*b*). The limit to which the term "literary" work could be stretched was probably reached in the directory cases, where it was held that headings in a directory denoting different trades could be the subject of copyright (*c*), but a photograph album containing coloured drawings with a short description of each is not a literary work (*d*), nor are sporting tips (*e*), nor a particular mode of ruling a book for scoring purposes (*f*), nor specifications of Patents (*g*), but the author of a mining report has the property therein (*h*).

As a general rule there is no copyright in the name or title of a book unless it is a literary composition (*i*), nor in a *nom*

(*s*) *Chilton* v. *Progress Printing and Publishing Co.*, [1895] 2 Ch. 29, at p. 33.

(*t*) *Barfield* v. *Nicholson* (1824), 2 Sim. and St. 1, at p. 7.

(*u*) *Walter* v. *Lane*, [1900] A. C. 539, at p. 552.

(*x*) *Hollinrake* v. *Truswell*, [1894] 3 Ch. at p. 427.

(*y*) *Chilton* v. *Progress Printing and Publishing Co.*, [1895] 2 Ch., 29 at p. 34; *Kenrick* v. *Danube Collieries Co.*, 39 W. R. 473, a mining report.

(*z*) Section 35, Sub-s. 1.

(*a*) *Hollinrake* v. *Truswell*, [1894] 3 Ch. at p. 428.

(*b*) *Chilton* v. *Progress Printing and Publishing Co.*, [1895] 2 Ch. 29.

(*c*) *Kelly* v. *Morris*, L. R. 1 Eq. 697; *Lamb* v. *Evans*, [1893] 1 Ch. 218.

(*d*) *Schove* v. *Schmincke*, 33 Ch. D. 546; *Cable* v. *Marks*, (1882) 52 L. J. Ch. 137; a so-called book, consisting of an envelope on the outside of which a title was printed, and containing a piece of cardboard so cut that held up to the light it cast a shadow of a well-known picture together with a verse from Longfellow, held not to be a literary work. But see *Grace* v. *Newman*, L. R. 19 Eq. 623, where a book of designs containing very little letterpress and in the nature of an advertising catalogue was held to be the subject of copyright.

(*e*) *Chilton* v. *Progress Printing and Publishing Co.*, [1895] 2 Ch. 29.

(*f*) *Page* v. *Wisden* (1869), 20 L. T. 435.

(*g*) *Wyatt* v. *Barnard* (1814), 3 Ves. & B. 77.

(*h*) *Kenrick* v. *Danube Collieries and Minerals Co., Ltd.*, [1891] 39 W. R. 473.

(*i*) *Mack* v. *Peter* (1872), L. R. 14 Eq. 431, where a work called "The Birthday Scripture Text-book," consisting of a diary interleaved with a text, was protected against colourable imitations, such

Sect. 1.
LITERARY.

de plume (*k*), nor in the name of a newspaper or periodical (*l*); but if it can be shown that injury is likely to result from the use of the name or an assumed name or *nom de plume* on the ground that it misleads purchasers, the user can be restrained (*m*).

as "Children's Birthday Text-book," the title "Birthday Text-book" being protected; *Crotch* v. *Arnold*, 54 Sol. J. 49. Where the titles are the same, no injunction will be granted unless there is a risk of the one work being passed off for the other; *Kelly* v. *Byles* (1880), 39 Ch. D. 682, held that there was no right to the exclusive use of the words "Post Office Directory," but compare *Weldon* v. *Dicks* (1878), Ch. D. 247; *Dicks* v. *Yates* (1881), 18 Ch. D. 76, where it was held that there was no copyright in the title "Splendid Misery," which was a hackneyed phrase which had been used as a title of a novel many years before, but there might be copyright "in a whole page of title or something of that kind requiring invention," *per* JESSEL, M.R., at p. 89. A title might make a trade mark, and as such be the subject of an action for fraudulently inducing the public to believe they were buying the work of another.

(*k*) *Landa* v. *Greenberg* (1908), 24 T. L. R. 441, where the name was used in a way calculated to lead to the belief that certain weekly contributions to a newspaper were being conducted by a person other than the actual contributor.

(*l*) *Ingram* v. *Stiff* (1859), 33 L. T. (o.s.) 195; *Maxwell* v. *Hogg* (1867), 2 Ch. App. 301; *Platt* v. *Walter* (1867), 17 L. T. 159; *Kelly* v. *Hutton* (1868), 3 Ch. App. 703; *Bradbury* v. *Beeton* (1869), 39 L. J. Ch. 57, where, in an action by the proprietors of *Punch* to restrain the publication of *Punch and Judy*, it was held that the adoption of the whole title *Punch and Judy* was no infringement of the right to use, and property in, the name *Punch*. *Metzler* v. *Wood* (1878), 8 Ch. D. 606; *Kelly* v. *Byles* (1880), 30 Ch. D. at p. 690; *Hutchings* v. *Sheard*, W. N. (1881) 20; *Walter* v. *Emmott* (1885), 54 L. J. Ch. 1059, . . . "in nine cases out of ten the use of a name would be evidence from which few minds could draw any other inference except that damage would be done by deceiving the customer or the public in respect of the two businesses," *per* BOWEN, L.J., at p. 1065. *Borthwick* v. *Evening Post* (1888), 37 Ch. D. 449, . . . the owner of a publication claiming an injunction to restrain the issue of another publication with a similar name must show not only that the assumption of the name is calculated to deceive the public, but also that there is a probability that injury will result from such deception. *Licensed Victuallers Newspaper Co.* v. *Bingham* (1888), 38 Ch. D. 139; "I think that there is no copyright in the title of a newspaper. . . . The title to the name depends on user. The publisher of a newspaper has no right to the exclusive use of its name till he has so used it that it is known as denoting his newspaper. For an action to restrain the use of it to succeed the plaintiffs must show that the defendant is doing something calculated to deceive, that people are likely to buy the defendant's newspaper in the belief that it is that of the plaintiffs. To show that to be the case there must have been such a sale as will establish in the mind of the public a connection between the name and the plaintiff's newspaper. That can only be after a reasonable time," *per* BOWEN, L.J., at p. 143.

(*m*) *Pidding* v. *How*, 8 Sim. 477, where an injunction was refused to restrain the defendant from selling a new tea under the same name as another, the plaintiff having made false statements as

Sect. 1 — ABRIDGMENTS.

Abridgments.—An abridgment is an epitome of the work abridged. The substance and essence of the work must be preserved in suitable language. "To constitute a true and proper abridgment of a work the whole amount must be preserved in its sense, and thus the act of abridgment is an act of the understanding employed in conveying a larger work into a smaller compass (*n*)." But it is more than a mere selection, to copy certain passages while omitting others, so as to bring the work into a smaller compass, is not an abridgment (*o*).

It was always uncertain to what extent abridgments were protected. According to the cases under the old law, where the abridgment was a real condensation, and the result of intellectual effort expressed in language substantially different, it was protected as an original work (*p*), and it is submitted that this still remains the law. A colourable condensation was always held to be an evasion of copyright (*q*), but the line between fair and unfair abridgments was never very distinct. A fair and *bonâ fide* abridgment is in its nature original (*r*), and each case has to be decided upon its merits, whether or no the work is such as to constitute an abridgment. The Copyright Commission in 1878 recommended that no copyright work be abridged without the author's consent. "Even though an abridgment may be so framed as to escape being a piracy, still it is capable of doing great harm to the author of

to the nature of the mixture he was seeking to protect. *Elkin & Co.* v. *Francis, Day and Winter* (1910), The Times, Jan., where the defendants were restrained from publishing the "Blue Bird Valse," on the ground that it would lead to the belief that the valse was taken from the music of the play *The Blue Bird.*

(*n*) *Gilbert* v. *Newberry,* Lofts Rep. 775.

(*o*) *Story's Exors.* v. *Holcombe,* 4 McLean, 306.

(*p*) *D'Almaine* v. *Boosey* (1835), 1 Y. & C. Ex. 288. . . . "It is a nice question what shall be deemed such a modification of an original work as shall absorb the merit of the original in the new composition. No doubt such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are in their nature original. Their compiler intends to make of them a new use; not that which the author proposed to make. It must be a *bonâ fide* abridgment, because if it contains many chapters of the original work or such as made that work most saleable, the maker of the abridgment commits a piracy," *per* ABINGER, L.C.B., at p. 301.

(*q*) *Gyles* v. *Wilcox* (1740), 2 Atk. at p. 142 . . . "a fair abridgment is a new book because . . . the invention, learning and judgment of the author is shown in them," *per* L. C. HARDWICKE. Where the question is one of colourable alteration the parties ought to fix on two persons of learning in the law to accurately and carefully compare the books and report their opinion to the Court.

(*r*) *D'Almaine* v. *Boosey* (1835), 1 Y. & C. Ex. 288; *Story's Exors.* v. *Holcombe,* 4 McLean, 306.

Sect. 1.

ABRIDGMENTS.

the original work by interfering with his market; and it is the more likely to interfere with that market and injure the sale of the original work, if, as is frequently the case, it bears in its title the name of the original author" (*s*).

Under the Berlin Convention, "reproductions in an altered form of a literary or artistic work . . . shall be protected as original works, without prejudice to the rights of the author of the original work" (*t*). Rights are thus conferred by this Article upon a person who makes an unauthorised *bonâ fide* abridgment which is in the nature of an original work, but such rights are without prejudice to the rights of the author of the original work, and the intention is to give power to the person who makes the unauthorised abridgment to protect his work from copyists from him.

The Copyright Committee, 1909, recommended the adoption of this Article. In the Copyright Bill, as first introduced, it was provided that copyright should not be infringed by making an abridgment for private use; under the present Act there is no specific mention of abridgments, but any fair dealing with a work for the purposes of private study or research is not an infringement (*u*).

The result seems to be that under this Act, the author of the original work cannot prevent the publication of any fair and *bonâ fide* abridgment which is in its nature original, and that such abridgments will be protected as original works, although unauthorised. To this extent, therefore, the present Act does not appear to adopt the Berlin Convention.

Collective Works.—These include—(*x*)

(1) An encyclopædia, dictionary, year book, or similar work.

(2) A newspaper (*y*), review, magazine, or similar periodical; and

(*s*) Copyright Commission, 1878, Report, p. xv.

(*t*) Art. 2.

(*u*) S. 2, sub-s. 1, and see p. 57.

(*x*) S. 35, sub-s. 1, in *Heinemann* v. *Smart Set Publishing Co.* (1909), Times, July 15, p. 3, the meaning of "magazine right" and "serial right" was discussed. In the case of serial right evidence was given that it meant publication of a novel by instalments in a periodical, and that there must be two parts at least. Magazine rights had no definite trade meaning, though it appears to be used in the United States to denote the better class magazines.

(*y*) A newspaper is defined under the Newspaper Libel and Registration Act, 1881, as "any paper containing public news, intelligence, or occurrence, or any remarks or observations therein printed for sale, and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two such papers, parts or numbers. Also any paper printed in order to be disposed, and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements."

Sect. 1.
—
COLLECTIVE WORKS.

(3) Any work written in distinct parts by different authors.

The provisions of s. 5 (*z*) with respect to ownership must be observed. Under that section the proprietor of a collective work is also the owner of the copyright in any contribution, where the author of the contribution is employed to write it (*a*). The proviso, that in the absence of any agreement to the contrary, there is reserved to the author the right to restrain the publication of the contribution in separate form, prevents the proprietor of the collective work republishing otherwise than as part of a collective work, while the author himself cannot republish in separate form since he is not the owner of the copyright (*b*). The exact meaning of the proviso is open to some doubt, since the right of the contributor to restrain only extends to publications otherwise than as part of *a* newspaper, magazine, or similar periodical, not as part of *such* newspaper. It appears therefore that although the contributor can restrain *any* publication in separate form, he cannot prevent the republication in *any other collective work* besides the original collective work in which the contribution was first published, since he is not the owner of the copyright; in other words, the proprietor of the copyright, although not having the right to republish in separate form, nevertheless may republish in any collective work whatsoever, and is not bound to publish only in the collective work for which the contribution was originally written.

The term of protection of the contribution in the collective work will be the life of the author, who in this case is not the owner of the copyright, and for fifty years after his death.

The proprietor of the collective work is only the owner of the copyright when there is a definite contract of employment and the work was made in the course of that employment (*c*). In the case of contributions not written under the contract of employment, which is the case with most of the contributions

(*z*) See p. 67.

(*a*) The words of s. 5 sub-s. (1) are:—Where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in absence of any agreement to the contrary, be the first owner of the copyright. There is a further proviso that where the work is a contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work otherwise than as part of a newspaper, magazine, or similar periodical.

(*b*) That is to say separately from the collective work in a book or any other form distinct from the collective work.

(*c*) See s. 5, p. 67, and notes thereon.

Sect. 1.

COLLECTIVE WORKS.

to reviews, magazines, or similar periodicals, the author of the work is also the owner of the copyright, and retains it in the absence of any contrary agreement. It seems, therefore, that the author could prevent any republication by the proprietor of the collective work even as part of the whole collective work, while the author would also have the right to himself republish his work in separate form (*d*). The proprietor of a review, or other periodical, or indeed any collective work, therefore, who does not take an assignment of the contribution or make some agreement with regard to it, may find that contribution appearing in separate form as a pamphlet on the same day, or before his collective work is published, and have no remedy as against the author or publisher in such separate form.

The present Act provides that copyright shall subsist in all cases for a period of fifty years after the death of the author, except in the case of joint authorship, when certain special provisions apply. The proprietor of a collective work therefore has copyright in his collective work in respect of each article, or contribution, if he is the owner of the copyright in such article or contribution, until the expiration of fifty years from the death of the writer of the article. Where, however, the author retains the copyright in his contribution, it is submitted that the right under which the proprietor of a collective work publishes a contribution, is in the nature of a licence to publish as part of the collective work, and, in the absence of any agreement, would probably be construed as a licence lasting during the whole period of copyright. The proprietor of the collective work would have the right to restrain the publication of the contribution by persons other than the author or owner of the copyright, but would not have the right to prevent republication by the author or owner of the copyright in separate form (*e*).

(*d*) The Bill as introduced contained different provisions with respect to such cases, providing that where an author first published in a collective work, and the proprietor of the collective work was not the owner of the copyright in the contribution, then the owner of the copyright in the contribution retained his copyright; but the proprietor of the collective work had the sole right of reproducing the work as a whole for a period of fifty years from the date of first publication of the collective work, and was entitled to all the rights and remedies in respect of infringement in any part of the work, as if he were the owner of the copyright. This provision was dropped in Committee. Under it the author, while retaining copyright, would not have any right of separate publication, the proprietor of the collective work being given all rights and remedies in respect of infringement *in any part* of the work, while the proprietor of the collective work would also be prevented from republishing in separate form since the author retained the copyright.

(*e*) Under the old law the proprietor had copyright from the

Sect. 1.
COLLECTIVE WORKS.

This view is supported by reference to the sub-section relating to assignment, according to which the proviso, that no assignment or licence shall be operative for more than twenty-five years from the death of the author in cases where the author is the first owner of the copyright, but there shall be a reversionary interest devolving upon the author's legal personal representatives, does *not* extend to the assignment of the copyright in a collective work, or a licence to publish a work as part of a collective work. In other words, the Act recognizes the case of a contributor to a collective work retaining the copyright, and granting a licence to publish as part of the collective work, such licence to last for the whole period of the copyright.

Newspapers stand upon a somewhat different footing, and are fully dealt with under s. 5 (*f*).

Compilations.—There is a clear distinction between an abridgment and a compilation. The former adopts the same arrangement, and conveys the same knowledge in a condensed form, the latter can neither adopt the arrangement nor convey the same knowledge by the extracts (*g*). Compilations are entitled to protection where they involve independent labour (*h*).

date of publication for the statutory period, but had not the right to publish in separate form without the consent of the author or his assigns; so far the law seems to remain the same. On the other hand, the author could not publish in separate form for a period of twenty-eight years from first publication, though he could restrain others from so publishing, while at the expiration of the twenty-eight year period, he acquired the right to publish in separate form for a further period of fourteen years. These rights, namely, that of the proprietor to prevent the authors publishing in separate form for twenty-eight years, and the right of the author after the expiration of that period to so publish for a period of fourteen years are kept alive in the case of existing rights by the first schedule of the Act, a fact which must be carefully observed. It is only of importance, however, in those cases of a contract of employment where the proprietor, by virtue of s. 5, is also the owner of the copyright, and as such could under the old law, prevent any republication in separate form by the author for a period of twenty-eight years.

(*f*) See p. 74.

(*g*) *Story's Exors.* v. *Holcombe*, 4 McLean, 306.

(*h*) *Wilkins* v. *Aikin* (1810), 17 Ves. 423; a work on Architecture. *Mawman* v. *Tegg* (1826), 2 Russ. 385; an encyclopædia. *Lewis* v. *Fullarton* (1839), 2 Beav. 6; a topographical dictionary—the test of *animus furandi*. *Jarrold* v. *Houlston* (1857), 3 K. & J. 708; a guide to science in the form of question and answer—instances of unfair use in works of this description. *Ager* v. *Collingridge* (1886), 2 T. L. R. 291; a telegraph code consisting of a book of words selected from eight languages held to be infringed by a book containing some 70,000 of the words comprised in the code, with the addition of interpretations suited to the purpose of a certain trade. *Leslie* v. *Young & Sons*, [1894] A. C. 335; "It is not to be disputed that there may be copyright in a compilation

Sect. 1. COMPILATIONS.

The Compiler must in every case go to the common original sources of information (*i*). To constitute infringement it must be proved that there has been a substantial copying (*k*), and a work is none the less copied where alterations are merely colourable (*l*).

Protection has accordingly been granted to advertisements (*m*), catalogues (*n*), directories (*o*), digests (*p*), lists of

or abstract involving independent labour." A compilation of train services in connection with circular tours. *Exchange Telegraph Co.* v. *Gregory & Co.*, [1896] 1 Q. B. 247; Stock Exchange quotations, printed on tapes and sheets protected.

(*i*) *Matthewson* v. *Stockdale* (1806), 17 Ves. 270, a directory; *Bailey* v. *Taylor* (1824), 3 L. J. (o. s.) Ch. 16; tables of calculations. *Kelly* v. *Morris* (1866), L. R. 1 Eq. 697, at p. 751, a directory. See *supra*, p. 14. *Morris* v. *Ashbee* (1868), L. R. 7 Eq. 734, trade directory. *Morris* v. *Wright* (1870), 5 Ch. App. 279; a trade directory. *Ager* v. *P. & O. Steamer Navigation Co.* (1884), 26 Ch. D. 637; a telegraph code infringed by a compilation for private use printed and distributed gratuitously amongst agents at home and abroad. "Multiplying copies for private distribution among a limited class of persons is just as illegal as if it were done for the purpose of sale." *per* Kay, J., at p. 641. And see *Novello* v. *Sudlow*, 12 C. B. 177. *Nesbet & Co.* v. *Golf Agency* (1907), 23 T. L. R. 370; biographical notes in a Golf Annual. *Weatherby* v. *International Horse Agency*, [1910] 2 Ch. 297; lists of thoroughbred brood mares. The lists were held not to be such mere useless lists of names as to be incapable of copyright. "An unfair use may be made of one book in the preparation of another, even if there is no likelihood of competition between the former and the latter . . . and an action will lie even though no damage be shown," *per* PARKER, J., at p. 305.

(*k*) *Spiers & Brown* (1858), 6 W. R. 352; a dictionary—tests as to what constitutes a legitimate use of preceding works. *Pike* v. *Nicholas* (1869), Ch. App. 251; a historical work.

(*l*) *Moffat & Paige* v. *Gill & Sons* (1902), 86 L. T. 465; an annotated edition of one of Shakespeare's plays protected.

(*m*) *Lamb* v. *Evans*, [1893] 1 Ch. 218; the headings and arrangement of a page of advertisements in a newspaper. *Semble*, a publisher could not have copyright in a single advertisement.

(*n*) *Holten* v. *Arthur* (1863), 32 L. J. Ch. 771; a descriptive book catalogue. *Grace* v. *Newman* (1875), L. R. 19 Eq. 623; a book of designs. *Maple & Co.* v. *Junior Army & Navy Stores* (1882), 21 Ch. D. 369; an illustrated furniture catalogue. *Collis* v. *Cater, Stoffell & Fortt* (1898), 78 L. T. 613; a chemist's catalogue—"there is copyright in a list of articles prepared by a person who deals in them and advertises them as articles which he sells, and in which he names the prices at which he will sell," *per* NORTH, J., at p. 615. *Slingsby* v. *Bradford Patent Truck & Trolley Co.*, [1905] W. N. 122; a fraudulent catalogue. *Davis* v. *Benjamin*, [1906] 2 Ch. 491; a trade advertisement consisting of a sheet of illustrations with no letters except the name of the advertising firm, and the names and prices of the articles is a "sheet of letterpress."

(*o*) *Kelly* v. *Morris* (1886), L. R. 1 Eq. 697; street directories.

(*p*) *Butterworth* v. *Robinson* (1801), 5 Ves. 709; digest of Legal Cases. *Hodge* v. *Welsh* (1840), 23 Eq. R. 266. *Sweet* v. *Benning* (1855), 16 C. D. 459; "a digest may be made from pub-

bills of sale (*q*), time tables (*r*), and annotations (*s*). Part of a compilation may also be protected (*t*).

Letters.—The writer of a letter is the author of it, and retains the copyright in the letter. He can therefore restrain its publication, and the receiver, though he has the property in the paper, and may maintain an action for detinue against the person into whose possession it has passed (*u*), may not publish the letter without the author's consent (*x*). But the receiver may communicate information contained in a letter which is not private or confidential (*y*). Under the old law, the person who received a letter had a strictly limited right to

lished reports, where the party applies the exertion and skill of his own brain in extracting the principle or substance of the decisions before him so as to produce an original work," *per* JERVIS, C.J., at p. 482. *Butterworth* v. *Kelly* (1888), 4 T. L. R. 430.

(*q*) *Trade Auxiliary Co.* v. *Middlesborough & District Tradesmen's Protection Association* (1889), 40 Ch. D. 425; *Cate* v. *Devon & Exeter Constitutional Newspaper Co.* (1889), 40 Ch. D. 500; lists of deeds of arrangement.

(*r*) *Leslie* v. *Young & Sons*, [1894] A. C. 335, and see cases there cited.

(*s*) *Tonson* v. *Walker* (1752), cited 1 East. 361.

(*t*) *Cary* v. *Longman* (1801), 1 East, 358; *Lamb* v. *Evans*, [1893] 1 Ch. 218.

(*u*) *Oliver* v. *Oliver* (1861), C. B. (N.S.) 139.

(*x*) *Pope* v. *Curl* (1741), 2 Atk. 341. "It would be extremely mischievous to make a distinction between a book of letters, which comes out into the world either by the permission of the writer, or the receiver of them, and any other learned work," *per* HARDWICK, L.C. *Queensberry* v. *Shebbeare* (1758), 3 Eden, 329. *Thompson* v. *Stanhope* (1774), Amb. 737; *Oliver* v. *Oliver* (1861), C. B. (N.S.) 139. *Howard* v. *Gunn* (1863), 32 Beav. 462; a solicitor of a company who writes a letter apparently on behalf of the company has no such property in it as to entitle him to prevent its publication, although he swears that it was written in his private capacity. "If the agent or servant of a company write a letter to a shareholder, it is the property of the company, and the agent or servant cannot say to the company "You shall not produce or publish that letter." Many instances may be adduced to show that a letter is not always necessarily the property of the person who wrote it," *per* ROMILLY, M.R., at p. 465. *Lytton* v. *Dewey* (1884), 54 L. J. Ch. 293; *Pollard* v. *Photographic Co.* (1888) 40 Ch. D. 345; *Labouchere* v. *Hess* (1897), 77 L. T. 559; *Thurslow* v. *Charles* (1905), 21 T. L. R. 659.

(*y*) *Philip* v. *Pennell*, [1907] 2 Ch. 577. The case of a biography of Whistler authorised by himself, but where no express authority had been given to publish any letters, the writers of the biography were held entitled to use the information contained in letters or documents written by Whistler for the purpose of compiling the biography, when they had lawfully come into their possession without any express or implied authority, but they were not entitled to publish the letters or extracts. Authorities seem to show that the possession of a letter should give all the rights usually incident to property, and that any use may be made of the letters except publication unless special circumstances intervene. *Semble*, The intention of the writer of a letter is not a satisfactory test of the lawfulness of the use to which it is put.

Sect. 1.
LETTERS.

publish it for purposes of personal vindication (*z*). Such a right was recognised to be an exception to the Copyright law, and was narrowly construed. It does not appear that the law is altered by the present Act. It is submitted that the old decisions still hold, and that the right of the recipient of a letter to publish a letter reflecting upon his character, either to vindicate his character, or in the public interest, still remains under the inherent jurisdiction of the Courts. In any case damages would never be awarded if the use made of the letter were justifiable. A "private and confidential" letter may be published in a Court of law if required for purposes of justice (*a*). Under the old law letters of a deceased person might be published by the owner of the author's manuscript (*b*), unless they were of a private and confidential nature, and such that they ought not to be published, when their publication would be restrained on the application of the personal representatives of the deceased (*c*). This is no longer the case. Letters that have not been published during the author's lifetime, are posthumous works, and the copyright in them belongs to the author's personal representatives, and subsists until publication, and for a term of fifty years thereafter (*d*). The copyright, therefore, exists in perpetuity if the letters are never published. The author is deemed to have died at the date of such publication for the purposes of s. 3 of this Act, and therefore the unrestricted copyright only lasts for twenty-five years from the date of publication, and the further period of twenty-five years is restricted as provided by s. 3 (*e*).

Maps, Charts, Plans and Tables, and Compilations.—These

(*z*) *Percival* v. *Phipps* (1813), 2 Ves. & B. 19; *Gee* v. *Pritchard* (1818), 2 Swan, 402; *Palin* v. *Gathercole* (1844). 1 Coll. 565; *Lytton* v. *Dewey* (1884), 54 L. J. Ch. 293; *Labouchere* v. *Hess* (1897), 77 L. T. 559.

(*a*) *Hopkinson* v. *Burghley* (1867). 2 Ch. App. 447; where it was held that a defendant could not refuse to produce private and confidential letters from a stranger on the ground that the writer forbade their production. But they must not be used for any collateral object. But the defendant may be justified in refusing to produce the letters without the direction of the Court.

(*b*) *Macmillan* v. *Dent*, [1907] 1 Ch. 107.

(*c*) *Thompson* v. *Stanhope* (1774), Amb. 737; *Lytton* v. *Dewey* (1884), 54 L. J. Ch. 293; *Macmillan* v. *Dent*, [1907] 1 Ch. at p. 131.

(*d*) S. 17. By sub-s. 2 of s. 17, it is provided that the proprietorship of an author's unpublished manuscript after his death shall be *primâ facie* proof of the copyright being with the proprietor of the manuscript. It is submitted that this sub-section could hardly be held to apply in the case of letters, where the receiver is in all cases the proprietor of the letter though he has not the copyright; and that the publication of a letter by the owner of it without the consent of the writer's personal representative would be restrained.

(*e*) See p. 60, and notes thereon.

are protected as literary works (*f*). The word "map" is not confined to what is popularly known as a map—*viz.* a geographical map—nor is "chart" to what is popularly called a chart—*viz.* a map of a portion of the seas showing the rocks, soundings, and such-like information for the use of navigators (*g*),—but the words are used in their wide sense, and thus include physiological and anatomical plans of the human frame (*g*). It has been held that a cardboard pattern sleeve, containing upon it scales, figures and descriptive words, adapting it to sleeves of any dimensions, might be the subject of a patent as an instrument or tool, but was not capable of copyright as a "map, chart, or plan" (*h*), nor is the face of a barometer a "chart or plan." Separated from the instrument it has no use or meaning (*i*).

A map of a particular locality, made by the expenditure of original research and labour, is not an infringement of a published map, though it may be almost a facsimile (*k*).

Dramatic Work.—There is no definition of dramatic work, but the law has been widely extended so as to include under dramatic works new forms of copyright property (*l*).

A dramatic work includes "any piece for recitation (*m*), choreographic work (*n*), or entertainment in dumb show the scenic arrangement or acting form of which is fixed in writing or otherwise (*o*), and any cinematograph production (*p*) where

(*f*) S. 35 (1). For "Compilations," see p. 21, *supra*.

(*g*) *Hollinrake* v. *Truswell*, [1894] 3 Ch. 420, at p. 427.

(*h*) *Ibid.*

(*i*) *Davis* v. *Comitti* (1885), 54 L. J. Ch. 419.

(*k*) *Matthewson* v. *Stockdale* (1806), 12 Ves. 270; *Wilkins* v. *Atkin* (1810), 17 Ves. 422.

(*l*) S. 35 (1).

(*m*) Under s. 2, sub-s. (1) (vi), the reading or recitation in public of a reasonable extract from a published work is not to constitute an infringement.

(*n*) A choreographic work is a descriptive ballet, and has been defined as a work which "represents a processional dance, sometimes also a dancing group, which has for its object the reproduction on the stage of a determinate subject, often an allegory or a symbolic grouping "Le Droit d'Auteur," 1899, p. 14 . . . the author of a choreographic work is the ballet-master or person who has arranged the steps of the dance or the scenic or acting form, and has the copyright, just as the composer of the music or the writer of the libretto are each of them the authors of their respective works. Compare a case in the Paris Courts reported in the *Daily Telegraph*, Feb. 10, 1911.

(*o*) "Fixed, in writing or otherwise." The meaning of this phrase is doubtful but it is probably intended to ensure that the scenic arrangement or acting form should be immutable, and not of such a nature that it could be varied from time to time, since it is impossible to have copyright in something that is indefinite. There must be certainty in the subject-matter. It is upon this principle that "Gag" is not protected, *Tate* v. *Fullbrook*, [1908] 1 K. B. 821, at p. 832.

(*p*) "Cinematograph" includes "any work produced by any process analogous to cinematography," s. 35 (1).

Sect. 1.

DRAMATIC WORK.

the arrangement or acting form, or the combination of incidents represented give the work an original character" (*q*); and the copyright in the case of a dramatic work includes the right "to make any record, perforated roll, cinematograph film or other contrivance by means of which the work may be mechanically performed or delivered" (*r*). This very wide interpretation seems to include almost every kind of entertainment, mechanical or otherwise.

The Act of 1842 defined the term "dramatic piece" as "every tragedy, comedy, play, opera, farce or other scenic or dramatic entertainment," while it has been also defined as "any piece which could be called dramatic in the widest sense, any piece which on being presented by any performer to an audience, would produce the conditions which are the purpose of the regular drama, and which constitute the entertainment of the audience" (*s*). It must have a story or plot capable of being printed and published (*t*). Apart from story or plot mere stage effects are not protected, but they may be protected as part of a whole dramatic work (*u*). It has been

(*q*) For the meaning of "original" see *supra*, p. 13.

(*r*) S. 1, sub-s. 2 (*c*).

(*s*) *Russell* v. *Smith*, 12 Q. B. 217, at p. 236.

(*t*) *Tate* v. *Fullbrook*, [1908] 1 K. B. 821, at p. 832. "For the purpose of judging whether one dramatic piece is a plagiarism from another, where words of pieces deal with more or less similar subject-matters, it is legitimate to look at dramatic situations and scenic effects, in order to see whether taking them in conjunction with the words, they do not help to show that there has been a borrowing of an idea or of an expression of an idea from another piece." *Karno* v. *Pathé Frères* (1908), 99 L. T. 114; 100 L. T. 260. "Looking to the object of the statute which is evidently to protect the results of independent labour and composition in dramatic work and to extend to dramatic compositions the same protection as that already given to books, I see no reason in the nature of things why a dramatic composition which is entirely pantomimic or performed in dumb show, and neither reduced nor reducible into writing, should not be protected against piracy as being a piece 'composed'—that is, 'put together' by its author." *Per* JELF, J., at p. 117. It is to be observed that under this Act the scenic arrangement or acting form must be fixed in writing or otherwise. S. 35, sub-s. (1).

(*u*) *Chatterton* v. *Cave* (1878), L. R. 10 C. P. 572. ". . . The whole of the language of the defendant's drama being different from the plaintiff's, and the two versions being substantially independent, can it be said because in the last scene an expedient is adopted which is identical with that adopted by the plaintiff's drama, but which may be said to be 'common form' in all such plays, there is an infringement of copyright? I think this would be going too far. The intention is to protect original work; it would be descending to absurdity to give protection to the application of a common-place expedient of scenic art to the end of a version of a drama," *per* GROVE, J., at p. 579; *Beere* v. *Ellis* (1889), 5 T. L. R. 330; *Tree* v. *Bowkett* (1896), 74 L. T. 77. An infringement of Trilby. "I cannot see why a man should not be the

held that a song requiring for its proper representation acting and possibly scenery is a dramatic work, but not if these are not required (*x*).

Sect. 1. — DRAMATIC WORK.

Musical Work.—The nature of a musical work is not defined, but it is submitted that it must be limited to the representation of the sequence of harmonic sounds, that is to say to the musical setting; and the author of the setting has the sole right to produce or reproduce or to perform the work in any material form (*y*).

Under the Musical (Summary Proceedings) Copyright Act, 1902, which is not repealed, Musical Work is defined as "any combination of melody and harmony, or either of them, printed, reduced to writing or otherwise graphically produced or reproduced."

It is a question of fact in each case what is such a material part taken from a musical composition as will constitute an infringement (*z*). A number of consecutive bars forming an entire air or melody taken from the work of another has been held to be an infringement (*a*), and it is an infringement even if such bars are placed in a different order or others inserted, if the air is substantially the same (*b*).

"The mere adaptation of the air, either by changing it to a dance or by transposing it from one instrument to another, does not, even to common apprehensions, alter the original subject . . . the ear tells you that it is the same. The original air requires the aid of genius for the construction, but a mere mechanic in music can make the adaptation or accompaniment. 'author' of a dramatic piece because the foundation of it is taken from some other drama," *per* KEKEWICH, J., at p. 78; *Tate* v. *Fullbrook*, [1908] 1 K. B. 821.

(*x*) *Russell* v. *Smith* (1848), 12 Q. B. 217; *Fuller* v. *Blackpool Winter Gardens*, [1895] 2 Q. B. 429.

(*y*) Fair dealing with the work for the purpose of private study research, criticism, review or newspaper summary is not an infringement. S. 2, sub-s. (1).

(*z*) *Planche* v. *Braham* (1837), 4 Bing. N. C. 17.

(*a*) *D'Almaine* v. *Boosey* (1835), 1 Y. & C. Ex. 289 at p. 302; where the airs of an opera published in the form of quadrilles and waltzes were held to be a piracy. "Piracy may be of part of an air as well as of the whole . . . It is the air or melody which is the invention of the author . . . and you commit a piracy if by taking not a single bar but several, you incorporate in the new work that in which the whole meritorious part of the invention consists. . . . It appears to me that if you take from the composition of an author all those bars consecutively which form the entire air or melody, without any material alteration it is a piracy: though on the other hand you might take them, in a different order or broken by the intervention of other like words in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. . . ." *per* ABINGER, Lord Chief Baron.

(*b*) *Ibid.*

Sect. 1. — MUSICAL WORK.

Substantially the piracy is where the appropriated music, though adapted to a different purpose from the original, may still be recognised by the ear. The adding variations makes no difference in the principle" (*c*).

Adaptations such as the setting of a pianoforte score from an opera, have always been held to be infringements if published without the consent of the owner of the copyright in the original work (*d*). But where old melodies in which there is no subsisting copyright are set to music, the author of such musical composition is protected (*e*).

The copyright also includes the sole right "to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered" (*f*).

Artistic Work.—This term is widely interpreted. Section 35 (1) provides that artistic works shall include "works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs."

"Work of sculpture" is to include casts and models. The copyright consists in the sole right to produce or reproduce such works in any material form, or to convert into dramatic works by way of performance in public or otherwise (*g*). The provisions of S. 2 are to be observed—the author of the artistic work who is not the owner of the copyright (*h*), may use "any

(*c*) *D'Almaine* v. *Boosey* (1835), 1 Y. & C. 289 at p. 302; *Hein* v. *Harris*, 175 Fed. Rep. 875; infringement does not depend upon the musical merit of the piece, nor upon the fact that the style may be borrowed unless the copy is so substantial that to the ear of the average person the two melodies appear to be the same; in this case it was held to be an infringement where thirteen out of seventeen bars were substantially the same, though the keys were different. Lack of originality and musical merit were held to be of no consequence. "While the public taste continues to give pecuniary value to a low position of no artistic excellence, the Court must continue to recognise the value so created."

(*d*) *Wood* v. *Boosey* (1868), L. R. 1 Q. B. 340, at p. 350. "The pianoforte arrangement of the music of an opera which originally consisted of vocal music and instrumentation . . . is a specific separate and distinct work from the opera itself," *per* COCKBURN, C.J.; *Boosey* v. *Fairlie* (1877), 7 Ch. D. 301, at p. 317.

(*e*) *Leader* v. *Purday* (1849), 7 C. B. 4; *Chappell* v. *Sheard* (1855), 2 K. & J. 117; *Lover* v. *Davidson* (1856), 1 C. B. (N.S.) 182.

(*f*) S. 1, sub-s. (2) (*c*). See also s. 19 for the special provisions in the case of mechanical instruments reproducing musical works. It is not to be deemed an infringement of copyright in any musical work to make such contrivance if the maker proves: (1) that they were previously made with the consent of the copyright owner, and (2) that he has given notice of his intention to make the contrivance and paid certain royalties.

(*g*) S. 1, sub-s. (2) 6. This applies to tableaux vivants, see p. 42, *infra*.

(*h*) Under s. 5 (1) the author is

Sect. 1
——
ARTISTIC WORK.

mould, cast, sketch, plan, model or study made by him for the purpose of the work, provided the main design is not imitated" (*i*).

Further the following acts do not constitute infringement:— (*k*)

1. The making or publishing of paintings, drawings, engravings, or photographs of works of sculpture or artistic craftsmanship, if such works are permanently (*l*) situate in a public place or building.

2. The making or publishing of paintings, drawings, engravings, or photographs not in the nature of architectural drawings or plans (*m*) of any architectural work of art.

In the evidence given before the Copyright Committee of 1910, a draft Bill on Artistic Copyright was submitted in which some of the terms used in the present Act are more fully defined. The definitions there given, while not in any way authoritative, are referred to here as working definitions which it is believed the Courts might well adopt (*n*).

Painting or Drawing.—These words mean any painting or drawing in any medium or material executed by hand and not by printing or any mechanical or chemical process (*o*). A painting is a pictorial work in colours, the object and value of which are artistic. Whether or not a pictorial work is a painting is a question for the jury (*p*). Original models or designs painted are not paintings (*q*).

Sculpture.—A "work of sculpture includes casts and models" (*r*), and in the evidence before the Copyright Committee it was proposed that it should include any statue, sculpture, model or cast (other than a cast from nature) carved or made in any material either in the round, in relief, or in

not the owner (*a*) when the work is made on commission, and (*b*) when the author is under a contract of employment.

(*i*) For meaning of main design, see p. 60.

(*k*) S. 2, sub-s. (1) (iii.), and see also p. 49 and notes thereon.

(*l*) See p. 49, for meaning of "permanently."

(*m*) See p. 50.

(*n*) Minutes of Evidence before the Copyright Committee, 1910, p. 247.

(*o*) *Ibid.*

(*p*) *Woodward* v. *L. S. W. & N. W. R.*, 3 Ex. D. 121.

(*q*) *Woodward* v. *L. S. W. & N. W. R.*, 3 Ex. D. 121. Coloured imitations of rugs and carpets designed by skilled persons and hand painted, held not to be paintings in the ordinary sense of works of art. "It is a matter of human knowledge that many beautiful and artistic designs for hangings, paper for walls, muslins, china, etc., representing animals flowers, landscapes, etc., are so exquisitely drawn and painted that they may partake of the character of paintings in the popular sense, in addition to their character as designs in a commercial sense. Whether they do so or not must always be a question for a jury," *per* HAWKINS, J., at p. 125.

(*r*) S. 35, sub-s. (1).

Sect. 1.

ARTISTIC CRAFTSMANSHIP.

intaglio by hand or by any process (*s*), and this may be taken as a working definition. Casts of fruits and leaves have been protected (*t*) as being within the terms of the old Sculpture Copyright Act, 1814, "any subject being matter of invention in sculpture," and as showing ingenuity, artistic taste, judgment and arrangement. Toy soldiers were also protected and now would probably be protected as works of artistic craftsmanship (*u*).

Artistic Craftsmanship.—This term is nowhere defined. It is submitted that it is intended to include plastic works, works of painting or sculpture in any form, whether the material of which the work is composed be metal, marble, ivory, wood, or some other substance, casts from nature, moulds of natural objects, and casts made therefrom. Jewellery, silver, or other metal work, in fact almost all works of design or representation with an artistic character in the widest sense (*x*).

Copyright in a work of sculpture or artistic craftsmanship if permanently situate in a public place or building is not

(*s*) Minutes of Evidence Copyright Committee, 1910, p. 247.

(*t*) *Caproni* v. *Alberti*, [1892] 40 W. R. 235; 65 L. T. 785.

(*u*) *Britain* v. *Hanks Bros. & Co.* (1902), 86 L. T. 765; metal models of mounted yeomen sold as toys, the evidence being that they were anatomically and technically correct and displayed artistic skill and merit on the part of the producer.

(*x*) *Caproni* v. *Alberti* (1892), 65 L. T. 785. Casts of leaves and fruit protected. "The object of the artist was to produce as perfect a model as possible of certain natural fruits, and the process adopted by him was first to form in his mind a design, the reproductions of which would, he thought, be suitable for the purposes for which they were ultimately destined; viz. as drawing models for various art schools. Having transferred the design to paper, he proceeded to supply himself with the necessary materials, such as fruit, leaves and branches, with which he experimented until he was able to carry out his design, arranging each portion of the model in such a manner as to make it best answer the purpose for which it was intended. The carving which was needful in order to reproduce the fine lines, which the plates cut would not alone have given back, having been supplied by artistic skill, and the various parts of the model having been modelled one by one and put together again by the artist, and the finishing touches added, the model was then complete and was sent to be moulded. The history of the mode in which these productions were made seems to me to establish clearly that they were such as were contemplated by this Act." That is, came within the old Act as "any subject being matter of invention in sculpture," *per* MATHEW, J., at p. 786. *Britain* v. *Hanks Bros. & Co.* (1902), 86 L. T. 765; toy soldiers protected. *Marie* v. *Beurville, Blauvillain and Polak*, Trib. corr. de la Seine, 10e Ch. Audience du 2 Février, 1905; see Le Droit d'Auteur, (1905) p. 89, where a medallion composed of stones of different colours was protected; see also Le Driot d'Auteur, (1904) p. 96. Cf. *Saunders* v. *Wiel*, [1893] 1. Q. B. 470, where a representation of Westminster Abbey on the handles of metal spoons was held to be an original design.

infringed by making or publishing paintings, drawings, engravings or photographs of such works (*y*).

Sect. 1.

ARCHITECTURAL WORK OF ART.

The provisions of S. 22 must be observed. That section provides that designs capable of being registered under the Patents and Designs Act, 1907, are not protected except such as are not used or intended to be used as models or patterns to be multiplied by any industrial process. Rules are to be made for determining the conditions under which a design is to be deemed to be used for industrial purposes.

Architectural Work of Art is defined as "any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure, provided that the protection afforded by the Act shall be confined to the artistic character and design, and shall not extend to processes or methods of construction" (*z*).

The inclusion of architecture amongst copyright property is entirely new, and it is necessary to look to foreign decisions to see the nature of the works protected. The intention seems to be to protect works having an original and artistic character and not works of common type. The following excerpt from the judgment in a case before the Courts at Antwerp of the infringement of the architectural design of a mortuary may be taken to be what would in substance be held here (*a*):

"In order to be considered as author of a work it is not necessary to produce a conception entirely and completely original of which all the elements have been invented and composed by the person who created the work, the person who composes or executes a design and scheme by adding his character of individuality to the elements supplied him by the "Domaine Public" may be deemed to be the author thereof.

"It is, in fact, the combination of these various elements in a particular way which makes of them an original work, an artistic creation in the legal sense, and it is such work that the legislature has intended to protect.

"It is unnecessary that the work produced be one of genius, it is sufficient that it has an artistic character.

"It therefore matters little that the various elements which compose the monument designed by the complainant existed previously, since the assemblage only of the elements should be considered and their disposition in a certain special way; it is this which constitutes in such a matter, the product of the intellectual activity of the author, his personal and artistic

(*y*) S. 2, Sub-s. (1) (iii); and see *Binder* v. *Huggler*, Le Droit d'Auteur (1906), p. 23, where wooden models of a public statue of William Tell were held not to be an infringement.

(*z*) S. 35, sub-s. (1).

(*a*) *Hompus* v. *H. & L.*, quoted Minutes of Evidence, the Copyright Committee, 1910, p. 177.

Sect. 1. — ENGRAVINGS, PHOTOGRAPHS.

endowment, and consequently establishes the individuality of the work in question."

In yet another case it was laid down (*b*)—

"A distinction must be drawn in the architect's profession between the production which is a matter of current practice and the production which, being the result of special study and exceptional knowledge, acquires thereby a character marked by individuality; a production of the latter nature is evidently a creation protected by the law of artistic copyright."

Copyright in an architectural work of art is not infringed by the making or publishing of paintings, drawings, engravings or photographs of such work so long as they are not in the nature of architectural drawings or plans (*c*): such architectural drawings or plans are themselves protected as literary works (*d*).

Engravings include "etchings, lithographs, woodcuts, prints, and other similar works, not being photographs" (*e*).

In the draft Bill before the Commission "engraving" was defined as "any work executed by hand (and not by photography, or any mechanical means) upon any material whence prints or impressions of such work may be taken or multiplied immediately or mediately by any process, and includes any prints or proofs so taken" (*f*).

Photographs includes "photo-lithograph and any work produced by any process analogous to photography" (*g*).

In the draft Bill before the Commission it was defined so as to include "photographic negatives or positives and every work produced by any photographic process upon any material whence prints or copies of such work may be taken or multiplied definitely or indefinitely, and any such work though developed or finished by hand or by any mechanical means, and shall include any prints, proofs or copies made therefrom" (*h*).

There are special provisions under the Act dealing with photographs, providing that the term of copyright therein shall be fifty years from the making of the original negative,

(*b*) *Beyaert* v. *La Revue de l'Architecture Belgique*, quoted in Minutes of Evidence, Copyright Committee, 1910, p. 178. Compare also *Acker* v. *Abbeloos*, Tribunal Civil de Bruxelles, 2e Ch. Audience du 3 Novembre, 1909, and Le Droit d'Auteur, (1910), p. 22.; *Defize* v. *Guillemin*, Tribunal Civil de Liége, June 7 1902; and Le Droit d'Auteur (1902), p. 118; *Christenen* v. *Henriksen and Andersen*, Cour supérieure de Copenhagen, September 17, 1906, and Le Droit d'Auteur (1907), p. 141.

(*c*) S. 2, sub-s. (1) (iii), and see p. 50.

(*d*) S. 35, sub-s. (1).

(*e*) S. 35, sub-s. (1).

(*f*) Minutes of Evidence, Copyright Committee, 1910, p. 247.

(*g*) S. 35, sub-s. (1).

(*h*) Minutes of Evidence, Copyright Committee, 1910, p. 247.

Sect. 1.

AUTHOR.

while the owner of the original negative is deemed to be the author of the work (*i*).

Author.—The author of a work is the person who makes or produces the work or to whom the work owes its origin. "In my opinion, 'author' involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drama or a painting or a photograph" (*k*). The author of a literary and dramatic work is the writer or compiler of the composition (*l*); and in the case of a musical work, the composer (*m*). The author of an artistic work is the person who designs or creates the work or who causes it to be created, as in the case of a person unable to draw but supplying the materials and information and employing another to make the design (*n*); but in the case of a

(*i*) S. 21, p. 123, and see notes, p. 70, for a full discussion of photographs.

(*k*) *Nottage* v. *Jackson* (1883), 11 Q. B. D. 637.

(*l*) *Wallenstein* v. *Herbert* (1867), 16 L. T. 453; *Levy* v. *Rutley* (1871), L. R. 6 C. P. 523; *Tree* v. *Bowkett* (1896), 74 L. T. 77; the adaptor of a play who introduces into his version material alterations was held to be the author of a dramatic piece under the old law. "Adaptation is not, of course, so fine an art as original work, but I cannot see why a man should not be 'the author' of a dramatic piece because the foundation of it is taken from some other drama," *Walter* v. *Lane*, [1900] A. C. 539; a reporter is the author of his report. "A mere copyist of written matter is not an 'author' . . . but a translator from one language to another would be so. A person to whom words are dictated for the purpose of being written down is not an 'author.' He is the newsagent of the person dictating and requires to possess no art beyond that of knowing how to write. . . . But an 'author' may come into existence without producing any original matter of his own. . . . The compilation of a street directory. . . . The table of the times of running of certain trains, and yet in one sense no original matter can be found in such publications. Still, there was a something apart from originality on the one hand and mere mechanical transcribing on the other which entitled those who gave these works to the world to be regarded as their authors," *per* Lord JAMES of Hereford at p. 554. *Springfield* v. *Thame* (1903), 89 L. T. 242; where an article was contributed by a journalist to a newspaper which did not publish the article as written but from the information contained in it; the sub-editors of the newspaper compiled a paragraph in an abbreviated form. It was held that the true authors were the sub-editors. *Nisbet & Co.* v. *Golf Agency* (1907), 23 T. L. R. 370 (compiler); *Tate* v. *Fullbrook*, [1908] 1 K. B. 821.

(*m*) *Wood* v. *Boosey* (1868), L. R. 3 Q. B. 223, Ex. Ch.

(*n*) *Stannard* v. *Harrison* (1871), 24 L. T. 570, a bird's-eye view in the nature of a map of the operations during the Crimean War, "that the plaintiff cannot draw himself is a matter wholly unimportant if he has caused other persons to draw for him. He invents the subject of the design beyond all question. He prescribes the proportions and the contents of the design; he furnishes part of the materials from which the drawing has to be made in the first instance and afterwards collects daily from the proper sources [the necessary material]. These he communicates to the man whom

Sect. 1.

DATE OF THE MAKING OF THE WORK.

painting, drawing or photograph such an employer would not be the author (*o*).

In the case of a photograph the Act provides that the person who is the owner of the negative from which the photograph is made shall be deemed to be the author of the work (*p*).

The Date of the Making of the Work.—This is a new and undefined period from which to date copyright. Formerly copyright ran from publication, and an author had a Common Law right in his unpublished work from the date of the making of the work until the date of publication, when copyright commenced.

With regard to paintings, drawings, and photographs, however, it was held in one case that copyright in such works commenced from the date when the works were made (*q*), and therefore the Common Law and statutory rights existed concurrently. The adoption in all cases of the "date of the making of the work" as the date from which copyright in the unpublished work commences, renders this Common Law right unnecessary, and it has accordingly been abolished (*r*).

It is apprehended that considerable difficulty will be found in ascertaining and proving when a work is made (*s*), but it is submitted that: "the date of the making of the work" means the date of the day on which the act constituting the completion or execution of the work took place—the date when the work became ready to be put forth or published, although it might not be published on that date. In the case of a photograph, where the copyright runs from the date of the making of the original negative, this would be the date when the plate was developed and fixed. Until then it is not complete, and the image is only latent.

Produce or Reproduce.—That is to say, the right to make the work or bring it into being, and to multiply copies of the original (*t*). To produce a work, therefore, does not mean to publish it, by issuing copies to the public, but is a right

he has employed to make a drawing for him. Not having the skill to do so himself he stands by and comes daily with material from which the lithograph is to be compiled," *per* V.C. BACON, at p. 572.

(*o*) *Kenrick* v. *Lawrence & Co.* (1890), 25 Q. B. D. 99. "I do not see how a [person] who is incapable of drawing even such a very simple picture as a rough sketch of the human hand and who did not, in fact, set pencil to paper in the matter, can be called the author of the drawing. He suggests the subject. . . . But it seems to me that in an Act which gives copyright to drawings the author must mean a person who has at least some substantial share in putting the touches on the paper," *per* WILLS, J., at p. 186.

(*p*) S. 21. See p. 123.

(*q*) *Tuck* v. *Priester*, 19 Q. B. D. 629, *per* Lord ESHER, M.R., at p. 636.

(*r*) S. 31.

(*s*) *Reichardt* v. *Saple*, [1893] 2 Q. B. 308, where the date of the making of a dramatic work was proved.

(*t*) As to what is a copy or reproduction, see p. 43.

Sect. 1.
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PRODUCE OR REPRODUCE.

existing independently of publication, and copyright exists in a work simply produced for private circulation (*u*), or for exhibition, and extends to the right of reproducing the work in any material form, and multiplying copies (*x*). An author is entitled to prevent any additions to his work without his consent, as in the case of a dramatic work, where an injunction was granted restraining the manager and actors from introducing a new song (*y*).

Any Substantial Part.—What is a substantial part, is a question of fact in each case (*z*). Cases on the infringement of copyright where a portion of an author's work has been copied show that the Courts will consider not only the quantity but also the value of the abstracted matter, and this is frequently of far greater importance than the proportion of the work taken. "When it comes to a question of quantity, it must be very vague. One writer might take all the vital parts of author's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to" (*a*). What is a fair and

(*u*) *Prince Albert* v. *Strange*, 1 Mac. & G. 25.

(*x*) *Millar and Lang* v. *Polak*, [1908] 1 Ch. 433, at p. 440, where dies of original drawings of designs for decorating Christmas cards were engraved, and from such dies copies or reproductions of the drawings were struck off or stamped, generally in gold leaf.

(*y*) *Gilbert* v. *Workman* (1910), Times, Jan. 19, p. 3.

(*z*) *Planche* v. *Braham* (1847), 4 Bing. N.C. 17, in the case of a musical work; *London Stereoscopic and Photographic Co.* v. *Kelly* (1888), 5 T. L. R. 160; *Brooks* v. *Religious Tract Society*, [1895] W. N. 25, an engraving; *Hanfstaengl* v. *Empire Palace* (1895), 11 T. L. R. 314; [1894] 3 Ch. 109, at p. 116.

(*a*) *Bramwell* v. *Halcomb* (1836), 3 My. & Cr. 737, *per* Lord COTTENHAM at p. 738. See also *Saunders* v. *Smith* (1836), 3 My. & Cr. 711; *Bohn* v. *Bogue* (1846), 10 Jur. 420; An injunction may be granted even though the passages taken are stated to be quotations and are not so extensive as to render the new work a substitute for the original. *Scott* v. *Stanford* (1867), L. R. 3 Eq. 718. ". . . full acknowledgment of the original and absence of dishonest intention will not excuse the appropriator, where the effect is to injure and supersede the sale of the original work." It is necessary to "look to the nature and object of the selections made, the quantity and value of the material used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work," quoted by WOOD, V.C., at p. 722 from *Folson* v. *Marsh*, 2 Story 100, 116. *Pike* v. *Nicholas* (1869), 5 Ch. App. 251; *Jarrold* v. *Heywood* (1870), 18 W. R. 279. "You cannot make out piracy where you have to track mere passages and lines through hundreds of pages," *per* JAMES, V.C., at p. 282. *Smith* v. *Chatto* (1874), 31 L. T. (N.S.) 775. Sketches appropriated to an undue extent, and for the purpose of increasing and enhancing the value of the defendant's book by making it more attractive. The test in this case was the value of the extracts to the person taking them without paying for them, not their value to the owner of the copyright in them. *Chatterton* v. *Cave* (1878), 3 App. Cas. 483, where two scenes from a drama were taken,

Sect. 1.

ANY SUBSTANTIAL PART.

legitimate use of another person's work is, in all cases, difficult to define—the character of the work must be looked at, and wider limits are allowed if the work is of an entirely different character (*b*).

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

Perform . . . in Public.—"Performance" means "any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument" (*d*). Under the old law the first performance of a dramatic piece was equivalent to the first publication of a book, and the performing right was lost by publishing in printed form unless specially reserved. This is no longer the case (*e*), and the British law is brought into line with the Declaration of Paris, 1896, and the Berlin Convention of 1908, whereby a dramatic piece is not published by performance, but only by being issued to the public in printed form.

In the case of a Lecture to Deliver.—"Lecture" includes address, speech and sermon (*f*). It has been held that it

but the parts so taken were neither substantial nor material parts. *Cooper* v. *Stevens*, [1895] 1 Ch. 567; illustrations reproduced. *Neale* v. *Harmer*, [1897] 13 T. L. R. 209; where three architectural drawings were appropriated. "The test was not so much what proportion of the plaintiff's work had been taken, but rather what proportion of the defendant's work was the plaintiff's," *per* KEKEWICH, J. *Bartlett* v. *Crittenden*, 5 Maclean, 32.

(*b*) *Bradbury* v. *Hotten* (1872), L. R. 8 Ex. 1, where nine pictures from *Punch* were appropriated.

(*c*) *Bradbury* v. *Hotten* (1872), L. R. 8 Eq. 1, *per* KELLY, C.B., at p. 5. See also *Leslie* v. *Young*, [1894] A. C. 335.

(*d*) S. 35, sub-s. (1).

(*e*) S. 35, sub-s. (3), over-ruling *Boucicault* v. *Delafield* (1863), 1 Hem. & M. 597; and *Boucicault* v. *Chatterton* (1876), 5 Ch. D. 267.

(*f*) S. 35, sub-s. (1). This was held in *Caird* v. *Sime* (1887), 12 App. Cas. 326 at p. 338.

Sect. 1.

IN THE CASE OF A LECTURE TO DELIVER.

is matter communicated to the public by oral delivery (*g*), but it is now provided that "delivery" in relation to a lecture includes "delivery by means of any mechanical instrument" (*h*).

A lecturer has, therefore, copyright in his lecture. The copyright consists in the sole right to "deliver the work or any substantial part thereof in public (*i*)," but this is subject to the provisions according to which the lecturer must go through somewhat elaborate and stringent formalities, if he wishes to retain the copyright (*j*), and, even then, a reasonable newspaper summary is allowed (*k*). In the case of political speeches delivered at a public meeting a newspaper report is in no case an infringement (*l*). A newspaper report of a lecture, or address other than an address of a political nature delivered in public is not an infringement, unless such report is prohibited. And the notice prohibiting the lecture must fulfil all the following conditions:—

(i.) It must be a conspicuous written or printed notice (*m*).

(ii.) It must be affixed before the lecture.

(iii.) It must be maintained during the lecture.

(iv.) It must be affixed at or about the main entrance of the building in which the lecture is given.

(v.) It must be also affixed in a position near the lecturer (*n*).

These somewhat elaborate provisions make it possible for those whose lectures are the result of years of original work to retain copyright, while those who deliver lectures for ordinary public purposes, social or otherwise, are free to give their lectures to the world, so long as they do not seek to exercise their protective privileges. Anything like a verbatim report can, therefore, be prohibited, but, whether prohibited or not, "any fair dealing with the work . . . for the purposes of newspaper summary" is always allowed (*o*).

When the lecture is not prohibited, any newspaper report may be made, and the law remains the same, that each reporter has an independent copyright in his own report (*p*).

Lectures orally delivered in any university, public school, or

(*g*) *Caird* v. *Sime* (1887), 12 App. Cas. 326.

(*h*) S. 35, sub-s. (1).

(*i*) For the meaning of "in public," see p. 38. The public generally is meant without distinction of persons, or selection or restriction.

(*j*) S. 2, sub-s. 1 (i) and (v).

(*k*) S. 2, sub-s. 1 (l).

(*l*) S. 20. See p. 122.

(*m*) What is a conspicuous notice will be a question of fact depending upon the size of the lettering and the position in which such notice is affixed. In the Act as originally drafted, the words were: "in a conspicuous place . . . in letters not less than an inch in height."

(*n*) This condition is excepted when the building is being used for public worship.

(*o*) S. 2, sub-s. 1 (l) and (v). For a discussion on what is meant by "fair dealing" and "newspaper summary," see pp. 57 and 59.

(*p*) *Walter* v. *Lane*, [1900] A. C. 539.

Sect. 1.

IN PUBLIC.

college, or in virtue of any endowment foundation or gift, were not protected under the repealed Acts, if delivered to a *public* audience (*q*). Protection is afforded to such lectures under this Act, if their report is duly prohibited.

In Public.—That is to say, in a place where the general public are invited, and admitted, or to which the public can demand admittance. A room in hospital, where a performance is given for the benefit of the patients and nurses, is not a place of public entertainment. A representation to be "in public" must be other than domestic and private; it must be one to which any portion of the public are freely admitted either with or without payment (*r*), and without distinction of persons and selection or restriction (*s*). The use of the place for the time being is the material factor (*t*).

The members of a university, though members of the public, do not represent the general public, and do not attend a professor's lecture in that capacity (*u*).

Publish.—Publication is defined as follows: (*x*) "For the purposes of this Act publication, in relation to any work, means the issue of copies (*y*) of the work to the public, and does not include the performance in public (*z*) of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art (*a*), but for the purposes of

(*q*) *Abernethy* v. *Hutchinson* (1825), 1 H. & T. W. 28. Lectures to students at Guy's Hospital: "A person who attends oral lectures is not justified in publishing them for profit. An action lies on the implied contract." *Nicols* v. *Pitman* (1887), 26 Ch. D. 374. "Where a lecture of this kind is delivered to an audience, especially where the audience is a limited one admitted by tickets, the understanding between the lecturer and the audience is that whether the lecture has been committed to writing beforehand or not, the audience are quite at liberty to take the fullest notes they like for their own personal purposes, but they are not at liberty, having taken those notes, to use them afterwards for the purpose of publishing the lecture for profit," *per* KAY, J., at p. 381. *Caird* v. *Sime* (1887), 12 App. Cas. 326.

(*r*) *Duck* v. *Bates*, 13 Q. B. D. 843.

(*s*) *Caird* v. *Sime*, 12 App. Cas. 326, at p. 344.

(*t*) *Russell* v. *Smith* (1848), 12 Q. B. 217, at p. 237.

(*u*) *Caird* v. *Sime*, *ibid.*

(*x*) S. 1, sub-s. 3.

(*y*) For the meaning of "copy," see p. 43.

(*z*) For the meaning of 'in public," see *supra*.

(*a*) That the public performance of a musical or dramatic work or the exhibition of an artistic work no longer constitutes publication brings the British law into line with the Berlin Convention. Formerly this was not the case, since Great Britain refused to accept the Interpretative Declaration of 1896. The adoption of this definition of publication overrules *Boucicault* v. *Chatterton*, 5 Ch. D. 267. With regard to the exhibition of a work of art, the old law was that any unconditional exhibition to the public constituted a publication; this was abandoned, there being no adequate reason why

this provision the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works" (*b*).

To constitute publication, therefore, it is necessary to expose copies of the work for sale (*c*), or offer them gratuitously (*d*), so that any members of the general public may enjoy that which

the British law should not be made to conform with the Berlin Convention.

With regard to the provision that the construction of a work of architecture shall not constitute a publication. The Copyright Committee recommended that it should be accepted for international purposes. In their view the object of the provision as contained in the Berlin Convention is merely to define what may be considered unpublished works for international purposes, in order to obtain for such works the protection afforded by the Convention. See Report of the Copyright Committee, 1909, p. 14, and the Blue Book of Correspondence respecting the revised Convention of Berlin, Cd. 4467, p. 124. The Committee in their report say: "[the provision] would be operative in certain cases, as, for instance, where an English architect erects a building in a non-Union country, and issues no drawings or copies of any kind of it. Such a building would be treated under the Revised Convention as an unpublished work, and the architect would therefore obtain protection throughout the Union [*and in the United Kingdom*] against any one who attempted to copy his work within the Union; whereas, if construction were publication, the building having been first published in a country outside the Union, the architect would not be so protected.

"If, however, a building be erected within the Union by an architect of the Union, he would get protection whether the building be treated as published or unpublished, and the clause would be immaterial; but an architect, not a member of the Union, constructing a building within the Union, would not get protection until publication, and such publication must be within the Union under Art. 6.

"These considerations show that this provision is not of a very satisfactory character, and that, at any rate, Great Britain ought not to be in any way prevented from holding that construction of a building in the United Kingdom may be a publication of it, as would usually be the case with all buildings exposed freely to the public view."

This Act adopts the provision in its wide sense, thus going beyond the Report of the Committee, and accordingly the construction of a building is not a publication of it. The words in square brackets, *supra*, in the report read "except in the United Kingdom," which would have been the case had the provision only been adopted for international purposes as recommended in the report.

(*b*) Photographs and engravings therefore of works of sculpture and of architectural works of art may be made and issued without infringing the copyright.

(*c*) *McFarlane* v. *Hutton*, [1899] 1 Ch. 884; publication of a newspaper. *Britain* v. *Kennedy*, [1902] 19 T. L. R. 122. Canvassing for orders and showing a pirated copy of a bust is not "exposing for sale." Exposure for sale means the exposure of particular articles.

(*d*) *Novello* v. *Sudlow* (1852), 12 C. B. 177. Extensive ...tuitous distribution of lithogra... ...opies of a musical work amongs... ...bers of a musical society—held to be a publication. *Blanchett* v. *Ingram* (1887), 3 T. L. R. 687; *Alexander* v. *Mackenzie*, 9 Sess. Cas. 2nd series, 748. Circulation amongst members of a society.

Sect. 1. PUBLISH.

is to be protected by copyright. A single copy is sufficient, for the sale of one copy is as much a publication as the sale of many. Copies of a work issued for private circulation are not published (*e*). The act of publication is the act of the author and is not dependent on the act of a purchaser. It is also clear that the printing of a work cannot be publication, for the work may be withheld from the public after it is in print. The publication of a story in parts in a magazine has been held to be equivalent to publication in book form (*f*), and a newspaper or periodical is published whenever and wheresoever it is offered to the public by the proprietor (*g*). In the case of an artistic work or design, such a work is published when it is publicly exhibited for sale (*h*), but the exhibition of a picture in public for the purpose of obtaining subscribers for engravings of the work is not publication (*i*). The date of the publication (*k*) is still a material factor in the case of posthumous works (*l*) and certain Government publications (*m*).

Translations.—Copyright includes the exclusive right of translation, that is to say the sole right to produce or reproduce, perform or publish any translation of the work (*n*).

(*e*) *Prince Albert* v. *Strange* (1849), 2 De G. & Sm. 652, and G. 25, where Queen Victoria and Prince Albert had given to their friends copies of drawings they had made for their own amusement, *Kenrich* v. *Danube Collieries & Minerals Co.* (1891), 39 W. R. 473; copies of a mining report given to a few persons engaged in the formation of a company. *Caird* v. *Sime*, 12 App. Cas. 326; an author may impose restrictions which will prevent a publication, as "by giving copies for private perusal or by recitation before a select audience. In the latter case the retention of the author's right depends upon its being either a matter of contract, or an implied condition that the audience are admitted for the purpose of receiving instruction or amusement, and not in order that they may take a full note of what they hear and publish it for their own profit, and for the information of the public at large," *per* Lord WATSON, at p. 344.

(*f*) *Holmes* v. *Hurst* (1898), 174, U. S. Rep. 82; *Mifflin* v. *Dutton* (1901), 107 Fed. Rep. 708; *Mufflin* v. *White* (1902), 112 Fed. Rep. 1004.

(*g*) *McFarlane* v. *Hulton*, [1899] 1 Ch. 884.

(*h*) *Blank* v. *Footman* (1888), 39 Ch. D. 678. Where the inventor of a design showed it to and consulted his agent. The agent consulted another person, and also showed it to two customers and asked them for orders. *Britain* v. *Hanks Bros.* (1902), 18 T. L. R. 525; *Dalglish* v. *Jarvie*, 2 Mac. G. 231.

(*i*) *Turner* v. *Robinson*, 10 Ir. Ch. Rep. 510; and *cf. Britain* v. *Kennedy* (1902), 19 T. L. R. 122.

(*k*) The United States Copyright Act, 1909, defines "date of publication" which "shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorised edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority," s. 62.

(*l*) S. 17.

(*m*) S. 18.

(*n*) S. 1, sub-s. 2 (*a*).

Sect. 1. —— TRANSLATIONS.

Copyright and translating right therefore are now co-extensive. Previously this was not the case. The Berlin Convention provides that authors shall have the exclusive right of making or authorising translations of their works (*o*), and that translations are to be protected as original works "*without prejudice to the rights of the author of the original work.*" This means that protection is to be given to the unauthorised translator as against every one except the original author, so that the unauthorised translator could protect his work from copyists from him (*p*).

It is submitted, however, that the present Act does not fully adopt this provision, for it gives the sole translating right to the original author, and it does not appear that unauthorised translations are in any way protected. This was probably the case under the old law, though there is no conclusive judicial authority on the point.

Translations, however, may be made and are protected (i) where the author has given his consent, (ii) where the copyright has lapsed, (iii) where the work is fairly dealt with for the purpose of private study, research, criticism, review or newspaper summary (*q*).

The result appears to be that the Berlin Convention is adopted so far as it gives an author the sole right to produce a translation in accordance with Article 8, but that this Act probably does not give the author of an unauthorised translation any rights which he could enforce as against a copyist from him (Art. 2); in view of the fact that the original author could at any time obtain an injunction restraining the author of the unauthorised translation from in any way dealing with his work. If however, the original author does not wish to restrain the author of the translation, it is submitted that the proper procedure would be a joint claim by the original author and the translator as against the person who copies the translation (*r*). A translation means an accurate interpretation

(*o*) Art. 8.—The authors of unpublished works, being subjects or citizens of one of the countries of the Union, and the authors of works first published in one of those countries shall enjoy in the other countries of the Union, during the whole term of the right in the original work, the exclusive right of making or authorising a translation of their works.

(*p*) Art. 2, par. 2. This is shown by the omission of the word "licite" which has been applied to translations by the Berne Convention.

(*q*) S. 2, sub-s. 1 (1).

(*r*) The Copyright Committee recommended the adoption of Art. 2 of the Berlin Convention on the basis that it was not intended to protect the matters mentioned (which include translations) except so far as they present the character of new and original works. It can hardly be said that a *mere* translation is a new and original work: in some cases, however, a work might be so altered in the translation as to present all the features

Sect. 1. — TRANSLATIONS.

of the whole work so as to make it known through the medium of the new language (*s*). It need not be a literal translation; additions and omissions which do not substantially alter its character do not prevent its being copyright (*t*).

In the case of a Novel or other Non-Dramatic work, or of an Artistic work, to convert into a Dramatic work.—As regards the dramatisation of a novel, under the old law it was no infringement to dramatise a novel and cause it to be performed (*u*). This is now forbidden. It was always the case, however, that the printing of a dramatisation infringed the copyright of the author of the novel, and the Act does not alter the law in this respect. And the infringement consists in taking part of the book, even if only in manuscript for acting purposes or for delivery to the Lord Chamberlain to obtain a licence (*x*).

The copyright will be infringed if in the dramatisation, any material or substantial (*y*) feature of the original work is copied, either by performance or otherwise. The Berlin Convention appears to go further, and to provide that copying a work and adding new matter so as to make an original work is not an infringement (*z*). This implication has not been adopted by the present Act.

As regards the conversion of an artistic work into a dramatic work, this is probably meant to cover exhibitions of *tableaux vivants* and similar productions, since under the old law it was held not to constitute an infringement to represent a picture by waxwork figures or a group of living persons (*a*).

In the case of a Literary, Dramatic, or Musical work, to make any Record, Perforated Roll, Cinematograph Film . . .—The owner of the copyright in any literary, dramatic, or musical work has the sole right to make records or other contrivances by means of which the work may be mechanically performed or delivered, and there are special provisions under the Act with reference to such mechanical instruments (*b*). This alteration in the law became necessary in consequence of a decision in which it was held that a perforated roll could not be a copy of a sheet of music—the fundamental idea

of a new and original work—in which case it would undoubtedly be protected.

(*s*) *Wood* v. *Chart* (1870), L. R. 10 Eq. 193, at p. 205, distinguishes an adaptation.

(*t*) *Laurie* v. *Renad*, [1892] 3 Ch. 402, at p. 414; *Wood* v. *Chart* (1870), L. R. 10 Eq. 193, at p. 201.

(*u*) *Reade* v. *Conquest* (1861), 9 C. B. (N. S.) 755; 11 C. B. (N. S.) 479; *Tinsley* v. *Lacy* (1863), 1. Hem. & M. 747.

(*x*) *Warne* v. *Seebohm* (1888), 39 Ch. D. 73.

(*y*) For meaning of "substantial part," see p. 35.

(*z*) Article 12, and see Report of the Copyright Committee, p. 22.

(*a*) *Hanfstaengl* v. *Empire Palace*, [1894] 2 Ch. 1.

(*b*) S. 19.

Sect. 1.

IN THE CASE OF A LITERARY, DRAMATIC, OR MUSICAL WORK, TO MAKE ANY RECORD, PERFORATED ROLL, CINEMATOGRAPH FILM.

underlying the two being different (*c*). Such perforated rolls, therefore, could be made with impunity to the detriment of the owner of the copyright in the work. The section introduces new matter for protection, namely, cinematograph films, in accordance with Article 14 of the Berlin Convention (*d*). It also adopts what had previously been held, namely, that the public representation by cinematograph of a dramatic piece was an infringement of the performing right (*e*). To sell, however, a cinematograph film, knowing that it was to be used for the purpose of representing a dramatic piece, was not an infringement under the old law, and did not make the seller liable (*f*). This is no longer the case. The owner of the copyright has under this provision the sole right to make any record, film, or other contrivance, and any person who sells such a work knowing that the work is an infringing work, himself infringes the copyright (*g*).

Copy.—There is no definition of the word "copy," and it is impossible to lay down any very definite rules as to what does or does not constitute a copy of a work. A copy has been defined as "that which comes so near to the original as to give to every person seeing it the idea created by the original" (*h*); and in a later case as "that which comes so near to the original as to suggest that original to the mind of every person seeing it" (*i*). But, in applying these definitions to any particular case, the degree of resemblance is all important (*k*). To be a copy the work must be an effective substitute for the whole or a substantial part (*l*) of the original,

(*c*) *Boosey* v. *Wright*, [1900] 1 Ch. 122; *Newmark* v. *National Phonograph Co.*, [1907] 23 T. L. R. 439.

(*d*) Art. 14.—Authors of literary, scientific, or artistic works shall have the exclusive right of authorising the reproduction and public representation of their works by cinematography.

Cinematograph productions shall be protected as literary or artistic works if, by the arrangement of the acting form or the combinations of the incidents represented, the author has given the work a personal and original character.

Without prejudice to the rights of the author of the original work, the reproduction by cinematography of a literary, scientific, or artistic work shall be protected as an original work.

The above provisions apply to reproduction or production effected by any other process analogous to cinematography.

(*e*) *Karno* v. *Pathé Frères* (1909), 100 L. T. 260 at p. 262, approving *Karno* v. *Pathé Frères* (1908), 99 L. T. 114, at p. 116.

(*f*) *Ibid.*

(*g*) S. 2, sub-s. (2); this subsection does not provide for the selling only, but also for letting for hire, exposure for sale, or distribution and in the other ways mentioned in the section.

(*h*) *West* v. *Francis*, 5 B. & Ald. 737, adopted in *Hanfstaengl* v. *Empire Palace*, [1894] 3 Ch. 109.

(*i*) *Hanfstaengl* v. *W. H. Smith*, [1905] 1 Ch. 121.

(*k*) *Hanfstaengl* v. *Empire Palace*, [1894] 3 Ch. 109, *per* LINDLEY, L. J., at p. 129.

(*l*) *Chatterton* v. *Cave* (1875), L. R. 10 C. P. 572; 3 A. C. 483.

Sect. 1. COPY.

and while the purpose for which the work is required should be looked at, the manner of copying or the material in which the work is copied appear to be immaterial. The words of the Act "produce or reproduce the work in any material form whatsoever" (*m*) must be construed according to their plain meaning, and are so wide as to appear to make the word "copy" synonymous with "reproduction in any material form whatsoever." It will be entirely a question of fact whether a work is or is not a copy, and a copy would seem to include any material thing by means of which the essential features of the work, or the ideas, or information in the work may be communicated. It is a copy, therefore, if the work is a reproduction of the fundamental idea of the original so far as is possible in the material in which the copyist works. But the fundamental idea underlying the original and the copy must be the same, and it was for this reason that a perforated roll was held not to be a copy of a sheet of music (*n*). Further, in the case of paintings and drawings, it has been held that the words "copying and reproducing by any means" do not include "reproducing in the sense of imitating or representing by means not equivalent to drawing or painting or photographing, or any such means, but by totally different means, by the exhibition of living figures." It is not meant to give the right "to restrain Madame Tussaud from exhibiting a representation of a painting in waxwork, but to restrain people from providing something which would compete in the market, with the originals or with authorised copies of them" (*o*). Paintings, drawings, photographs and engravings of artistic works, show a similar underlying principle, and can therefore be looked upon as copies of the original (*p*), and, in an American case, it has been held that a photograph in which there was copyright was infringed by a reproduction of a material part of it in relief on leather to be used as a chair-back (*q*); "if this is good law, it should work both ways, and it would follow that a copyright chair-back in relief would be infringed by a photograph of the chair-back, and if a chair-

(*m*) S. 1, sub-s. (2).

(*n*) *Boosey* v. *Whight*, [1900] 1 Ch. 122, "The fundamental ideas underlying the two are different, and the uses to be made of them are fundamentally different. Music appeals to the ear, but a sheet of music appeals to the eye . . . conceding . . . that a person might be trained to play or even sing from the perforated sheet, it is clear that they are not made to be so used, nor are they ever so used in fact," *per* LINDLEY, M.R., *Mabe* v. *Connor*, [1909] 1 K. B. 515.

(*o*) *Hanfstaengl* v. *Empire Palace*, [1894] 2 Ch. 1, *per* LINDLEY, L.J., at pp. 5 and 6.

(*p*) *Bracken* v. *Rosenthal*, [1907] 151 Fed. Rep. 136, where it was held that a photograph of a piece of sculpture was a copy.

(*q*) *Falk* v. *Howell*, 37 Fed. Rep. 202.

back in relief is infringed by a photograph, there seems to be no reason for not holding that a relief tablet or figure in bas-relief is infringed by a photograph or other picture" (*r*).

It is for this reason that in certain cases it is provided that the making or publishing of such works shall not constitute an infringement of the copyright (*s*).

Copies of *Literary and Dramatic Works*.—A copy is a graphic reproduction of the whole or a substantial portion of the work in such a form as to provide a reasonable substitute for it. Additions or corrections by the copyist are therefore immaterial. Besides reprinting, copies may be made by writing (*t*), lithography (*u*), typewriting (*v*), shorthand (*x*), photography (*y*), or from electro blocks (*z*), or by any other mechanical process. A *substantial* part of the work must be taken. "There may be a taking so minute in its extent and so trifling in its nature as not to incur liability" (*a*). But "if the quantity taken be neither substantial nor material, if 'a fair use' only be made of the publication, no wrong is done and no action can be brought" (*b*).

Musical Works.—Similar reasoning applies in determining what is a copy in the case of a musical work; the fundamental idea underlying the two must be the same, and it is in consequence of this fact that a perforated roll could not be and has been held not to be a copy of a sheet of music (*c*). Special provision is now made for the protection of musical works from such infringements by providing that the author of a musical work shall have the sole right to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered (*d*).

Artistic Works.—While decisions under the repealed Acts as to what was a copy of a literary work are numerous, it has always been doubtful what was to be deemed a copy of an

(*r*) *Bracken* v. *Rosenthal* (1907), 151 Fed. Rep. at p. 137.

(*s*) S. 2, sub-s. 1 (iii.).

(*t*) *White* v. *Geroch* (1819), 2 B. & Ald. 298; *Boosey* v. *Whight*, [1900] 1 Ch. 122, "any mode of copying, whether by printing, writing, photography, or by some other method not yet invented," *per* LINDLEY, M.R., at p. 123.

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

(*v*) *Warne* v. *Seebohm* (1888), 39 Ch. D. 73, where "Little Lord Fauntleroy" was dramatised and performed. Four copies were made, one for the Lord Chamberlain and three for the use of the performers, very considerable passages in the play being extracted almost verbatim.

(*x*) *Nicols* v. *Pitman* (1884), 26 Ch. D. 374.

(*y*) *Boosey* v. *Whight*, [1900] 1 Ch. 122.

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

(*a*) *Chatterton* v. *Cave*, 3 A. C. 483, *per* Lord O'HAGAN at p. 498.

(*b*) *Ibid.* at p. 492; and see notes on "*original work*," p. 13, and "*any substantial part*," p. 35.

(*c*) *Boosey* v. *Whight*, [1900] 1 Ch. 122.

(*d*) S. 1, sub-s. 2 (*c*).

Sect. 1.
COPY.

artistic work. Whether, for instance, a painting or sketch of a sculpture could be called a copy. The English case law lays down no definite principle. But it has been decided in an American case that a photograph of a piece of sculpture is a copy (*e*), and also that a photograph would be infringed by its reproduction in relief on leather (*f*). The present Act attempts to set the law upon a definite basis. The author has the sole right to produce or reproduce the work in any material form whatsoever. No difficulty can arise in simple cases of works which are reproductions of the same nature, in the sense that they reproduce the peculiar art of the original—a painting or sketch of a painting, or the cast of a sculpture—are as clearly copies as a reprint of a book. The difficulty arises where, though the design may be the same, the material form, or even purpose of the work is different. Reproducing is producing again, and it has been held that in the case of a painting you must have something which itself is and would be properly described as a picture (*g*).

A picture or engraving is infringed if reproduced by photography, or by any other process, mechanical or otherwise, whereby copies may be indefinitely multiplied, and it is immaterial whether the copy be arrived at directly from the picture or through intervening copies (*h*).

The object to be attained is well laid down in a judgment under the old Acts—

"The object of the statute to my mind was not merely to prevent the reputation of the artist from being lessened in the eyes of the world, but to secure to him the commercial value of his property—to encourage the arts by securing to the artist a monopoly in the sale of an object of attraction. If that be the object of the statute, it is plain that a photographic copy may excite in the mind of the beholder the same pleasurable emotions as would be communicated by a copy of any other description, and I see no reason why these very wide and general words should not be construed according to their plain and ordinary meaning, and be held to apply to any mode of copying known at that time, and to such other modes of multiplying copies as the ingenuity of man may from time to time discover. Is the reproduction of the print by photography a manner of copying? To that I answer in the affirmative, and whether the photographic copy is of the

(*e*) *Bracken* v. *Rosenthal* (1907), 151 Fed. Rep. 136.

(*f*) *Falk* v. *Howell*, 37 Fed. Rep. 202.

(*g*) *Hanfstaengl* v. *Empire Palace*, [1894] 2 Ch. 1, *per* KAY, L.J., at p. 8, where it was held that the representation of a picture by *tableau vivant* was not an infringement of copyright in the picture.

(*h*) *Exp. Beal*, L. R. 3 Q. B. 287.

same size as the original, or is enlarged or very much diminished" (*i*).

The Act further provides (*k*) that it shall not constitute an infringement—

(i) "To make or publish paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship if permanently situate in a *public place or building* (*l*).

(ii) To make or publish paintings, drawings, engravings or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art.

A painting, drawing, engraving or photograph (*m*) of any work of sculpture or artistic craftsmanship *not permanently situate in a public place or building* (*n*) is therefore such a copying of the work as will be prohibited, and reproduction by these means and in these cases is a right given exclusively to the owner of the copyright. It will still be a question of fact to be determined in each case, whether such a substantial part of the work has been reproduced as to be deemed a copy of the work (*o*). There are other forms of reproduction of artistic works which it is apprehended will be held to be copies under the wide definition of reproduction in any material form. In the Artistic Copyright Bill, which was in evidence before the Commissioners (*p*), a "copy" was defined. The definition, it is submitted, goes somewhat beyond what the Courts will hold to be a copy of an artistic work, but it is given here as suggesting the limits towards which decisions may tend.

"'Copy' shall . . . mean any representation or reproduction or colourable imitation of a work or any *substantial* part thereof, or the design thereof in the same or in any other form, and in any material and in any size and shall include—

(*a*) "A reproduction of a work of fine art by using or applying it either in the pattern or in the shape or configuration, or in the ornamentation of any article of manufacture (*q*);

(*i*) *Gambert* v. *Ball*, 14 C. B. (N.S.) 306, *per* ERLE, C.J., at p. 317. The words of the statute referred to are "the sole right and liberty of printing and reprinting the same," and "engraving, etching or working in mezzo tints or chiaro oscuro or otherwise, or in any manner copying, in the whole or in part, by varying, adding to or diminishing from the main design." The present Act clearly includes such methods under the words "reproduction in any material form whatsoever."

(*k*) S. 2, sub-s. (1) (iii).

(*l*) For meaning of public place or building, see p. 38.

(*m*) For definitions of painting, drawing, engraving and photograph, see pp. 29 and 32, and S. 35, sub-s.(1).

(*n*) For definition of public place, see p. 38.

(*o*) For substantial part, see *supra*, p. 35.

(*p*) See Minutes of Evidence, 1910, p. 248.

(*q*) A "work of fine art" was there defined as "every painting

Sect. 1.
COPIES OF.

(*b*) "A reproduction of any other work of fine art, cast from nature or photograph by a sculpture, or of a sculpture by any other work of fine art or photograph, and

(*c*) "A representation of any work by a living picture, a cinematographic reproduction or by any other means whereby the design of the work is reproduced" (*r*).

SECTION II.

Infringement of Copyright.

2.—(1) Copyright in a work shall be deemed to be infringed by any person (*a*) who, without the consent (*b*) of the owner (*c*) of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright (*d*): provided that the following Acts shall not constitute an infringement of copyright:—

(i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary (*e*):

(*a*) Any person includes company. *Marzials* v. *Gibbons* (1874), L. R. 9 Ch. 518; *McLean* v. *Moody*, 20 Sess. Cas. 1154.

(*b*) Written consent does not appear to be necessary.

(*c*) See s. 5. The author is the first owner of the copyright except in two cases: (1) in the case of an engraving, photograph or portrait made for valuable consideration, in which case the person who ordered the work is the first owner; (2) when the author was in the employment of some other person and the work was made in the course of the employment then the employer is the first owner.

The author may also part with his ownership by assignment. See s. 5, sub-s. (2) and (3).

(*d*) That is to say, does any of the acts mentioned in s. 1, sub-s. (2).

(*e*) See p. 57.

or drawing, sculpture and engraving as hereinafter defined, and any other like work of fine art, and shall include any design of an artistic nature applicable or applied to any article of manufacture, whether so applicable or applied in respect of the pattern, or the shape or configuration or the ornament thereof." For definition of painting, drawing, sculpture and engraving, see pp. 29 and 32, and see s. 22 and notes, p. 124, for designs applicable to industrial purposes.

(*r*) See p. 42, *ante*.

(ii) Where the author (*a*) of an artistic work (*b*) is not the owner of the copyright therein (*c*), the use by the author of any mould, cast, sketch, plan, model, or study made by him for the purpose of the work (*d*), provided that he does not thereby repeat or imitate the main design (*e*) of that work:

(iii) The making or publishing (*f*) of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship (*g*), if permanently (*h*) situate in a public place or building (*i*), or the making or publishing of paintings, drawings, engravings, or photographs (which are not in the nature of architectural drawings or plans) (*k*), of any architectural work of art (*l*):

(*a*) See p. 33 for the definition of the author.

(*b*) For the definition of artistic work, see s. 35, sub-s. (1) and p. 28.

(*c*) The author of an artistic work is not the owner of the copyright.

(i) Where the artistic work is an engraving, photograph or portrait made for valuable consideration—in which case the ownership vests in the person who ordered the work. See s. 5, sub-s. (1) (*a*), p. 67.

(ii) When in the case of *any* artistic work the author was in the employment of some other person and the work was made in the course of his employment the employer is then the owner. See s. 5, sub-s. (1) (*b*).

(iii) When the author has assigned his ownership. See s. 5, sub-ss. (2) and (3).

(*d*) The author therefore is at liberty to use and avail himself of his previous labour in producing another work, provided the main design of the original work is not repeated or imitated.

(*e*) For the meaning of main design, see p. 60.

(*f*) For the meaning of publication, see p. 38. This was omitted from the Bill as originally drafted.

(*g*) For definitions, see pp. 29 and 30.

(*h*) This did not appear in the original draft. The intent appears to be that works on exhibition or loan though in a public place or building should be protected, but that where

Sect. 2.

(iv) The publication in a collection, mainly composed of non-copyright matter, *bonâ fide*, intended for the use of schools, and so described in the

the work is such that for the time being it may be considered as part of the public place or buildings then the provision applies.

(*i*) *A place* is public if it is so situated that what passes there can be seen by any considerable number of persons if they happen to look. For the meaning of "in public," see p. 38.

A place used for public purposes means a place to which the public can demand admittance or to which they are invited to come. A public building has been defined in the Public Health Acts, and the London Building Act, 1894. See also *Josolyne* v. *Meeson* (1885), 53 L. T. (N. S.) 319; *Moses* v. *Marsland*, [1901] 1 K. B. 668; it is submitted that works of sculpture or artistic craftsmanship, or architectural works of art situate on private property, but which can be seen by the public from some public place cannot be reproduced by paintings, drawings, engravings or photographs under this sub-section. In *Benziger* v. *Schlunft* (1899), July 20, Court of Cassation, Switzerland; and Le Droit d'Auteur (1900), p. 29, it was decided that the frescoes in the William Tell Chapel, which can be seen into from the street, could be reproduced since they were "in a public place." "The fundamental idea is that works of art, which, from the manner in which they are erected or placed, constitute an integral part of the panorama of a town or landscape, and which can be viewed, by any person upon public places or in public streets (*sur des places ou dans des rues publiques*) have fallen into *le domaine public.*" See also *Union Photographique* v. *Brunner and Hauser* (1898), December 15, Court of Cassation, Switzerland; and Le Droit d'Auteur (1899), p. 31, as to the meaning of public place where the distinction is drawn between *les œuvres d'art regardant sur des rues ou places publiques* and *celles qui se trouvent dans des rues ou sur des places.*

(*k*) Under the London Building Act, 1905, plan is defined as meaning "plans, sections and elevations." Murray's English Dictionary defines plan as "a drawing or diagram showing the relative positions of the parts of a building as projected upon a horizontal plane." See also *Paynter* v. *Watson*, [1898] 2 Q. B. 31.

(*l*) For definition of architectural work of art, see s. 35, sub-s. (1), and p. 31, and notes thereon.

title and in any advertisements issued by the publisher, of short passages from published literary works, not themselves published for the use of schools in which copyright subsists: Provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged (*a*):

(*a*) This is a useful clause which excludes school literature containing copyright extracts from the results of infringement. Such books as come within the exception must be *bonâ fide* school books, and must comply with the following conditions:—

(i) Bear on the title page the fact that they are for the use of schools;
(ii) If advertised—then advertised as school books;
(iii) The passages inserted must be short;
(iv) The source must be acknowledged, which involves stating both the name of the author and the work from which the passage is taken;
(v) There must not be more than two passages from the works of the same author published by the same publisher within five years;
(vi) The passages taken must be from published literary works which are not themselves school books.

The sixth condition is intended to prevent deliberate copying from one school book into another, but it does not prohibit an author from publishing in his school book the same passage as appears in a school book already published. Whether there has been such a copying of material extracts from one school book into another so as to be an infringement will always be a question of fact.

The protection afforded by the sub-section has been known for many years in foreign countries, and is recognised by the Berlin Convention, Art. 10. "As regards the liberty of extracting portions from literary or artistic works for use in publications destined for educational purposes, or having a scientific character, or for Chrestomathies (*selections of choice passages from an author or authors*), the effect of the legislation of each country of the Union and of special arrangements existing, or to be concluded between them, is not affected by the present Convention."

Sect. 2.

(v) The publication in a newspaper (*a*) of a report (*b*) of a lecture (*c*) delivered in public (*d*), unless the report is prohibited by conspicuous (*e*) written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except whilst the building is being used for public worship, in a position near the lecturer (*f*); but nothing in this paragraph shall affect the provisions in paragraph (i) as to newspaper summaries (*g*):

(*a*) A newspaper is published whenever and wheresoever it is offered to the public by the proprietor. *McFarlane* v. *Hutton*, [1899] 1 Ch. 884.

(*b*) That is to say, a substantially accurate account, be that verbatim or condensed in such a manner as to give a just impression of what took place. The reporter has the copyright in his own report. *Walter* v. *Lane*, [1900] A. C. 539.

(*c*) Lecture includes "address, speech or sermon," s. 35, sub-s. (1).

This sub-section abolishes the previous cumbrous procedure of giving notice to magistrates, and provides an easy way of retaining copyright. Under the old law where no notice had been given the lecturer could not prevent any report of his lecture.

Under s. 20, it is not an infringement to publish in a newspaper a report of "an address of a political nature delivered at a public meeting." Such reports cannot be prohibited. For a full discussion of lectures and prohibition of reports, see p. 36, *ante*.

(*d*) For the meaning of "in public," see p. 38, *ante*, and cases there cited.

(*e*) In the bill as first introduced the notice had to be in letters not less than an inch in height and affixed in a conspicuous place near the lecturer. It will be a question of fact in each case whether the notice is sufficiently conspicuous to safeguard the lecturer.

(*f*) The reference to the case when the building is being used for public worship primarily refers to sermons and addresses. In such a case the notice need only be affixed at or about the main entrance of the building.

(*g*) The report in such a case must be reasonable and

(vi) The reading or recitation in public by one person of any reasonable extract from any published work (*a*).

(2) Copyright in a work shall also be deemed to be infringed by any person who (*b*)—

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

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

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

(*d*) imports for sale or hire (*g*), into any part of His Majesty's dominions to which this Act extends (*h*), any work which to his knowledge (*i*) infringes copyright or would infringe copyright if it had been made within the part of His Majesty's dominions in or into which the sale or hiring, exposure, offering for sale or hire, distribution, exhibition, or importation took place (*k*).

anything like a substantially complete account will be an infringement.

(*a*) The intention is to bring the law into line with the Berlin Convention which includes readings and recitations. Under the old law any person could read a copyright book in public. See *Hanfstaengl* v. *Empire Palace*, [1894] 3 Ch. 109 at p. 116.

(*b*) The sub-divisions of this sub-section correspond to those of s. 11 dealing with summary remedies.

(*c*) The mere possession of unlawful copies does not appear to be an offence unless the possession is for sale or hire, and with knowledge of the infringing nature of the works.

(*d*) For the meaning of "expose for sale," see *Britain* v. *Kennedy* (1902), 19 T. L. R. 122; and "offers for sale," see *Wolff* v. *Wood* (1903), Times, October 31, p. 5, where a provisional price was quoted.

(*e*) It appears that gratuitous distribution not being by way of trade and to a limited extent is not an infringement—that is to say to such an extent as not to affect prejudicially the owner of the copyright. Under the old law it was

Sect. 2.

immaterial that the distribution was limited. *Ager* v. *P. & O. Steam Navigation Co.* (1884), 26 Ch. D. 637, where the defendants compiled from a telegraphic code a work for their own private use and distributed free copies of their work amongst their agents at home and abroad, but had not printed the book for sale, about fifty copies being distributed. An injunction was granted. "It has long been settled that multiplying copies for private distribution among a limited class of persons is just as illegal as if it were done for the purpose of sale," *per* KAY, J., at p. 641.

Novello v. *Sudlow*, 12 C. B. 177; gratuitous distribution of lithographed copies of a piece of music amongst members of a musical society.

It will be a question of fact in each case whether the distribution was to such an extent as to affect prejudicially the owner of the copyright.

(*f*) Exhibition in public not being by way of trade appears not to be an infringement. Whether such exhibition to a wide extent would be allowed may be considered doubtful though there is no limiting adjective used in the section, while in the bill as brought up to the Commons from Committee the words were: "or widely or by way of trade distributes or exhibits in public," thereby strictly limiting such exhibition to a small extent, as well as not by way of trade.

(*g*) In *Badische Anilin Und Soda Fabrik* v. *Hickson*, [1905] 2 Ch. 495, approving *Sacharin Corporation* v. *Reitmeyer*, [1900] 2 Ch. 659, it was held that an English trader who, in pursuance of a contract made in England, procured a patented article abroad, and delivered it at a foreign port to persons to hold to the order of the purchaser who was an English importer, and then completed the sale by communicating the fact to the purchaser in England that the goods were at his order at the foreign port, did not "sell" the goods in England, although the purchaser afterwards imported the goods.

(*h*) See s. 25.

(*i*) In all cases it is necessary to prove knowledge on the part of the defendant. Under the old law in the majority of cases which come within this sub-section, knowledge was immaterial. This sub-section requires the act to be wilful and there is no infringement if the act is innocent, and the onus lies upon the plaintiff to prove the defendant's knowledge; thus overruling *Mansel* v. *Valley Printing Co.*, [1908] 2 Ch. 441.

As evidence of knowledge notice should be given to the defendant before applying for an injunction. *Cooper* v. *Whittingham* (1880), 13 Ch. D. 501. See also *Colburn* v.

(3) Copyright in a work shall also be deemed to be infringed by any person who for his private profit (*a*) permits (*b*) a theatre or other place of entertainment (*c*) to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

Simms (1843), 2 Hare, 543, 557. There may be a material distinction between a printer and a publisher. "A printer copying a work which he finds to exist in print, may be bound to inquire whether the copyright has expired, but a person merely employed to sell a work, purporting to be an original work, may not be under an obligation to make that inquiry," *per* SHADWELL, V.C.

(*k*) That is to say, although the work is made without those parts of the dominions where any sale or hiring, exposure, offering for sale or hire, distribution, exhibition, or importation takes place, there being therefore no infringement because the making took place without those parts, yet if such a work so made is imported for sale or hire, or sold, or let for hire, or by way of trade is exposed or offered for sale or hire, or distributed either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright, or by way of trade is exhibited in public, then an infringement is to be deemed to have occurred.

(*a*) Under the old law all performances were included and it was immaterial whether the performance was for private profit or not. It is now limited to cases where the use of the theatre or other place is permitted for private profit.

(*b*) Under the old law it was an infringement to cause or permit a dramatic work to be represented without consent, he really did not know of the infringement he will not be liable.

Personal knowledge is probably not essential and the proprietor or his agent "permits" if he knows, or ought to know, that the performance is unauthorised. See *Bosley* v. *Davies*, 1 Q. B. D. 84; *Redgate* v. *Haynes*, 1 Q. B. D. 89, "Suffering gaming" under s. 17 of the Licensing Act.

(*b*) Under the old law it was immaterial that the defendant did not know that the performance was an infringement. It is for the defendant to prove that he was not aware and had no reasonable grounds for suspecting that the performance would be an infringement. The defendant therefore must not know of the infringement nor connive at it nor wilfully shut his eyes to it, but if he can prove

Sect. 2.

while the liability in the case of musical works only existed when the causing or permission was wilful. That is to say, the proprietor, and even the lessee of the place where the unauthorised performance of a dramatic piece was given, was liable even though having employed persons to perform, he did not select the piece performed or know that it was an infringement, *Monaghan* v. *Taylor* (1886), 2 T. L. R. 685. While in the case of a musical composition there had to be wilful knowledge under the Copyright (Musical Compositions) Act, 1888.

The present Act makes the law more stringent with respect to musical works and somewhat less stringent in the case of dramatic works, since it is a good defence if the defendant proves that he was really unaware of the infringement. The onus of proof is put upon the defendant with the object of preventing a defendant, who in fact is aware or has abundant material for making himself aware of the infringing nature of the work, from raising the defence of "no knowledge" to the charge of permitting the unauthorised performance, thereby putting the plaintiff to the great difficulty of proving such knowledge. In *Monaghan* v. *Taylor*, *supra*, BOWEN, L.J., said, "It is not unreasonable to require that the person who lets his premises for a concert should make inquiries as to the copyright of the pieces performed." It must be carefully observed, however, that such knowledge need not be wilful—that is, deliberate and intentional.

(*c*) A place used for the public representation for profit of a dramatic piece becomes a place of dramatic entertainment.

Under the repealed Dramatic Copyright Act, 1833, the words "at any place of dramatic entertainment" were held to mean any place which for the time being was used for the performance of a work, and to which the public were freely admitted with or without payment. *Duck* v. *Bates* (1884), 13 Q. B. D. 843; where a room of a hospital in which there was a representation of a dramatic piece for the entertainment of those connected with the hospital, and who were admitted free was held not to be a place of public entertainment. "The representation must be other than domestic and private. There must be a sufficient part of the public who would go to a performance as a commercial transaction; otherwise the place where the drama is represented will not be a 'place of dramatic entertainment,'" *per* BRETT, M.R., at p. 847. See also p. 38, and notes thereon.

Russell v. *Smith*, 12 Q. B. 217, at p. 237. "The use for the time in question is the essential fact. As a regular theatre may be a lecture-room, dining-room, ball-room, and concert room on successive days, so a room used ordinarily

for either of those purposes would become for the time being a theatre if used for the representation of a regular stage play," at p. 237.

Fair dealing . . . for the purposes of private study, research, criticism, or review or newspaper summary.

Private Study and Research.—What is a fair dealing with a work depends upon the circumstances of each particular case, and has been well put in an American case: "As a question of strict law, apart from exceptional cases, the privilege of fair use accorded to a subsequent writer must be such, and such only, as will not cause substantial injury to the proprietor of the first publication; but cases frequently arise in which, though there is some injury, yet equity will not interpose by injunction to prevent the further use, as where the amount copied is small and of little value, if there is no proof of bad motive, or where there is a well-founded doubt as to the legal title, or where there has been long acquiescence in the infringement, or culpable laches and negligence in seeking redress, especially if it appear that the delay has misled the respondent" (*b*).

In the case of a book the following ways of using the work have been decided to be fair (*c*):—

(1) Using the information or the ideas contained in it without copying its words or imitating them so as to produce what is substantially a copy.

(2) Making extracts (even if they are not acknowledged as such) appearing under all the circumstances of the case, reasonable in quality, number and length, regard being had to the object with which the extracts are made and to the subjects to which they relate.

(3) Using one book on a given subject as a guide to authorities afterwards independently consulted by the author of another book on the same subject.

(4) Using one book on a given subject for the purpose of checking the results independently arrived at by

(*b*) *Lawrence* v. *Dana*, 4 Cliff. 1, at p. 83, and cases there cited. This case gives an excellent summary of the law. Fair and original abridgements, proof of unfair usage, and similar matters are fully discussed.

(*c*) See Digest of the Law of Copyright, by Sir James Stephen. Copyright Commission, 1878, p. lxx. See also *Kelly* v. *Morris*, L. R. 1 Eq. 697; *Spiers* v. *Brown*, 6 W. R. 352; *Cary* v. *Kearsley*, 4 Esp. 138, where the distinction is drawn between plagiarism as a literary impropriety, and piracy as a legal wrong. *Saunders* v. *Smith*, 3 Myl. Cr. 711; *Campbell* v. *Scott*, 11 Sim. 31; *Roworth* v *Wilkes*, 1 Camp. 94; *Jarrold* v. *Houlston*, 3 K. & J. 718; *Sweet* v. *Benning*, 16 C. B. 459.

Sect. 2.

FAIR DEALING

the author of another book on the same subject (*d*).

The question of what is a fair use in making an abridgement is one of the greatest difficulty. It would seem from the decided cases under the old law that "An abridgement may be an original work if it is produced by a fair use of the original or originals from which it is abridged; but the republication of a considerable part of a book is an infringement of the copyright existing in it although it may be called an abridgement, and although the order in which the republished parts are arranged may be altered" (*e*). It is submitted that the present Act does not alter the law with respect to abridgements, and that if *bonâ fide* and original, although made without the original author's consent, they are not infringements. In determining whether or not a fair use has been made of another's work, similar considerations arise as in the question of what is an original work (*f*), or what is a copy (*g*).

Criticism or Review.—Quotation is necessary for the purposes of criticism or review, but it must be fair and *bonâ fide* and within reasonable limits.

"Books are published with an expectation, if not a desire, that they will be criticised and reviewed, and if deemed valuable, that parts of them will be used as affording illustrations by way of quotation or the like, and if the quantity taken be neither substantial nor material, if, as it has been expressed by some judges, 'a fair use' only be made of the publication, no wrong is done and no action can be brought" (*h*).

Quotation, however, while necessary for the purpose of reviewing, may be carried to the extent of manifesting piratical intention (*i*), and it is a question of fact whether such a substantial portion of a work has been taken as to constitute an

(*d*) *Sampson and Murdoch Co.* v. *Seaver Radford Co.*, 140 Fed. Rep. 539. As to what constitutes unfair use of another's work in checking results where for the purpose of compiling a directory the defendant, after completing an original canvass of names, copied such names as he did not have from another directory and sent out canvassers to verify them, and then reprinted them without alteration.

(*e*) Digest of Copyright, Sir James Stephen, Copyright Commission, 1878, p. lxx.; and see the question of what constitutes an abridgement further discussed, p. 17.

(*f*) For original, see p. 13.

(*g*) For copy, see p. 43.

(*h*) *Chatterton* v. *Cave*, 3 A. C. 483, *per* Lord HATHERLEY, V.C., at p. 492.

(*i*) *Mawman* v. *Tegg* (1826), 2 Russ. 385, at p. 393; *Wilkins* v. *Aikin*, 17 Ves. 423; "there is no doubt that a man cannot, under the pretence of quotation, publish either the whole or a part of another author's work; though he may use, what is in all cases very difficult to define, fair quotation," *per* Lord ELDON at p. 424. *Harper & Bros.* v. *Biggs & Sons* (1907), Times, June 27.

infringement. Where so much is extracted that the review substantially communicates the same knowledge as the work reviewed, so as to supersede the original work, it will be restrained (*k*).

Newspaper Summary.—Here again it must be entirely a question of fact as to what will constitute a legitimate dealing with the work. It is to be observed that a fair newspaper summary of a public lecture, the report of which has been prohibited as provided by paragraph (iv.), is not an infringement. It seems, therefore, that in the case of prohibited lectures the summary must be of the briefest kind, and that anything approaching a *verbatim* report would constitute an infringement, the intention being that whether a *verbatim* report was prohibited by the lecturer, or not, fair dealing by way of newspaper summary should be allowed.

S. 20 further provides that newspaper reports of political speeches are not to be deemed infringements; in these cases, therefore, a full report may be given, not merely a brief summary.

(*k*) *Roworth* v. *Wilkes* (1807), 1 Camp. 94, at p. 97; *Folson* v. *March*, 2 Story, 186; "No one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passage for the purpose of fair and reasonable criticism. On the other hand, it is as clear that if he thus cites the most important parts of the work, with a view not to criticise but to supersede the use of the original work and substitute the review for it, such a use will be deemed in law a piracy." See also *Dodsley* v. *Kinnersley* (1761), Amb. 403; *Cary* v. *Kearsley* (1802), 4 Esp. 167; "that part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action; a man may fairly adopt part of the work of another: he may so make use of another's labours for the promotion of science, and the benefit of the public; but having done so the question will be, was the matter so taken used fairly with that view, and without what I may term the *animus furandi?*" *per* Lord ELLENBOROUGH, at p. 169. *Whittingham* v. *Wooler* (1817), 2 Swan. 428; *Bell* v. *Whitehead* (1839), 8 L. J. Ch. 141; *Campbell* v. *Scott* (1842), 11 Sim. 31; *Baker* v. *Bogue* (1846), 10 Jur. 420; where it was held that a work might be a piracy although the quotations were not so extensive as to render the work a substitute for the original. *Scott* v. *Stanford* (1867), L. R. 3 Eq. 718; regard must be had to the quantity and matter which is taken and republished and the test is in the result: full acknowledgment of the original and absence of dishonest intention will not excuse the piratical author where the effect is of necessity to injure and supersede the sale of the original. The difference in price is an important factor. *Pike* v. *Nicholas* (1869), 5 Ch. App. 251; *Bradbury* v. *Hothen* (1872), L. R. 8 Ex. 1; *Smith* v. *Chatto* (1874), 31 L. T. 775; *Walter* v. *Steinkopff*, [1892] 3 Ch. 489, copying in a newspaper; *McGuire* v. *Western Morning News Co.*, [1903] 2 K. B. 180, criticism in a newspaper of a stage play; *Unwin* v. *Clarke & Co.* (1908), Times, March 31, fair comment on a rival publication; *Murray* v. *Walter* (1908), Times, May 6–9, comment on the manner of publishing a book; the limits of fair criticism exceeded.

Sect. 2. MAIN DESIGN.

Main Design.—The design of a work does not mean the idea—there can be no copyright in an idea—but it means "the particular forms and arrangements (whether of lines or colouring) which the copyright author has selected as the vehicle for conveying his idea to those who see his work" (*l*). It has been also well defined in an American case, "Design is that character of a physical substance which by means of lines, images, configurations and the like, taken as a whole, makes an impression through the eye upon the mind of the observer. The essence of a design resides not in the elements individually, nor in their method of arrangement, but in the *tout ensemble*—in that indefinable whole that awakens some sensation in the observer's eye. Impressions thus imparted may be complex or simple; in one is mingled impressions of gracefulness and strength, in another impressions of strength alone. But whatever the impression, there is attached in the mind of the observer, to the object observed, a sense of uniqueness and character" (*m*).

It is this general impression that constitutes the main design. The essentials of design are what cannot be changed without destroying the characteristic appearance of the design (*n*).

In the case of prints—"It is to be considered whether there be such a similitude and conformity between the prints, that the person who executed the one set must have used the others as a model. In that case he is a copyist of the main design. But if the similitude can be supposed to have arisen from accident; or necessarily, from the nature of the subject; or from the artist having sketched the design merely from reading the letterpress . . . then he is not answerable" (*o*).

SECTION III.

Term of Copyright.

3. The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act (*a*), be the life of the author, and a period of fifty years after his death.

(*l*) *Hanfstaengl* v. *Baines*, [1895] A. C. 20, *per* Lord WATSON, at p. 27.

(*m*) *Pelouze Seale & Co.* v. *American Cutlery Co.*, 102 Fed. Rep. 916, cited in Ruling Cases, Vol. XXV. p. 266.

(*n*) *Whithall* v. *Lowell Manufacturing Co.*, 79 Fed. Rep. 787.

(*o*) *Roworth* v. *Wilkes* (1817), 1 Camp. 94, *per* Lord ELLENBOROUGH, at p. 98. See also s. 23.

Sect. 3.
TERM OF COPYRIGHT.

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

(*a*) In the case of *joint authors*, the period is during the life of the author who first dies, and for a term of fifty years thereafter, or during the life of the author who dies last, whichever period is the longer. See s. 16, and p. 64.

In the case of *posthumous* literary, dramatic, or musical works, or an engraving, copyright subsists till publication, and for a term of fifty years thereafter. In such cases the date of publication is material. See s. 17, and p. 63.

In the case of *mechanical instruments* the term of copyright is fifty years from the making of the original plate from which the contrivance was directly or indirectly derived. See s. 19, sub-s. (1), and p. 113.

In the case of *photographs* the term is fifty years from the making of the original negative. See s. 21, p. 123.

In the case of *Government publications* the period is one of fifty years from the date of their first publication. See s. 18, p. 111.

(*b*) In the case of posthumous works this proviso applies as

Sect. 3. Section three has profoundly modified the law, and has introduced uniformity with respect to all classes of works. The term of fifty years which has been adopted brings the British law into line with Article 7 of the Berlin Convention, which the Royal Commission recommended should be adopted (*a*). The term specified in this section refers to **published works.** In the case of **unpublished works** copyright subsists in all cases until publication, with two exceptions, namely: (i) mechanical instruments; and (ii) photographs, copyright in which runs from the date of the making of the original plate or negative. The date of publication therefore is no longer material, except in the case of posthumous works, for the period of copyright now runs, except in such cases, from the "date of the making of the work." From that date until publication, copyright exists in the unpublished work, provided the author was at the date of the making of the if the author had died at the date of the publication. See p. 64.

(*c*) See s. 2, sub-s. 2, and p. 53. Reproductions for purposes other than for sale would be an infringement. This benefit of restricted reproduction upon the payment of royalties only applies, therefore, to persons who reproduce the work for trade purposes.

(*d*) The onus of proof is thus put upon the defendant.

(*e*) That is the price at which the work is issued to the public on credit. In the ordinary case of novels this is not the *net* price. In some cases, however, works are published at a *net* price, and in agreements between authors and publishers the fact must be taken into consideration.

(*f*) These regulations have not been made at the time of going to press.

(*a*) *Art.* 7.—**The term of protection granted by the present Convention shall include the life of the author and fifty years after his death.**

Nevertheless, in case such term of protection should not be uniformly adopted by all the countries of the Union, the term shall be regulated by the law of the country where protection is claimed, and must not exceed the term fixed in the country of origin of the work. **Consequently the contracting countries shall only be bound to apply the provisions of the preceding paragraph in so far as such provisions are consistent with their domestic laws.**

For photographic works and works produced by a process analogous to photography, for posthumous works, **for anonymous or pseudonymous works, the term of protection shall be regulated by the law of the country where protection is claimed, provided that the said term shall not exceed the term fixed in the country of origin of the work.** [The provisions of the Berlin Convention which differ from those of the Berne Convention are shown in Clarendon type.]

Sect. 3. — TERM OF COPYRIGHT.

work a British subject or resident within the British dominions; and thereafter upon publication, provided that first publication takes place within the British dominions, the copyright continues during the life of the author and for a term of fifty years after his death, but in two periods—

(i) A period of twenty-five years after the death of the author, or thirty years in the case of a work in which copyright subsists at the passing of the Act, during which an unrestricted copyright is enjoyed; and

(ii) For a further period of twenty-five years, or twenty years in the case of a work in which copyright subsists at the passing of the Act, which is limited in the sense that any person may reproduce the work for sale without infringement provided he has given the prescribed notice, which must be in writing, of his intention to reproduce the work and has paid the royalties according to the Board of Trade regulations.

The date of the author's death has therefore become the material date for the purpose of determining the time when the unrestricted period of copyright expires. Both uniformity and simplicity are thus attained, since all an author's works run out of copyright at the same time, and it is a comparatively easy matter to determine the date of an author's death.

The proviso as to the payment of royalties requires a fixed percentage of 10 per cent. on the published price in the case of all copies sold. And the Board of Trade are empowered to make regulations with respect to the notices and the payment of the royalties.

It is to be observed that there is nothing to prevent contracting out of this clause; in fact, the whole field of negotiation and agreement is left open under the Act, and authors and publishers may make what terms they please. Nor is it necessary that the agreement between author and publisher be in writing.

Under s. 4, compulsory licences to reproduce the work may be granted, upon complaint made to the Privy Council that the work is being withheld from the public—that section thus gives protection to the public against unreasonable withholding of the work, and provides a safeguard in consequence of the extension of the period of copyright. There is also the privilege of reproduction in the case of school literature under s. 2, sub-s. 1 (iv).

Posthumous works.—In the case of these works, which are dealt with in s. 17, the date of publication is still the material factor. In such cases, where the work, which may be a literary,

Sect. 3.

POSTHUMOUS WORKS.

dramatic, or musical work, but not an artistic work other than an engraving, has not been published before the death of the author, copyright in the work subsists until publication, however long that period may be, and for a term of fifty years after publication, with this limitation, that the copyright shall be unrestricted for the first twenty-five years, while for the second twenty-five years any person may reproduce the work upon giving notice and upon payment of the royalties. The author is deemed to have died at the date of the publication, that is to say, at the date of the issue of copies to the public (*b*). The adoption of the definition of publication as the issue of copies to the public, brings Great Britain into line with the Berlin Convention, and removes the difficulty, which existed under the old law, of determining the date of publication, by making the date of publication a more easily ascertainable fact.

Joint authorship.—The provisions of s. 16, sub-s. (1), with reference to this section, must be carefully observed (*c*). The full term (*d*) for which copyright subsists is during the life of the author who dies first and fifty years after his death, or during the life of the author who dies last, whichever period is the longer.

The proviso under s. 3 only allowing unrestricted copyright for a period of twenty-five years after the death of the author, only applies in the case where the full term of copyright is during the life of the author who dies first and fifty years after his death, and in such case the second period of twenty-five years, namely, of restricted copyright (*e*), is, as regards the works of joint authors,—

(i) The period after the expiration of twenty-five years from the death of the author who dies first until the expiration of the full term of copyright; or

(ii) The period after the death of the author who dies last

(*b*) S. 1, sub-s. 3, and see p. 38, *ante*.

(*c*) S. 16, sub-s. (1). In the case of a work of joint authorship, copyright shall subsist during the life of the author who first dies, and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer, and references in this Act to the period after the expiration of any specified number of years from the death of the author shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first or after the death of the author who dies last, whichever period may be the shorter, and in the provisions of this Act with respect to the grant of compulsory licences a reference to the date of the death of the author who dies last shall be substituted for the reference to the date of the death of the author.

(*d*) In the case of a published work the copyright lasts during two periods, one of unrestricted, the other of restricted copyright, making up the full period of 50 years after the death of the author.

(*e*) That is, restricted in the sense that any one may reproduce the work upon payment of royalties.

until the expiration of the full term of copyright, whichever of the two periods may be the *shorter*.

For example, A. and B. write a joint work. The full term for which copyright subsists is I., during a period of fifty years after the death of the author who dies first, *or*, II., during the life of the author who dies last, whichever period is the longer.

These two cases are :—

I. Where B. dies within fifty years of the death of A.—Suppose A. dies in 1920, B. dies within fifty years of that date, that is, before 1970. Then the full term for which copyright subsists is (1920 + 50), that is, until 1970. While the two periods of unrestricted and restricted copyright are computed as follows :—

(*a*) If B. dies within twenty-five years of the death of A., that is, before 1945, then—

(i) Unrestricted copyright subsists from 1920 for twenty-five years, that is, until 1945, and

(ii) Restricted copyright subsists from 1945 until the expiration of the full term of copyright in 1970,

since the period after the expiration of twenty-five years from the death of A. until the expiration of the full term of copyright, namely, from 1945 until 1970, that is a period of twenty-five years, is *shorter* than the period, after the death of B., who dies before 1945, until the expiration of the full term of copyright in 1970.

(*b*) If B. dies after twenty-five years from the death of A., that is, after 1945 but before 1970, then—

(i) Unrestricted copyright subsists from 1920 until the death of B., although that period may be longer than twenty-five years ; and

(ii) Restricted copyright subsists from the death of B. until 1970, although that period may be less than twenty-five years ; since the period, from the death of B., who dies after 1945, until the expiration of the full term of copyright in 1970, is *shorter* than the period, after the expiration of twenty-five years from the death of A., until the expiration of the full term of copyright, namely, the period from 1945 until 1970.

II. Where B. survives A. for more than fifty years.—A. dies in 1920, but B. survives A. for more than fifty years, that is, dies after 1970. The full term of copyright subsists until the death of B., whenever that may be, and when B dies copyright ceases, so that in this

Sect. 3.

case the two periods of unrestricted and restricted copyright do not arise.

The case is similar to that of I. (*b*) (i), *supra*, unrestricted copyright subsisting from 1920 until the death of B.; further, since when B. dies copyright ceases, the unrestricted period coincides with the full term of copyright, and there is no period of restricted copyright possible after the death of B.

In the case of joint authors, therefore, the date of the death of B., that is, of the author who dies last, is in every case the factor which determines what period of restricted copyright (if any) arises.

The above example covers all possible cases, and there should be no difficulty in computing in any particular case when the unrestricted period of copyright expires.

Foreign Countries.—The terms of protection in other countries, as well as the dates of their copyright laws, are set out in a table in Appendix IV.

SECTION IV.

Compulsory licences.

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

This section substantially reproduces s. 5 of the Copyright Act, 1842, which ran as follows :—

> It shall be lawful for the Judicial Committee of Her Majesty's Privy Council, on complaint made to them that the proprietor of the copyright in any book after the death of the author has refused to republish or to allow the publication of the same, and that by reason of such

(*a*) In the case of joint authors, under s. 16, sub-s. (1), the date of the death of the author who dies last is to be substituted for the date of the death of the author.

refusal such book has been withheld from the public, to grant a licence to such complainant to publish such book in such manner and subject to such conditions as they may think fit, and that it shall be lawful for such complainant to publish such book according to such licence.

Sect. 4. — COMPULSORY LICENCES.

There does not appear to be any record of any action taken under this section (*b*).

In view of the expense of appealing to the Privy Council, and the fact that, after a period of twenty-five years from the author's death—or, in the case of a work published before the commencement of this Act, thirty years, there is a right to reproduce the work upon giving proper notice, and upon payment of certain royalties, it hardly seems likely that any considerable use will be made of this section.

There must be a refusal to republish or allow republication or performance in public, and it must be shown that by reason of such refusal, the work is withheld from the public—it must also be after the death of the author.

The complaint would be by petition.

When the Bill was introduced, it was intended to give the right to insist upon the author allowing his work to be reproduced, to the Comptroller-General of Patents on the analogy of compulsory licences under the Patents Act, 1907. Owing to strong opposition in Committee, these clauses were replaced by the above section.

SECTION V.

Ownership of copyright, &c.

5.—(1) Subject to the provisions of this Act, the author (*a*) of a work shall be the first owner of the copyright therein :—

Provided that—

(*a*) where in the case of an engraving, photograph, or portrait (*b*) the plate or other original (*c*) was ordered by some other person, and was made for valuable consideration in pursuance of that order (*d*), then, in the absence of any agreement to the contrary (*e*), the person by whom such plate or other original was ordered shall be the first owner of the copyright ; and

(*b*) But see Copinger, 4th ed., p. 86.

Sect. 5.

(*b*) where the author was in the employment of some other person under a contract of service or apprenticeship (*f*) and the work (*g*) was made in the course of his employment by that person (*h*), the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is a contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical (*i*).

(*a*) For the meaning of author, see p. 33. In the case of certain Government publications the ownership is in the Crown, see p. 111, *post*.

(*b*) A portrait is the likeness or image of a person or animal drawn or painted from life; for definitions of photograph and engraving, see p. 32.

(*c*) For the definition of plate, see s. 35, sub-s. (1).

(*d*) For what constitutes valuable consideration, see *Melville* v. *Mirror of Life Co.*, [1895] 2 Ch. 531; in that case it was held that where the agreement is that the photographer may sell copies of a portrait, made by the photographer without payment by the subject to the photographer, the portrait is made for a "good and valuable consideration," *Stackmann* v. *Paton*, [1906] 1 Ch. 774.

(*e*) For form of agreement for work on commission, see Encyclopædia of Forms, Vol. V. p. 352.

(*f*) It is essential there should be some contract of service or apprenticeship. See p. 72.

(*g*) Any work.

(*h*) The author, in so far as he acts outside the course of his employment is free, and so acquires first ownership of the copyright in any work made by him and capable of being copyrighted.

(*i*) See p. 18, *ante*, for a full discussion of the meaning of this proviso. Unless an agreement to the contrary be proved, the author retains the copyright.

Sect. 5.

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

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

(3) Where, under any partial assignment of copyright the assignee becomes entitled to any right comprised in copyright, the assignee as respects the rights so assigned; and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the

Sect. 5. copyright, and the provisions of this Act shall have effect accordingly (*f*).

(*a*) See p. 77.
(*b*) See sub-s. 3 of this section, and p. 77.
(*c*) See ss. 25, 26, 27 and 28, for application to British possessions.
(*d*) See p. 77.
(*e*) See p. 79.
(*f*) This sub-section makes no alteration in the law, and is merely explanatory.

Sub-section (1).—The general provision that the author of a work shall be the first owner of the copyright substantially reproduces the old law, but the author must be capable of acquiring copyright, that is, the work must be first published within those parts of His Majesty's dominions to which the act extends, or in the case of an unpublished work, the author must have been at the date of the making of the work a British subject or resident within His Majesty's dominions (*a*). Copyright on the death of the author or owner descends to his personal representatives. It also passes to the owner's trustee in bankruptcy (*b*).

Proviso.—This proviso leaves the law the same as it was before the Act with respect to photographs, extends it to engravings and limits it to such paintings and drawings as are portraits (*c*). It is to be observed also that it is made subject to any agrement to the contrary that may be made between the person ordering the work and the maker of it.

Photographs.—The author in ordinary cases has always been the person who takes the photograph, but where the grouping and general arrangement was under the control of some other person, that person was the author (*d*), and where an employee was sent by his employers to take a photograph, he was held to be the author (*e*). The present Act makes a substantial alteration by providing that the owner of the original negative at the time when such negative was made shall be deemed to be the author of the work (*f*). Where, however, the work is

(*a*) S. 1, sub-s. (1).
(*b*) See Bankruptcy Act, s. 44.
(*c*) For definition of portrait, see p. 68.
(*d*) *Nottage* v. *Jackson* (1883), 11 Q. B. D. 627, *per* BRETT, M.R., at p. 632; *Melville* v. *Mirror of Life Co.*, [1895] 2 Ch. 531.
(*e*) *Nottage* v. *Jackson* (1883), 11 Q. B. D. 627, *per* BRETT, M.R., at p. 632; *Melville* v. *Mirror of Life Co.*, [1895] 2 Ch. 531.
(*f*) See s. 21, p. 123, *post*.

ordered by another person, and is made for valuable consideration, the first ownership in the copyright belongs to the person so ordering the work in the absence of any contrary agreement (*g*). This was the old law, and it has not been altered. The photographer, therefore, may not sell or exhibit, or even reproduce copies without the owner's consent. He retains, however, the property in the negative (*h*).

It has been held that where a photographer has been allowed to enter and take photographs of a person's premises in the hope of selling copies to the owner of the premises, the copyright belongs to the owner of the premises, and not to the photographer (*i*).

The law does not appear to have been altered that where a photographer takes a person's photograph free of charge he has the copyright (*k*) (for permission to take the photograph is not valuable consideration) (*l*), and that is not altered by the fact that the person whose photograph has been taken afterwards orders copies and pays for them (*m*). This does not, however, prevent an agreement being made for such a case (*n*).

(*g*) Sub-s. 1 (*a*) of this section.

(*h*) *Pollard* v. *Photographic Co.* (1888), 40 Ch. D. 345; *Bolton* v. *London Exhibitions Ltd.*, & *Weiners Ltd.* (1898), 14 T. L. R. 550; *Stedall* v. *Houghton* (1901), 18 T. L. R. 126; *M'Cosh* v. *Crow & Co.* (1903), 5 F. (Ct. Sess.) 670; where photographers having taken a photograph of a customer which was paid for, without the consent of the customer exhibited enlargements on the walls of their studio. No objection was made, but the photographic business having changed hands it was held that the customer was entitled to restrain the exhibition and sale of the enlargements by *bonâ fide* purchasers. Acquiescence in the exhibition by the original photographer for many years made no difference, the original photographer being necessarily aware that the photographs were likenesses of customers. In reference to the question whether the property in the negative belonged to the customer or to the photographer, Lord Trayner expressed his *opinion* that the absolute property of the negative was not exclusively in either. "I think the photographer is entitled to the custody of the negative in order to secure to himself the exclusive privilege of printing from it should the customer desire this to be done. I think, further, that should the customer refrain from ordering copies for a considerable time, the photographer might destroy the negative as being practically of no further use. On the other hand, the customer has so much property in the negative, for the taking of which he has paid, that he may prevent the photographer using it except on the order or with the consent of the customer," at p. 679. *Boucas* v. *Cooke*, [1903] 2 K. B. 227.

(*i*) *Stachmann* v. *Paton*, [1906] 1 Ch. 774. The photographs are deemed to have been made for good consideration on behalf of the owner of the premises.

(*k*) *Boucas* v. *Cooke*, [1903] 2 K. B. 227.

(*l*) *Ellis* v. *Marshall & Son*, [1895] 64 L. J. (Q. B.) 757, at p. 759; *Melville* v. *Mirror of Life Co.*, [1895] 2 Ch. 531; *Stachmann* v. *Paton*, [1906] 1 Ch. 774.

(*m*) *Boucas* v. *Cooke*, [1903] 2 K. B. 227.

(*n*) See Encyclopædia of Forms, Vol. V. p. 351.

Sect. 5.

UNDER A CONTRACT OF SERVICE.

A photograph may be made of any work in which there is no copyright, and copyright in such photograph may be acquired; but this does not prevent any other person from also photographing the original work (*o*).

In the case of engravings and such paintings and drawings as are portraits the law is made the same as for photographs, and the above observations therefore apply equally in these cases.

Proviso (*b*).—This provision is independent of proviso (*a*), and may be read as if coming immediately after the words "provided that." It substantially reproduces the old law.

Under a Contract of Service.—A servant is a person subject to the command of his master, who not only prescribes the end of the servant's work, but retains the power of controlling the work as to the manner in which it shall be done. When, in fact, the contract is such that the employer has the right to say to the person employed, "You shall do it in this way, that is to say, not only shall you do it by virtue of your agreement with me, but you shall do it as I direct you to do it" (*p*).

"A servant is a person bound either by an express contract of service, or by conduct implying such a contract to obey the orders and submit to the control of his master in the transaction of the business which it is his duty as such servant to transact" (*q*).

Or Apprenticeship.—"Where the employer exercises some trade, and it is made a term of the contract that he shall teach as well as employ and remunerate the servant for some specific period in return for the service rendered, the contract amounts to an apprenticeship" (*r*). Every contract to serve on the one hand and to employ and teach on the other, amounts to a contract of apprenticeship.

There is no contract of apprenticeship if there is no engagement express or implied on the part of the master to teach (*s*).

"An apprentice is a person bound to and who serves another for the purpose of learning something which the other is to teach him" (*t*). The contract is of that nature that the master teaches, and the other serves the master with the intention of learning.

(*o*) *Hanfstaengel* v. *Empire Palace*, [1894] 3 Ch. 109, *per* LINDLEY, L.J., at p. 125.

(*p*) *Sadler* v. *Henlock*, 4 E. & B. 578; *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526; *Yewens* v. *Noakes*, 6 Q. B. D. 532, and see evidence of BRAMWELL, L.J., on Employers' Liability, Parl. Papers 1876, Vol. X. 58, and BEVAN on "Negligence," 3rd ed. p. 571.

(*q*) Stephen's Digest of Criminal Law, 5th ed. p. 271.

(*r*) Addison on Contracts, 11th ed. p. 937. See also Leake on Contracts, 6th ed. p. 477.

(*s*) *R.* v. *Shinfield*, 14 East, 541.

(*t*) *St. Pancras* v. *Clapham*, 2 E. & E. 742, *per* COCKBURN, C.J., at p. 750.

Sect. 5.
—
OR APPRENTICESHIP.

The general result is, that a publisher is the owner of the copyright where he employs some one to write an article or other literary composition, *and* the work was made in the course of that employment. There is, however, nothing to prevent any agreement to the contrary, and the section does not require such agreement to be in writing. But the agreement must be proved, and if a contract of service is established, the copyright is *primâ facie* in the employer. An intention to reserve the copyright may be inferred from the facts, where there is no express contract (*u*); and where the material facts are that a publisher employs a person to act as editor of a work and to write some of the articles at a given salary, and through the editor employs another person to write articles for a given remuneration, the inference to be drawn is that the publisher is the owner of the copyright (*x*).

Under the old law it was necessary to prove payment in full (*y*). A contract to pay was not sufficient (*z*). This was decided upon the wording of the particular statute (*a*), which requires the work to be "paid for." No such words appear in the present Act, and it would appear therefore that employment is sufficient, if the work is made in the course of that employment.

When a publisher abandons a publication, the author is entitled to sue on a *quantum meruit*, even without tendering or delivering the treatise (*b*), and the author is liable to be sued if he fails to supply the work, but it would be a good defence to show that the intended publication was illegal, though this cannot be presumed if the work is not produced (*c*).

It has been decided in the American Courts that where an author agrees to write on certain subjects for an encyclopædia, such articles to be subject to editorial changes, the copyright to belong to the proprietor of the encyclopædia, and the author having no right of separate publication, the author cannot insist upon his name being published as the author. The proprietors can publish the author's name if they wish, but they are not bound to do so (*d*), and where the proprietors have the sole copyright, they may publish the article in mutilated form, and interpolated with the work of other

(*u*) *Laurence & Buller Ltd.* v. *Aflalo*, [1904] A. C. 17.

(*x*) *Ibid.*

(*y*) *Ward, Lock & Co., Ltd.* v. *Long*, [1906] 2 Ch. 550, at p. 561; *Collingridge* v. *Emmett* (1887), 52 L. T. 864.

(*z*) *Brown* v. *Cooke* (1846), 16 L. J. Ch. 140.

(*a*) 5 & 6 Vict. c. 45, s. 18 (1).

(*b*) *Planche* v. *Colburn* (1833), 8 Bing. 14; *Gollancz* v. *Dent* (1903), 88 L. T. 258.

(*c*) *Gale* v. *Leckie* (1817), 2 Stark. 107.

(*d*) *Jones* v. *American Law Book Co.* (1908), 125 App. Div. N. Y. 519.

Sect. 5.

OR APPRENTICESHIP.

writers; the author's sole remedy, if any, being an action for injury to his reputation as an author (*e*).

Where a publisher commissions an author to write a work for a series, and the author delivers his manuscript, the publisher is bound to publish or return the manuscript (*f*), but specific performance of a contract to write a book will not be decreed (*g*).

Publication in separate form.—With the exception of the proviso to sub-s. (1) (*b*), in the case of contributions, there are no special provisions in this Act with regard to separate publication. It appears therefore that, in absence of any agreement to the contrary, where in the case of contributions to newspapers, magazines, or similar periodicals the ownership of the copyright is in the proprietor, under the publishing agreement or agreement of employment, the author can restrain the publication of the contributions in separate form (*h*), that is, otherwise than as part of a newspaper, magazine, or similar periodical, while, unless such right is reserved exclusively to the author, he himself cannot republish in separate form, since he is not the owner of the copyright. In the ordinary case, however, of a contribution to a review or other periodical where there is no special agreement, the author is the owner of the copyright; he can republish in separate form.

Newspapers.—The special provisions with regard to newspapers which appeared in the Bill when first introduced were afterwards dropped, and it appears, therefore, that the proprietor of a newspaper by virtue of the employment by him of those who write for the papers, and in the absence of any special agreement, has absolute copyright, and can republish any article or other matter contributed in separate form (*i*).

Under the Revised Berlin Convention of 1908, the rights of reproduction are as follows:—

> *Article* 9.—Serial stories, tales, and all other works, whether literary, scientific, or artistic, whatever their object, published in the newspapers, or periodicals of one of the countries of the Union may not be reproduced in the other countries without the consent of the authors.

(*e*) *American Law Book Co.* v. *Chamberlayne* (1908), 165 Fed. Rep. 313.

(*f*) *Le Suer* v. *Morang & Co., Ltd.* (1910), 20 Ont. L. R. 594. So held as an implied term of the agreement between the author and the publishers.

(*g*) *Clarke* v. *Price*, 2 Wils. (Ch.) 157; *Morris* v. *Colman* (1812), 18 Ves. 437.

(*h*) *In separate form* means separately from the periodical, either a book by itself, or in conjunction with other matter. *Mayhew* v. *Maxwell* (1860), 1 John & H. 312, at p. 318; *Smith* v. Johnson (1863), 4 Giff. 632; and see notes on collective works under s. 1, p. 18, where the subject is fully discussed.

(*i*) See also p. 18.

This paragraph probably remains unaltered by the present Act.

Sect. 5.

NEWSPAPERS.

> With the exception of serial stories and tales, any newspaper article may be reproduced by another newspaper unless the reproduction thereof is expressly forbidden. Nevertheless, the source must be indicated; the legal consequences of the breach of this obligation shall be determined by the laws of the country where protection is claimed.

This paragraph only relates to reproduction of articles in one newspaper by another. It is to be observed that newspaper articles may be protected from reproduction by any other newspaper by expressly forbidding such reproduction.

It is submitted that under the present Act, any reproduction is an infringement if without the consent of the owner of the copyright. This is somewhat more stringent than the Revised Convention, which allows reproduction if not expressly forbidden (*k*).

> The protection of the present Convention shall not apply to news of the day, or to miscellaneous information which is simply of the nature of items of news.

There is no decision that mere news has any protection, and the present Act does not seem to alter the law in this respect. There is, however, copyright in "the particular forms of language or mode of expression by which information is conveyed, and not the less so because the information may be with respect to the current events of the day" (*l*).

(*k*) In the Bill as first introduced in 1910 there was a special provision in these terms, "an article not being a tale or serial story, first published in a newspaper, may be reproduced in another newspaper if notice expressly forbidding reproduction is not published in some conspicuous part of the newspaper in which it is so first published, and if the source from which it is taken is acknowledged in such other newspaper." This clause was dropped when the Bill was reintroduced in 1911.

(*l*) *Walter* v. *Steinkopff*, [1892] 3 Ch. 489, *per* NORTH, J., at p. 495; *Exchange Telegraph Co.* v. *Howard and London and Manchester Press* (*Agency* 1906), 22 T. L. R. 375, where an injunction was granted restraining the defendants from surreptitiously obtaining or copying any cricket or other news collected by the plaintiffs for the purpose of transmission to their subscribers, and from transmitting, communicating or delivering such news to any person. "The knowledge of a fact which is unknown to many people may be the property of a person in that others will pay the person who knows it for the information as to that fact," *per* BUCKLEY, J. *Springfield* v. *Thame* (1903), 89 L. T. 242. Where a journalist contributed an article to a morning newspaper which was not published as written, but only a paragraph containing the facts in an abbreviated form compiled from the information contained in

Sect. 5. — NEWSPAPERS, PRINTERS AND READING ROOMS REPEAL ACT, 1869.

The provisions of the **Newspapers, Printers and Reading Rooms Repeal Act, 1869**, may be referred to here. Under that Act it is compulsory for printers to keep a copy of every paper printed by them, and to write thereon the name and address of their employers; but this requirement does not extend to papers printed by authority of Parliament, or to impressions of engravings, or to the mere printing of names and addresses. The name and address of the printers must appear on every paper or book, except any paper printed by the authority of any public board or public office, and in the case of the University Press the words, "Printed at the University Press, Oxford," or "The Pitt Press, Cambridge" are to appear. Penalties are attached to the non-performance of these requirements, but actions for their recovery can only be commenced in the name of the law officers.

Under the **Newspaper Libel and Registration Act, 1881** (*m*), there are certain special provisions for newspapers which may be shortly summarised as follows:—

By *sect.* 2, fair and accurate reports of a public meeting published in a newspaper without malice and for the public benefit are privileged.

Sect. 8. establishes a register of newspaper proprietors.

Sect. 9 provides that printers and publishers must make annual returns each July of (i) the title of the newspaper; and (ii) the names of all the proprietors of the newspaper, together with their occupations, places of business and residences. The Board of Trade under *sect.* 7 may authorise the registration of the newspaper in the name of certain "representative proprietors."

The penalty for omission to make these annual returns within one month is a sum not exceeding twenty-five pounds (*sect.* 10), while for wilful misrepresentation or omission from a return the penalty is one hundred pounds (*sect.* 12). These penalties are recoverable summarily (*sect.* 16). The register is open to all persons to search and inspect (*sect.* 13). The Act does not extend to Scotland.

Sub-section (2).—This sub-section deals with (1) assignments, (2) licences, and makes the law uniform with respect to all

the article, and that paragraph was reprinted with slight alterations in an evening newspaper of the same day, the journalist was held not entitled to an injunction against the publishers of the evening paper. "In my opinion, if the original composition had been accepted and published *verbatim et litteratim* the paragraph in the *Evening Standard* would still have been no infringement of the copyright in the original composition, since there is no copyright in news, but only in the manner of expressing it," *per* JOYCE, J., at p. 243.

(*m*) 44 & 45 Vict. c. 60.

Sect. 5. — SUB-SECTION (2). Assignments.

works abolishing the old and somewhat complicated provisions with respect to different works. That there is a difference between a licence, even an exclusive licence, and an assignment is well settled(*n*), and it has been so held in the case of copyright (*o*).

An assignment carries with it the whole interest in the thing assigned, including the right to reassign, while a licence is personal and not assignable without the grantor's consent. An exclusive licence is a leave to do a thing, and a contract not to give leave to anybody else to do the same thing. But it confers no interest or property in the thing, and only makes an action lawful which without it would have been unlawful (*p*); moreover, a licensee has no title to sue in his own name (*q*).

Where there is an assignment of the copyright in a work, and whether an entire work or a work consisting of several articles or compositions, the assignee has the full power of publishing the various compositions in any way, either separately, or together, or in part (*r*); but a grant of the sole right to print and publish a composition in a particular form does not necessarily amount to an assignment (*s*), and the question whether in any case there is an assignment depends on the terms of the particular document involved.

Partial assignment is allowed—under the old law this was held not to be the case (*t*). Assignments may also be limited to particular countries and in respect of time. The old law allowed such limitations in the case of licences, and the change in the law has put both licences and assignments on the same footing. There may be a grant of a licence with respect to a particular edition (*u*), or as to publishing in serial or volume

(*n*) *Heap* v. *Hartley*, 42 Ch. D. 461.

(*o*) *London Printing and Publishing Alliance, Ltd.* v. *Cox*, [1891] 3 Ch. 291. Where it was held that an assignee of the entire copyright in a painting without notice of a previous licence given to A. to publish in monochrome, could sue A. for infringement, although A. published without notice of the assignment.

(*p*) *Heap* v. *Hartley*, 42 Ch. D. 461.

(*q*) *Heap* v. *Hartley*, 42 Ch. D. 461; *Neilson* v. *Horniman* (1909), 25 T. L. R. 188. Where in the case of a dramatic piece the "sole right" to perform in the provinces for a year was granted by the proprietor of the performing right, it was held that there was no assignment and the grantee being only a licensee had no title to sue in his own name third persons for infringement of his sole right of performance.

(*r*) *Re Jude's Musical Compositions*, [1907] 1 Ch. 651, at p. 661.

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

(*t*) *Jeffreys* v. *Boosey* (1854), 4 H. L. Cas. 813, at p. 992.

(*u*) *Warne* v. *Routledge* (1874), L. R. 18 Eq. 497, where it was held that a new edition might be brought out by another publisher, although all the copies of the first edition had not been sold.

Sect. 5. SUB-SECTION (2). Assignments.

form (*x*). A licence to publish under a publishing agreement between an author and a publisher, being personal, is not assignable without the author's consent, whether the licensees are individuals, partners, or a limited company (*y*).

Where there is a licence in general terms to print, publish, and sell, the licensee may print without the author's name in any form (*z*).

In the case of an assignment, the assignor, in absence of agreement to the contrary, may continue selling such copies as were printed before the assignment, and are still in his possession (*a*). The assignment may be by gift, bequest or sale, and as the result of assignment, the assignee obtains control over the work, and can publish new editions with alterations such as condensation or omission, so long as the change is not such as to injure the author's reputation. If a new edition is edited by a person other than the original author, the publisher may be liable on the ground that the work of another is being passed off as that of the original author (*b*).

Both assignments and licences must be in writing, signed

(*x*) *Re Jude's Musical Compositions*, [1907] 1 Ch. 651.

(*y*) *Stevens* v. *Benning* (1854), 1 K. & J. 168. "If an author in consideration of a sum of money paid to him agrees that certain persons shall have the sole power of printing, reprinting, and publishing a certain work for all time, that would be parting with the copyright; but if the agreement is that the publishers performing certain conditions on their part, should, so long as they do perform such conditions, have the right of printing and publishing the book, that is a very different agreement. It is, in fact, a personal contract," *per* WOOD, V.C., at p. 174. *Read* v. *Bentley* (1857), 3 K. & J. 271; *Hole* v. *Bradbury* (1879), 12 Ch. D. 886 (Partners), where the agreement was that if the publication resulted in a loss the publishers were to bear the whole of it, and if there was a profit they were to pay half of it to the authors. It was held to be merely personal to the individuals comprising the publishers' firm and not assignable without consent, and accordingly the successors of the publishers' firm were restrained from publishing the book. *Griffith* v. *Tower Publishing Co.*, [1897] 1 Ch. 21 (a Limited Company); *Lucas* v. *Moncrieff* (1905), 21 T. L. R. 683, where the plaintiff having agreed to act as reader and adviser to the defendant, a publisher, afterwards wrote a book to be published by the defendant, profits to be shared equally. On the defendant becoming bankrupt, it was held that the agreement as to sharing profits did not vest the copyright in the defendant, but that it was a personal contract, and accordingly the defendant's trustee in bankruptcy had no right to reprint and publish the book.

(*z*) *Brook* v. *Lloyd, Ltd.* (1910), 26 T. L. R. 549. If the author of a copyright book intends to limit his licensee to printing and publishing in his own name, he should take care to insert words expressly limiting the licensee to that personal right.

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

(*b*) *Archbold* v. *Sweet* (1832), 5 C. & P. 219; *Lee* v. *Gibbings* (1892), 67 L. T. 263.

Sect. 5.
—
SUB-SECTION (2).
Assignments.

by the owner of the copyright or his authorised agent (*c*). But it does not appear that the authority of the agent need be in writing, as was the case under the old law in respect of the assignments of paintings, drawings, and photographs.

The proviso with respect to the period of assignment or licence after the death of the author who is the first owner of the copyright, is most important (*d*). It introduces an entirely new principle, which is to some extent analogous to the law with regard to the widows of civil servants—whereby a civil servant cannot mortgage his pension so as to deprive his widow of her interest. The intention appears to be that except by will, an author is only to be at liberty to assign or grant an interest in the copyright for a period not exceeding his life and twenty-five years after his death. At the expiration of such period the copyright shall become part of the personal estate of the author, with respect to the last twenty-five years of the copyright period, and the rights for that period revert to the author's personal representatives, who can then make any new arrangements with respect to the copyright. Any agreement contrary to such a reversion is void, and an author cannot contract out of the proviso.

In the case of an author who became bankrupt, the last twenty-five years of the copyright period would not form any part of the estate of the author which would pass on bankruptcy (*e*).

This proviso does not apply to the assignment of the copyright in a collective work or a licence to publish a work as part of a collective work (*f*).

(*c*) For form of assignment, see Encyclopædia of Forms, Vol. V. p. 328.

(*d*) See sub-s. (2) of this section. The author is the first owner in all cases except (1) where the work is executed on commission, and (2) where the author is under employment.

(*e*) Copyright passes to the trustee of a bankrupt owner: *Mawman* v. *Tegg* (1826), 2 Russ. at p. 392; and see Bankruptcy Act (1883), 46 & 47 Vict. c. 52, s. 44; *In re Curry* (1848), 12 Ir. Eq. 391; *Re Grant Richards, Ex parte Warwick Deeping*, [1907] 2 K. B. 33, where it was held that a transaction between an author and a publisher upon the terms that the publisher had the copyright and should pay certain royalties, was analogous to a sale of goods to be paid for according to different scales in different events, and that on the bankruptcy of the publisher the copyright vested in the trustee in bankruptcy, and that the author was only entitled to prove in the bankruptcy for the damage sustained by the breach of the agreement.

(*f*) S. 35, sub-s. (1), a collective work means: (*a*) An encyclopædia, dictionary, year book, or similar work; (*b*) a newspaper, review, magazine, or similar periodical; and (*c*) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated.

Sect. 5.

SUB-SECTION (2).

Assignments in the case of joint authors.

Joint Authorship.—In this case, the meaning of the proviso with respect to assignment is very doubtful. The first owner of a copyright cannot assign, except by will, for the last twenty-five years of the period of fifty years after his death, and the copyright during that period devolves on his legal personal representatives. The proviso as framed only deals with the ownership of a work by one person and does not consider the case of joint authors. Section 16 deals with joint authorship, and under that section, copyright subsists during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the *longer*, and references in the Act to the period *after the expiration of any specified number of years from the death of the author* are to be construed as references to the period after the expiration of the like number of years from the death of the author who dies first, or after the death of the author who dies last, whichever period may be the *shorter* (*g*).

The construction to be placed upon this section with reference to the proviso as regards assignment gives rise to questions of great difficulty (*h*); but it is submitted that the wording of the proviso that . . . no assignment . . . otherwise than by will . . . shall be operative to vest in the assignee . . . any rights with respect to the copyright . . . *beyond the expiration of twenty-five years from the death of the author* . . . (*i*) is a

(*g*) In the case of a work of joint authorship copyright shall subsist during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer, and references in this Act to the period after the expiration of any specified number of years from the death of the author shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first or after the death of the author who dies last, whichever period may be the shorter, and in the provisions of this Act with respect to the grant of compulsory licences a reference to the date of the death of the author who dies last shall be substituted for the reference to the date of the death of the author.

(*h*) The difficulty of construction was admitted during the Committee stages of the Bill. Lord Gorell, in moving an amendment, said: "I do not think that this clause (that is the proviso with respect to assignment) copes with the difficulties which will arise in the case of a work of joint authorship." While Lord Haldane, who was in charge of the Bill in the House of Lords, referred to it in these terms: "The application of the proviso will create considerable complication in the case of joint authorship."

(*i*) The proviso reads: Provided that where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him otherwise than by will after the passing of this Act, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work

reference to the period *after the expiration of a specified number of years from the death of the author* (*k*).

Assuming then this to be the case, and it is difficult to see what other construction could be put upon it, precisely similar cases arise as in the proviso to s. 3 with respect to restricted and unrestricted copyright, in the case of works of joint authors. These cases are fully discussed under s. 3 (*l*), and it is submitted that the example there worked out holds in the case of the proviso respecting assignment; always premising that—

For the words "**unrestricted copyright**" there must be substituted the words the "**period of valid assignment;**"

And for the words "**restricted copyright**" the words "**period of reversionary interest**" (*m*).

The result is as follows:—

A. and B. write a joint work. The term of copyright subsists I. for 50 years after the death of the author who dies first, *or* II. for the life of the author who dies last, whichever period is the longer.

I. Where B. dies within fifty years of the death of A.—Suppose A. dies in 1920, B. dies within fifty years of that date, that is before 1970. Copyright subsists until (1920 + 50), that is until 1970. The periods of possible assignment are as follows:—

(*a*) If B. dies within 25 years of the death of A., that is before 1945, then—

(i) the period of A.'s valid assignment of his interest is from his death in 1920 for 25 years, that is until 1945; and

beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void, but nothing in this proviso shall be construed as applying to the assignment of the copyright in a collective work or a licence to publish a work as part of a collective work.

(*k*) The wording is slightly different, the word "beyond" being used instead of the word "after," but it is doubtful whether this changes the construction.

(*l*) See p. 64.

(*m*) These phrases are taken arbitrarily to indicate the period in question, namely, "period of valid assignment" for the period during which an author may validly assign his interest, while "period of reversionary interest" is taken for period during which any assignment, if made, would be invalid, and during which the copyright of necessity devolves upon the author's legal personal representatives notwithstanding any agreement to the contrary.

Sect. 5.

(ii) the period of A.'s reversionary interest is from 1945 until 1970,

since the period after the expiration of 25 years from the death of A., namely from 1945 until 1970, when copyright expires, is *shorter* than the period, from the death of B. who dies before 1945 until 1970;

(iii) the period of B.'s valid assignment of his interest is from his death, which is before 1945 for 25 years, and after the expiration of such 25 years, B.'s reversionary interest runs until 1970, when copyright expires.

(*b*) If B. dies after 25 years from the death of A., that is, after 1945, but before 1970, then—

(i) the period of A.'s valid assignment of his interest is from his death in 1920 until the death of B., although that period is longer than 25 years; and

(ii) the period of A.'s reversionary interest is from the death of B. until 1970,

since the period from the death of B., who dies after 1945, until the expiration of copyright in 1970, is *shorter* than the period after the expiration of 25 years from the death of A. until the expiration of copyright, namely from 1945 until 1970.

(iii) the period of B.'s valid assignment of his interest is from his death which is after 1945 until 1970, when copyright expires. In this case the period of B.'s valid assignment is less than 25 years and there is no reversionary period at all.

II. Where B. survives A. for more than fifty years.—A. dies in 1920, but B. survives A. for more than fifty years, that is, dies after 1970. Copyright subsists until the death of B., and then ceases.

(i) As regards A., the period of reversionary interest never arises, and he can assign for the full period of copyright. The case is similar to I. (*b*) (i) and (ii) *supra*, and the period during which A. can validly assign his interest is from his death in 1920 until the death of B. When B. dies the copyright ceases. The period of valid assignment therefore coincides with the full term of copyright and there is no period of reversionary interest.

(ii) B. cannot assign his interest for any period after his death, since copyright expires when he dies.

The general result is that as regards joint authors, the date

Sect. 5.

II. WHERE B. SURVIVES A. FOR MORE THAN FIFTY YEARS.

of the death of B., that is of the author who dies last, is in every case the factor which determines the period of reversionary interest. In the case of the author who dies last, there is only one case in which there is any reversion in his interest—namely, if he dies within 25 years of the death of his co-author. In that case also he is able to make a valid assignment for the full period of 25 years. In no other case is a reversionary interest possible, while in one other case only—namely, when he dies within 50 years, but after 25 years from the death of his co-author, is he able to assign his interest at all, and the period of such assignment is then less than 25 years. In the case of the author who dies first the respective periods are as given in the above example, and it is to be observed that where his co-author (that is the author who dies last) survives him for more than 50 years, he can make a valid assignment for the full term of copyright and there is no reversionary interest (*n*).

SECTION VI.

Civil Remedies.

Civil remedies for infringement of copyright.

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

(2) The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the absolute discretion of the Court.

(3) In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts

(*a*) S. 8 exempts the innocent infringer from liability to pay damages; whilst under s. 9 no injunction or interdict can be obtained to restrain the construction, or order the demolition of works of architecture which have been commenced.

Offences and summary remedies are dealt with in ss. 11, 12 and 13. Mere infringement may, however, be the subject

(*n*) This sub-section in its relation to works of joint authors has been dealt with somewhat fully, owing to its acknowledged difficulties.

Sect. 6. in issue the existence of the copyright, or, as the case may be, the title of the plaintiff, and where any such question is in issue, then—

(*a*) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work ;

(*b*) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein (*a*).

of a criminal conspiracy if two or more persons combine together with intent to infringe copyright. *R.* v. *Willetts*, (1906), 70 J. P. 127; *R.* v. *Bokenham* (1910), Times, July 22, p. 4.

Sub-section (1).—The penalties under the old law have been abolished and this sub-section does nothing more than make statutory the law that civil wrongs give rise to civil remedies.

In the case of an unpublished work the author can sue for an injunction which will be granted when the illegal act is threatened or where its repetition appears to be intended (*b*).

Damages may be recovered for infringement, and it is not necessary to prove special damage (*c*). The copies printed and published must be delivered up (*d*). While damage actually suffered need not be shown to obtain an injunction, the Court must be satisfied that damage is likely to result (*e*) ;

(*a*) See p. 86.

(*b*) *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501, at p. 507 ; *Exchange Telegraph Co.* v. *Gregory & Co.*, [1896] 1 Q. B. 147.

(*c*) *Exchange Telegraph Co.* v. *Gregory & Co.*, [1896] 1 Q. B. 147, at p. 153.

(*d*) *Mansell* v. *Valley Printing Co.*, [1908] 1 Ch. 567.

(*e*) *Tinsley* v. *Lacy* (1813), 1 Hem. & M. 747 ; *Kelly* v. *Hooper* (1839), 4 Jur. 21 ; *Campbell* v. *Scott* (1842), 11 Sim. 31 ; *Borthwick* v. *Evening Post* (1888), 37 Ch. D. 449.

the injunction must be applied for promptly and there must be no unnecessary delay (*f*). If part of the work is clearly infringed, the Court will grant an injunction without waiting till the whole amount infringed is ascertained (*g*).

It is immaterial that the profits of the infringement have been large or small (*h*). The right to an account is ancillary to an injunction and will not be ordered where the case for an injunction is not made out (*i*), while both an account and an inquiry as to damage will not be allowed (*k*). The account will be for an account of net profits (*l*), and if the profits do not entirely cover the damage suffered, the plaintiff is entitled to an inquiry as to damages to supplement his compensation (*m*). The claim may include damages for infringement as well as an injunction, delivery up of copies which remain in the possession of the infringer and damages for conversion of such copies as have been disposed of (*n*), and the whole book may be ordered to be delivered up if the infringing portions cannot be conveniently separated (*o*).

(*f*) *Mawman* v. *Tegg* (1826), 2 Russ. 385, at p. 393; *Baily* v. *Taylor*, 1 Russ. & My. 73; *Lewis* v. *Chapman* (1840), 3 Bea. 133; *Buxton* v. *James* (1851), 5 De G. & Sm. 80, where uncertainty as to the law was held a sufficient excuse for delay. *Hogg* v. *Scott* (1874), L. R. 18 Eq. 444. There may be sufficient acquiescence to justify the Court in refusing an interlocutory injunction, but a much stronger case is required to deprive a plaintiff of his right to an injunction at the hearing. *Pitman* v. *Hine* (1884), 1 T. L. R. 39.

(*g*) *Smith* v. *N. S. W. Ry. Co.*, 23 L. J. Ch. 562; *Lewis* v. *Fullerton* (1839), 2 Bea. 6.

(*h*) *Nicols* v. *Pitman* (1884), 26 Ch. D. 374, at p. 379.

(*i*) *Smith* v. *L. & S. W. Ry. Co.* (1854), 23 L. J. Ch. 562. The case of a patent. *Baily* v. *Taylor* (1829), 1 R. & M. 73; *Sweet* v. *Maughan* (1840), 11 Sim. 51; *Price's Patent Candles* v. *Bawden* (1858), 4 K. &. J. 727. A patent case.

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

(*l*) *Delfe* v. *Delamotte* (1857), 3 K. & J. 581; *cf. Pike* v. *Nicholas* (1869), L. R. 5 Ch. 251, at p. 260.

(*m*) *Mawman* v. *Tegg* (1826), 2 Russ. 385, at p. 400.

(*n*) *Hole* v. *Bradbury* (1879), 12 Ch. D. 886. The Court has power under the general jurisdiction to order delivery up for destruction of copies. Where the order was that if profits had been made, then on the assent of the defendants the copies were to be delivered up, while if there were no profits, delivery up for destruction. *Warne & Co.* v. *Seebohm* (1888), 39 Ch. D. 73; *Butterworth* v. *Kelly* (1888), 4 T. L. R. 430, an injunction granted though only one copy sold; *Muddock* v. *Blackwood*, [1898] 1 Ch. 58.

(*o*) *Trusler* v. *Murray* (1789), 1 East, 363; *Cary* v. *Longman* (1801), 1 East, 358, where it was held that an action lay for printing the new corrections and additions to an old book. *Mawman* v. *Tegg* (1826), 2 Russ. 385; *Stevens* v. *Wildy* (1850), 19 L. J. Ch. 190; *Warne & Co.* v. *Seebohm* (1888), 39 Ch. D. 73, the order in this case was that the defendant should state on oath what copies existed, extract from such copies as were in his possession or power all passages copied, taken or colourably imitated for cancellation, and produce the copies for examination if required after the infringing portion had been removed. *Boosey* v. *Whight & Co.*, (No. 2) (1899), 81 L. T. 265.

Sect. 6.

SUB-SECTION 2).—COSTS.

Sub-section (2). Costs.—This sub-section substantially re-enacts s. 2 of the Copyright (Musical Compositions) Act, 1888, and extends it to all cases.

Where copyright has been infringed the plaintiff is entitled as of right to an injunction, and under ordinary circumstances to costs. But costs being in the discretion of the Court, the successful party may be refused his costs if he has acted unfairly (*p*), or if there has been acquiescence or undue delay (*q*). If the action is one which should never have been brought, a successful plaintiff may be ordered to pay the defendant's costs as well as his own (*r*).

Where a defendant offers to submit to an injunction with costs, if the plaintiff continues his action, though he may be entitled to judgment, the court will not give him costs subsequent to the date of the offer (*s*).

Sub-section (3).—This sub-section is a matter of pleading—under the old law so far as affects literary works, where the ownership of the copyright was disputed, the point had to be taken in the defence, and this is now extended to the case of all works.

Where, therefore, as regards any work—

(1) The existence of the copyright; or

(2) The absence of the title of the plaintiff are in dispute, they must be specially pleaded. Two cases then arise—

(i) Where a name purporting to be that of the author is printed on the work, then the presumption is that the person whose name is so printed is the author, and the onus lies upon the defendant to rebut such presumption and prove that the plaintiff was not the author; and

(ii) When the work appears to be anonymous, or the work is written under a pseudonym, the publisher shall be presumed to be the owner of the copyright for the purpose of all proceedings, unless proof be given of the contrary by the defendant.

These provisions are in accordance with Article 15 of the Berlin Convention (*t*)

(*p*) *Maple* v. *Junior Army & Navy Stores* (1882), 21 Ch. D. 369, at p. 373; and see *Cobbett* v. *Woodward* (1872), 14 Eq. 407, at p. 414.

(*q*) *Walter* v. *Steinkopff*, [1892] 3 Ch. 489, at p. 500.

(*r*) *Dicks* v. *Brooks* (1880), 15 Ch. D. 22, at p. 41.

(*s*) *Colburn* v. *Simms*, 2 Hare 543, at p. 561; *Muddock* v. *Blackwood*, [1898] 1 Ch. 58, at p. 64.

(*t*) *Art.* 15.—In order that the authors of works protected by the present Convention may, in the absence of proof to the contrary, be considered as such, and be consequently admitted to institute proceedings against pirates before the courts of the various countries of the Union, it will be sufficient

SECTION VII.

Sect. 7.

Rights of owner against persons possessing or dealing with infringing copies, etc

7. All infringing copies (*a*) of any work in which copy right subsists, or of any substantial part thereof (*b*), and all plates (*c*) used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

The old law is substantially reproduced in this section, which corresponds to s. 23 of the Copyright Act of 1842, with the extension to sculpture and like works. Under the old law previous demand in writing was necessary. This no longer seems to be the case. It is to be observed that proceedings for recovery under this section can only be taken when the whole work or any substantial part thereof is reproduced—where only a few passages were reprinted the property in the infringing work would not pass. This is in substantial accord with an Irish decision under the old law (*d*). In such a case the plaintiff would be entitled to delivery for cancellation (*e*). The proceedings under this section will be the ordinary proceedings for detinue or conversion.

SECTION VIII.

Exemption of innocent infringer from liability to pay damages, etc.

8. Where proceedings are taken in respect of the infringement of the copyright in any work and the

that their name be indicated on the work in the accustomed manner.

For anonymous or pseudonymous works, the publisher whose name is indicated on the work shall be entitled to protect the rights belonging to the author. He shall be, without other proof, deemed to be the legal representative of the anonymous or pseudonymous author.

(*a*) "Infringing copies" means copies including colourable imitations made or imported in contravention of the provisions of the Act. For the meaning of a "copy," see p. 43, and cases there cited.

(*b*) For the meaning of "substantial part," see p. 35.

(*c*) For the meaning of "plate," see s. 35, sub-s. (1), p. 152.

(*d*) *Rooney* v. *Kelly* (1861), 14 Ir. C. L. R., at p. 171. "It would be difficult to maintain that under the 23rd Section the proprietor of the copyright in a book would acquire the property of all copies of another book which contained printed therein a few pages or passages of his book."

(*e*) *Warne* v. *Seebohm* (1888), 39 Ch. D. 73.

Sect. 8.

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

This section is new law. Under the old law an innocent infringer was in most cases liable to pay damages. Now ignorance of the existence of copyright is a good defence, and the plaintiff is not entitled to any remedy other than an injunction or interdict where the defendant—

(i) In the pleadings in defence states that he was not aware of the existence of the copyright; and

(ii) proves—

(a) that at the date of the infringement he was not aware of the existence of the copyright; and

(b) that he had not reasonable grounds for suspecting its existence.

It is difficult to say what the Courts will require by way of proof when the defendant alleges at the date of infringement he was not aware, and that he had no reasonable grounds for suspecting that copyright subsisted in the work. Actual knowledge is not essential. It is enough if the defendant had the means of knowledge and the onus of proving a negative is thrown upon the defendant (*b*).

As originally introduced the bill contained provisions for optional registration, and it was provided that if sufficient particulars had been entered in the register a defendant was deemed to have had reasonable means of making himself aware the copyright subsisted in the work. The provisions as to registration were, however, dropped in the committee stage, thus bringing the British law into line with Article 4 of the Berlin Convention, which provides that the enjoyment of copyright should not be subject to any formalities. It therefore becomes entirely a question of fact whether under the particular circumstances of each case, there were such means of knowledge that the defendant ought to have known of the

(*a*) That is, the date when the infringing work is made, sold, or imported in contravention of the provisions of s. 2, see p. 48. The date when the wrongful act is committed which gives rise to the cause of action.

(*b*) See also s. 2, sub-s. 3, and notes thereto, p. 55.

existence of the copyright, and would have had actual knowledge had he used reasonable diligence. Whether in the ordinary course of things the average man in like circumstances would have been aware of its existence. Sect. 8.

Where the name of the author is indicated upon the work, it is difficult to see in what case a defendant would be unaware of the existence of the copyright, or would not have reasonable means of making himself aware of its existence, in view of the fact that copyright subsists for a period of fifty years after the author's death, since it might well be held in such a case, that the person reproducing the work of another was put upon his inquiry, as to the date of the death of a person whose name was indicated upon the work.

SECTION IX.

Restriction on remedies in the case of architecture.

9.—(1) Where the construction (*a*) of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work has been commenced the owner of the copyright shall not be entitled to obtain an injunction or interdict to restrain the construction of such building or structure or to order its demolition.

(2) Such of the other provisions of this Act as provide that an infringing copy of a work shall be deemed to be the property of the owner of the copyright, or as impose summary penalties, shall not apply in any case to which this section applies (*b*).

This section is new—the inclusion of architecture amongst copyright property was recommended by the Copyright Committee of 1910, and brings the British law into uniformity with the Berlin Convention. It is necessary to look at foreign decisions to see the working of the law with respect to works of architecture (*c*).

(*a*) The construction of an architectural work of art is not a publication of the work, s. 1, sub-s. 3, and see p. 38 note (*a*).

(*b*) See ss. 7, 11, 14, and 15.

(*c*) See this more fully discussed at p. 31, *ante*.

Sect. 9.

Protection is only afforded to original works of artistic character, and not to works of common type, and there will probably be considerable difficulty in proving infringement. The burden of proof lies upon the architect who is the plaintiff. It is the main design that will be protected (*d*), and not merely a feature of the work, and it will be necessary to prove that the main design is both original and artistic, and the term artistic will undoubtedly be very carefully construed by the Courts. It is possible that as a result of the inclusion of architecture amongst protected works, the practice of signing a building, which is common in France, will grow up. The practice is already officially recognised by the Royal Institute of British Architects.

The remedy open to a plaintiff whose work has been infringed will be an action for damages, since once a building has commenced to be constructed it cannot be pulled down. The amount of damages will probably be assessed upon the basis of the cost of the building infringed, and the nature of the infringement (*e*).

SECTION X.

Limitation of actions.

10. An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement.

Under the old law, the limitation of actions varied according to the nature of the work. In the case of literary rights and performing rights in dramatic and musical works, the period was twelve months; for engravings and sculpture, six months; while in the case of paintings, drawings, and photographs there was no special limitation.

Under this section the law is made uniform in the case of all works, and the owner of the copyright may bring his action within three years of any infringement, that is to say, in the case of any unlawful sales or importations or like infringements,

(*d*) S. 2, sub-s. 1 (2), and see p. 60 for the meaning of Main Design.

(*e*) *Lafont* v. *Lallement*. See Minutes of Evidence of the Copyright Committee, 1910, p. 177, where, in view of the small cost of the cottage which was infringed, the damages were assessed at 100 francs. *Beyaert* v. *La Revue de L'Architecture en Belgique*. Minutes of Evidence of Copyright Committee, 1910, p. 177, where a publication of a design of an Antwerp bank in a journal was prohibited: costs and nominal damages were awarded.

within three years from such sale or importation, although the work may have been published more than three years before action brought. Sect. 10.

The section does not apply so far as summary remedies are concerned. Proceedings taken under s. 11, are taken under the Summary Jurisdiction Acts, and must be within six months after the offence was committed. In cases where the proceedings are against "any person for any act done in pursuance or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority," the limitation is six months (*x*).

SECTION XI.

Summary Remedies.

Penalties for dealing with infringing copies, etc.

11.—(1) If any person knowingly (*a*)—

(*a*) makes for sale or hire any infringing copy of a work in which copyright subsists (*b*); or

(*b*) sells or lets for hire, or by way of trade exposes or offers for sale or hire any infringing copy of any such work (*c*); or

(*c*) distributes infringing copies of any such work either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright (*d*); or

(*d*) by way of trade exhibits in public any infringing copy of any such work (*e*); or

(*e*) imports for sale or hire into the United Kingdom any infringing copy of any such work (*f*):

he shall be guilty of an offence under this Act, and be liable on summary conviction to a fine not exceeding forty shillings for every copy dealt with in contravention of this section, but not exceeding fifty pounds in respect of the same transaction; or in the case of a second or

(*x*) The Public Authorities Protection Act, 1893, 56 & 57 Vict. c. 61, s. 1; see also *Muddock* v. *Blackwood*, [1898] 1 Ch. 58, at p. 64.

Sect. 11. subsequent offence, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months.

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

(*a*) This sub-section corresponds closely with s. 1 (1) of the Musical Copyright Act, 1906, and its sub-divisions correspond to the sub-divisions of s. 2 (2) of this Act. The copies must be infringing copies, and there is no infringement if the act is innocent (s. 2, sub-s. 2). The act must be wilful, and the onus is upon the person who brings the action for infringement to prove knowledge on the part of the defendant, overrruling *Mansel* v. *Valley Printing Co.*, [1908] 2 Ch. 441. As evidence of knowledge notice should be given: *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501.

(*b*) In *Britain* v. *Kennedy* (1902), 19 T. L. R. 122, it was held that it was not sufficient evidence of "making for sale," for a person to canvass, and show an infringing copy of the work.

(*c*) A person who quotes an approximate price in the negotiations for a sale does not "offer for sale"; *Wolff* v. *Wood* (1903), Times, Oct. 31, p. 5; nor does he "expose for sale" if he canvasses for orders and shows an infringing copy of a bust: *Britain* v. *Kennedy* (1902), 19 T. L. R. 122.

(*d*) Under the old law it was immaterial that the distribution was limited: see *Novello* v. *Sudlow* (1862), 12 C. B. 177. It appears, however, that under the Act there may be gratuitous distribution without the person so distributing becoming liable to penalties unless the distribution is for the purposes of trade, or to such an extent as to affect prejudicially the owners of the copyright. Whether such is the case will be a question of fact.

(*e*) Exhibition in public not by way of trade does not appear to make the exhibitor liable to a penalty.

(*f*) Under the old law ignorance in the case of importing was not a good defence. See *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501. It is now necessary to prove knowledge.

subsequent offence, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months (*i*).

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

(4) Nothing in this section shall, as respects musical works affect the provisions of The Musical (Summary

(*g*) For the full definition of "plate," see s. 35, sub-s. 1. In substance it means any plate or appliance used or intended to be used for reproducing copies of a work, or for making records, perforated rolls or other contrivances for acoustic representation. Under the Musical Copyright Act, 1906, the definition of "plate" is different: see p. 98, *post*.

(*h*) For the meaning of "in public," see p. 38, *ante*.

(*i*) See *Karno* v. *Pathé Frères* (1909), 100 L. T. 260, approving (1908), 99 L. T. 114. See also *Monaghan* v. *Taylor* (1886), 2 T. L. R. 685; *Cole* v. *Gear* (1888), 4 T. L. R. 246; *Moul* v. *Coronet Theatre* (1903), Times, Feb. 4, p. 10; *Sarpy* v. *Holland*, [1908] 2 Ch. 198. It has been held that the proprietor of a theatre where an unauthorised public performance takes place will not be liable if he has no management in the representation, and where he is not in partnership with the person who has the control over the performance; *Russell* v. *Briant* (1849), 8 C. B. 836; *Lyon* v. *Knowles* (1863), 3 B. & S. 556. But the proprietor is liable if the company and stage manager are in his employment; *Marsh* v. *Conquest* (1864), 17 C. B. (N. S.) 418. A stage manager instructed to produce a dramatic piece, who can neither forbid the performance nor engage or dismiss the actors, is not liable; *French* v. *Day* (1893), 9 T. L. R. 548.

(*k*) This sub-section considerably simplifies the procedure by enabling the order for delivery up, or destruction of, the infringing copies or plates to be made in the proceedings. Under the old law independent proceedings were necessary. ..

Sect. 11. Proceedings) Copyright Act, 1902, or the Musical Copyright Act, 1906 (*l*).

(*l*) See p. 96, *post*, where the sections of these Acts are set out in full with notes.

This section imposes summary penalties in the case of all works (*a*). It is modelled upon the Musical Copyright Act, 1906, and makes available for all works certain remedies which exist under that Act for musical works.

The clauses dealing with the seizure of pirated copies, and the right of search contained in the Musical Copyright Act, 1906, appeared in the Copyright Bill when it was introduced and applied to all works. Owing to strong opposition these clauses were dropped in Committee, and do not appear in this Act. It is for this reason that the Musical (Summary Proceedings) Copyright Act, 1902, and the Musical Copyright Act, 1906, are kept alive in spite of the fact that the intention was to make the present Act a Consolidating Statute and a complete code of copyright. The result is a lack of symmetry which is to be greatly deplored.

The provisions of the section extend only to the United Kingdom (*b*), and the penalties are confined to the making or selling, and the other unlawful acts enumerated in the section, in the case of *infringing* copies (*c*). The section therefore does not affect the mere copying of another's work. The penalties are in the nature of a fine for a criminal offence (*d*). In the bill as originally drafted the word "pirated" was used in place of "infringing." The term "infringing" was substituted on the third reading as a matter of literary criticism. It is unfortunate that the word "pirated" which has come to have a definite meaning in case law, should be given up, particularly in view of the fact that it is used in the Musical (Summary Proceedings) Copyright Act, 1902, and the Musical

(*a*) It is to be observed here that ss. 7 and 8 of the *Fine Arts Copyright Act*, 1862, are not repealed by the present Act. They impose penalties recoverable by summary proceedings in the case of **fraudulent productions and sales.** These sections are set out in full, p. 99, *post*.

(*b*) S. 15.

(*c*) Compare s. 2, sub-s. 2, to which the divisions of sub-s. (1) of this section correspond; there is a separate offence with respect to each copy. But the Court is not bound to give a penalty of at least one farthing in respect of each offence. A lump sum may be awarded, which, if divided by the number of offences, will give a fraction less than the minimum coin of the realm for each. See *Hildesheimer* v. *Faulkner*, [1901] 2 Ch. 552; *Ex parte Beal* (1868), L. R. 3 Q. B. 387; and *Nicholls* v. *Parker* (1902), 18 T. L. R. 459.

(*d*) *Ex parte Graves* (1868), L. R. 3 Ch. 642. The case was decided under the partially repealed Fine Arts Copyright Act, 1862, but it applies equally to the present Act.

Sect. 11.

SUB-SECTION (4).

Copyright Act, 1906, which Acts are not repealed. It does not appear, however, that any alteration in the law will result. "Infringing" is defined, and when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made, or imported in contravention of the provisions of the Act (*e*).

The ancillary remedy by injunction may be claimed under this section, although the remedies provided are penalties, and an injunction will be granted to prevent future breaches (*f*). The infringement of copyright may also be the subject of the criminal offence of conspiracy if two or more persons combine together with intent to infringe (*g*).

Sub-section 4.—The Musical (Summary Proceedings) Copyright Act, 1902, and the Musical Copyright Act, 1906, except as to registration, which is abolished, remain in force. There were several difficulties under the first of these Acts, which gave power only to seize pirated copies, these were removed by the later Act, which created the penal offences in addition to the power of search (*h*). It is to be observed that the definition of "plate" under the Musical Copyright Act, 1906, does not include "perforated music rolls, used for playing mechanical instruments, or records used for the reproduction of sound waves, or the matrices or other appliances by which such rolls or records are made" (*i*). This definition of "plate" must therefore be taken for the purpose of the penalties attaching to the infringement of musical works, when proceedings are taken under the Act of 1906. Under the Act of 1911 the word "plate" includes "any matrix or other appliance by which records, perforated rolls, or other contrivances for the acoustic representation of the work are or are intended to be made. There may be independent proceedings in such cases under that Act. It has been held that a perforated music roll is not a copy of a musical composition (*k*), or within the meaning of a "pirated" musical work (*l*).

It is a defence to a prosecution under these Acts to prove innocence, and upon the first offence the defendant is not liable for a penalty, if he shows that a name and address purporting to be that of the printer or publisher was printed on

(*e*) S. 35, sub-s. (1).

(*f*) *Carlton Illustrators* v. *Coleman & Co., Ltd.*, [1911] 1 K. B. 771, at p. 783; see also *Cooper* v. *Whittingham*, 15 Ch. D. 501; *Att.-G.* v. *Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101, at p. 107.

(*g*) *R.* v. *Willetts* (1906), 70 J. P. 127; *R.* v. *Bokenham* (1910), Times, July 22, p. 4.

(*h*) *Ex parte Francis*, [1903] 1 K. B. 275; *Ex parte Francis, No.* 2 (1903), 88 L. T. 806.

(*i*) Musical Copyright Act, 1906, s. 3.

(*k*) *Boosey* v. *Whight*, [1900] 1 Ch. 122.

(*l*) *Mabe* v. *Connor*, [1909] 1 K. B. 515.

Sect. 11. — MUSICAL (SUMMARY PROCEEDINGS) COPYRIGHT ACT, 1902.

the title page of the pirated copies, unless it can be proved that he knew the copies were pirated.

The provisions of these Acts with respect to seizure of copies and arrest without warrant, and search warrants, are to be observed—since they remain in force. The present Act as first drafted included such provisions with respect to all works, but these sections were dropped during the Committee Stage of the Bill.

It is important to note that there is no registration; that part of the Musical Copyright Act, 1906, which provided for registration being repealed.

The provisions of the two Acts are as follows:—

MUSICAL (SUMMARY PROCEEDINGS) COPYRIGHT ACT, 1902.

2 EDW. 7. c. 15.

An Act to amend the Law relating to Musical Copyright.

[*22nd July*, 1902.

A.D. 1902. — Seizure, etc., of pirated copies.

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

Power to seize copies on hawkers.

2. If any person shall hawk, carry about, sell, or offer for sale any pirated copy of any musical work, every such pirated copy may be seized by any constable without warrant, on the request in writing of the apparent owner of the copyright in such work, or of his agent thereto authorised in writing, and at the risk of such owner (*o*).

On seizure of any such copies, they shall be conveyed by such constable before a court of summary jurisdiction, and, on proof that they are infringements of copyright, shall be forfeited or destroyed, or otherwise dealt with as the court may think fit.

(*m*) *Mabe* v. *Connor*, [1909] 1 K. B. 515.

(*n*) *Ex parte Francis* (1903), 88 L. T. 806, where it was held that under this sub-section a magistrate must issue an order authorising seizure without warrant of alleged pirated music even if it appears that it is being sold at a private house.

(*o*) *Ex parte Francis*, [1903] 1 K. B. 275, where it was held that pirated music having been seized, the Court has no power to order such music to be forfeited or otherwise dealt with *ex parte*; the person from whom such music has been seized must be notified by summons. The only difference between s. 1 and s. 2 is that under s. 1 the seizure is effected under an order of the Court.

3. "Musical copyright" means the exclusive right of the owner of such copyright under the Copyright Acts in force for the time being to do or authorise another person to do all or any of the following things in respect of a musical work :— Sect. 11. —— Definitions.

(1) To make copies by writing or otherwise of such musical work.

(2) To abridge such musical work.

(3) To make any new adaptation, arrangement, or setting of such musical work, or of the melody thereof, in any notation or system.

"Musical work" means any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced.

"Pirated musical work" means any musical work written, printed, or otherwise reproduced, without the consent lawfully given by the owner of the copyright in such musical work.

4. This Act may be cited as the Musical (Summary Proceedings) Copyright Act, 1902, and shall come into operation on the first day of October, one thousand nine hundred and two, and shall apply only to the United Kingdom. Short title and commencement.

MUSICAL COPYRIGHT ACT, 1906.

6 EDW. 7, c. 36.

An Act to amend the law relating to Musical Copyright.

[*4th August*, 1906.

A.D. 1906.

1.—(1) Every person who prints, reproduces, or sells, or exposes, offers, or has in his possession for sale, any pirated copies of any musical work, or has in his possession any plates for the purpose of printing or reproducing pirated copies of any musical work, shall (unless he proves that he acted innocently) be guilty of an offence punishable on summary conviction, and shall be liable to a fine not exceeding five pounds, and on a second or subsequent conviction to imprisonment with or without hard labour for a term not exceeding two months or to a fine not exceeding ten pounds : Provided that a person convicted of an offence under this Act who has not previously been convicted of such an offence, and who proves that the copies of the musical work in respect of which the offence was committed had printed on the title page thereof a name and address purporting to be that of the printer or publisher, shall not be liable to any penalty under this Act unless it is proved that the copies were to his knowledge pirated copies. Penalty for being in possession of pirated music.

(2) Any constable may take into custody without warrant any person who in any street or public place sells or exposes, offers, or has in his possession for sale any pirated copies of any such musical work as may be specified in any general written authority addressed to the chief officer of police, and signed by the apparent owner of the copyright in such work or his agent thereto authorised in writing,

Sect. 11. MUSICAL COPYRIGHT ACT, 1906.

requesting the arrest, at the risk of such owner, of all persons found committing offences under this section in respect to such work, or who offers for sale any pirated copies of any such specified musical work by personal canvass or by personally delivering advertisements or circulars.

(3) A copy of every written authority addressed to a chief officer of police under this section shall be open to inspection at all reasonable hours by any person without payment of any fee, and any person may take copies of or make extracts from any such authority.

(4) Any person aggrieved by a summary conviction under this section may in England or Ireland appeal to a court of quarter sessions, and in Scotland under and in terms of the Summary Prosecutions Appeals (Scotland) Act, 1875.

38 & 39 Vict. c. 62.

Right of entry of police for execution of Act.

2.—(1) If a court of summary jurisdiction is satisfied by information on oath that there is reasonable ground for suspecting that an offence against this Act is being committed on any premises, the court may grant a search warrant authorising the constable named therein to enter the premises between the hours of six of the clock in the morning and nine of the clock in the evening, and, if necessary to use force for making such entry, whether by breaking open doors or otherwise, and to seize any copies of any musical work or any plates in respect of which he has reasonable ground for suspecting that an offence against this Act is being committed.

(2) All copies of any musical work and plates seized under this section shall be brought before a court of summary jurisdiction, and if proved to be pirated copies or plates intended to be used for the printing or reproduction of pirated copies shall be forfeited and destroyed or otherwise dealt with as the court think fit.

Definitions.

3. In this Act—

The expression "pirated copies" means any copies of any musical work written, printed, or otherwise reproduced without the consent lawfully given by the owner of the copyright in such musical work:

The expression "musical work" (*p*) means a musical work in which there is a subsisting copyright, [*and which has been registered in accordance with the provisions of the Copyright Act*, 1842, *or of the International Copyright Act*, 1844, *which registration may be effected notwithstanding anything in the International Copyright Act*, 1886] (*q*):

5 & 6 Vict. c. 45. 7 & 8 Vict. c. 12. 49 & 50 Vict. c. 33.

The expression "plates" includes any stereotype or other plates, stones, matrices, transfers, or negatives used or intended to be used for printing or reproducing copies of any musical work; Provided that the expressions "pirated copies" and "plates" shall not, for the purposes of this Act, be deemed to include perforated music rolls used for playing mechanical instruments, or records used for the reproduction of sound waves, or the matrices or other appliances by which such rolls or records respectively are made:

(*p*) The definition "musical work" is not the same in the Act of 1902.

(*q*) Copyright Act, 1911. The words in square brackets are repealed.

The expression "chief officer of police"— Sect. 11.

(*a*) with respect to the City of London, means the Commissioner of City Police;

(*b*) elsewhere in England has the same meaning as in the Police Act, 1890; 53 & 54 Vict. c. 45.

(*c*) in Scotland has the same meaning as in the Police (Scotland) Act, 1890; 53 & 54 Vict. c. 67.

(*d*) in the police district of Dublin metropolis means either of the Commissioners of Police for the said district;

(*e*) elsewhere in Ireland means the District Inspector of the Royal Irish Constabulary:

The expression "court of summary jurisdiction" in Scotland means the sheriff or any magistrate of any royal, parliamentary, or police burgh officiating under the provisions of any local or general police Act.

4. This Act may be cited as the Musical Copyright Act, 1906. Short title.

THE FINE ARTS COPYRIGHT ACT, 1862.

25 & 26 VICT. CAP. LXVIII.

An Act for Amending the Law relating to Copyright in works of the Fine Arts, and for repressing the Commission of Fraud in the Production and Sale of such Works. [29*th July*, 1862.

WHEREAS by Law, as now established, the Authors of Paintings, Drawings, and Photographs have no Copyright in such their Works, and it is expedient that the Law should in that respect be amended:

* * * * *

7. No Person shall do or cause to be done any or either of the following Acts; that is to say, Penalties on fraudulent productions and sales.

First, no Person shall fraudulently sign or otherwise affix, or fraudulently cause to be signed or otherwise affixed, to or upon any Painting, Drawing, or Photograph, or the negative thereof, any Name, Initials, or Monogram:

Secondly, no Person shall fraudulently sell, publish, exhibit, or dispose of, or offer for Sale, Exhibition, or Distribution, any Painting, Drawing, or Photograph, or Negative of a Photograph, having thereon the Name, Initials, or Monogram of a Person who did not execute or make such Work:

Thirdly, no Person shall fraudulently utter, dispose of, or put off, or cause to be uttered or disposed of, any Copy or colourable Imitation of any Painting, Drawing, or Photograph, or Negative of a Photograph, whether there shall be subsisting Copyright therein or not, as having been made or executed by the Author or Maker of the original Work from which such Copy or Imitation shall have been taken:

Fourthly, where the Author or Maker of any Painting, Drawing

Sect. 11.

THE FINE ARTS COPYRIGHT ACT, 1862.

or Photograph, or Negative of a Photograph, made either before or after the passing of this Act, shall have sold or otherwise parted with the Possession of such Work, if any Alteration shall afterwards be made therein by any other Person, by Addition or otherwise, no Person shall be at liberty, during the Life of the Author or Maker of such Work, without his Consent, to make or knowingly to sell or publish, or offer for Sale, such Work or any Copies of such Works so altered as aforesaid, or of any Part thereof, as or for the unaltered Work of such Author or Maker:

Penalties.

Every Offender under this Section shall, upon Conviction, forfeit to the Person aggrieved a Sum not exceeding Ten Pounds, or not exceeding double the full Price, if any, at which such Copies, Engravings, Imitations, or altered Works shall have been sold or offered for Sale; and all such Copies, Engravings, Imitations, or altered Works shall be forfeited to the Person, or the Assigns or legal Representatives of the Person, whose Name, Initials, or Monogram shall be so fraudulently signed or affixed thereto, or to whom such spurious or altered Work shall be so fraudulently or falsely ascribed as aforesaid: Provided always, that the Penalties imposed by this Section shall not be incurred unless the Person whose Name, Initials, or Monogram shall be so fraudulently signed or affixed, or to whom such spurious or altered Work shall be so fraudulently or falsely ascribed as aforesaid, shall have been living at or within Twenty Years next before the Time when the Offence may have been committed.

8. All pecuniary Penalties which shall be incurred, and all such unlawful Copies, Imitations, and all other Effects and Things as shall have been forfeited by Offenders, pursuant to this Act, [*and pursuant to any Act for the Protection of Copyright Engravings*] (*r*) may be recovered by the Person herein-before [*and in any such Act as aforesaid*] (*r*) empowered to recover the same respectively, and hereinafter called the Complainant or the Complainer, as follows:—

In *England* and *Ireland*, either by Action against the party offending, or by summary Proceeding before any Two Justices having Jurisdiction where the Party offending resides:

In *Scotland* by Action before the Court of Session in ordinary Form, or by summary Action before the Sheriff of the County where the Offence may be committed or the Offender resides, [*who, upon Proof of the Offence or Offences, either by Confession of the Party offending, or by the Oath or Affirmation of One or more credible Witnesses, shall convict the Offender, and find him liable to the Penalty or Penalties aforesaid, as also in Expenses, and it shall be lawful for the Sheriff in pronouncing such Judgment for the Penalty or Penalties and Costs, to insert in such Judgment a Warrant, in the event of such Penalty or Penalties and Costs not being paid, to levy and recover the Amount of the same by Poinding: Provided always,*

(*r*) The words in square brackets are repealed by the Copyright Act 1911.

that it shall be lawful to the Sheriff, in the event of his dismissing the Action and assoilzieing the Defender, to find the Complainer liable in Expenses,] (*s*) and any Judgment so to be pronounced by the Sheriff in such summary Application shall be final and conclusive, and not subject to Review by [*Advocation*] (*t*), Suspension, Reduction, or otherwise. Sect. 11.

No limit is imposed by this Act, the Limitation Act, 1623, therefore applies and the remedies under these sections will not be barred for six years.. This was the case before the Act of 1911 came into force, and it does not appear that the limit of three years under section 10 of that Act applies in this case.

SECTION XII.

12. Any person aggrieved by a summary conviction of an offence under the foregoing provisions of this Act may in England and Ireland appeal to a court of quarter sessions and in Scotland under and in terms of the Summary Jurisdiction (Scotland) Acts. Appeals to Quarter Sessions.

This section follows the Musical Copyright Act, 1906. The appeal must be made to a Court of Quarter Sessions held not less than fifteen days after the decision appealed against. See the Summary Jurisdiction Act, 1879, s. 31 (1). And notice of appeal must be given within seven days. S. 31 (2). The notice must contain the general grounds of appeal, and the appellant must enter into recognisances to appear and prosecute the appeal. At the hearing the matter is proceeded with *de novo*. The decision of Quarter Sessions is final, and the costs are within the discretion of the Court.

SECTION XIII.

13. The provisions of this Act with respect to summary remedies shall extend only to the United Kingdom. Extent of provisions as to summary remedies.

This section reproduces the old law.

(*s*) Repealed by the Statute Law Revision Act, 1893 (1).

(*t*) *Ibid.*

Sect. 14.

SECTION XIV.

Importation of Copies.

Importation of copies.

14.—(1) Copies made out of the United Kingdom of any work in which copyright subsists which if made in the United Kingdom would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agent to the Commissioners of Customs and Excise, that he is desirous that such copies should not be imported into the United Kingdom, shall not be so imported, and shall, subject to the provisions of this section, be deemed to be included in the table of prohibitions and restrictions contained in section forty-two of the Customs Consolidation Act, 1876, and that section shall apply accordingly.

(2) Before detaining any such copies or taking any further proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Commissioners of Customs and Excise may require the regulations under this section, whether as to information, conditions, or other matters, to be complied with, and may satisfy themselves in accordance with those regulations that the copies are such as are prohibited by this section to be imported.

(3) The Commissioners of Customs and Excise may make regulations, either general or special, respecting the detention and forfeiture of copies the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may, by such regulations determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) The regulations may apply to copies of all works the importation of copies of which is prohibited by this

section, or different regulations may be made respecting different classes of such works. Sect. 14

(5) The regulations may provide for the informant reimbursing the Commissioners of Customs and Excise all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention; and may provide for notices under any enactment repealed by this Act being treated as notices given under this section.

(6) The foregoing provisions of this section shall have effect as if they were part of the Customs Consolidation Act, 1876: Provided that notwithstanding anything in that Act the Isle of Man shall not be treated as part of the United Kingdom for the purposes of this section.

(7) This section shall, with the necessary modifications, apply to the importation into a British possession to which this Act extends of copies of works made out of that possession.

Section 42 of the Customs Consolidation Act, 1876, so far as it is not repealed by this Act, is as follows:—

"The goods enumerated and described in the following table of prohibitions and restrictions inwards are hereby prohibited to be imported or brought into the United Kingdom, save as thereby excepted, and if any goods so enumerated and described shall be imported or brought into the United Kingdom contrary to the prohibitions or restrictions contained therein, such goods shall be forfeited, and may be destroyed or otherwise disposed of as the Commissioners of Customs may direct.

A Table of Prohibitions and Restrictions Inwards.

Goods prohibited to be imported."

In the Table of Prohibitions therefore, sub-s. (1) of this section must be included.

The result is that the Customs law with respect to the seizure of copies is substantially reproduced, and extended to copies of works other than books, there being under the old law no procedure for seizure except in the case of books. This extension of the law has made it necessary to confer upon the

Sect. 14. Commissioners of Customs and Excise power to make regulations respecting procedure (*a*).

Under the old law the power given to the Customs authorities to seize copies was not of great effect, owing to the difficulty of detecting wrongful importations.

SECTION XV.

Delivery of Books to Libraries.

Delivery of copies to British Museum and other libraries.

15.—(1) The publisher (*a*) of every book (*b*) published in the United Kingdom shall, within one month after the publication, deliver, at his own expense (*c*) a copy of the book to the trustees of the British Museum, who shall give a written receipt for it.

(2) He shall also, if written demand is made before the expiration of twelve months after publication, deliver within one month after receipt of that written demand or, if the demand was made before publication, within one month after publication, to some depôt in London named in the demand a copy of the book for, or in accordance with the directions of, the authority having the control of each of the following libraries, namely: the

(*a*) A publisher under the Act of 1842 was spoken of as any one who projects, conducts, and carries on, or as the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever. See *Ward, Lock & Co., Ltd.* v. *Long*, [1906] 2 Ch. 550, at p. 560.

(*b*) The word book is defined in sub-s. 7.

(*c*) It is to be observed that in the case of the British Museum the delivery is at the publisher's expense without any demand being made, but that in the case of the other libraries, under sub-s. 2, a written demand must be made, and the delivery does not appear to be at the publisher's expense.

(*a*) These regulations have not been issued at the time of going to press; see Preface.

Sect. 15.

Bodleian Library, Oxford, the University Library, Cambridge, the Library of the Faculty of Advocates at Edinburgh, and the Library of Trinity College, Dublin, and subject to the provisions of this section the National Library of Wales (*a*). In the case of an encyclopædia, newspaper, review, magazine, or work published in a series of numbers or parts, the written demand may include all numbers or parts of the work which may be subsequently published (*b*).

(3) The copy delivered to the trustees of the British Museum shall be a copy of the whole book with all maps and illustrations belonging thereto, finished and coloured in the same manner as the best copies of the book are published, and shall be bound, sewed, or stitched together, and on the best paper on which the book is printed.

(4) The copy delivered for the other authorities mentioned in this section shall be on the paper on which the largest number of copies of the book is printed for sale, and shall be in the like condition as the books prepared for sale.

(5) The books of which copies are to be delivered to the National Library of Wales shall not include books of such classes as may be specified in regulations to be made by the Board of Trade (*c*).

(*a*) In the case of the Welsh National Library the intention is that under sub-s. 5 regulations shall be made to the effect that where a limited number of copies of a book are published, or expensive editions, there should be no absolute claim, but that the library should be entitled to obtain them at cost price.

(*b*) Overruling *British Museum* v. *Payne* (1828), 4 Bing. 540, where it was held, upon the construction of the old statute, that in the case of a book published in parts, a single part could not be demanded. A supplement to a newspaper is a part of the newspaper though not physically attached to it: *Comyns* v. *Hyde* (1895), 72 L. T. 250. The distinction, however, between a single book published in parts and a work published in a series of books or parts, is to be observed.

Sect. 15.

(6) If a publisher fails to comply with this section, he shall be liable on summary conviction to a fine not exceeding five pounds and the value of the book, and the fine shall be paid to the trustees or authority to whom the book ought to have been delivered (*d*).

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

(*c*) The intention is that where only a limited number of copies of a book are published, or where they are expensive editions, the National Library shall have no absolute claim to a free copy. See House of Commons Debates (1911), vol. 29, p. 2136. The regulations have not been made at the time of going to press. See Preface.

(*d*) This section is strictly penal—non-delivery in no case affects the copyright.

(*e*) *Cate* v. *Devon and Exeter Constitutional Newspaper Co.* (1889), 40 Ch. D. 500, at p. 503, where it was held that a newspaper is a sheet of letterpress, and therefore subject to copyright; *Hildesheimer* v. *Dunn & Co.* (1891), 64 L. T. 452, a sheet of letterpress includes a Christmas card; *Davis* v. *Benjamin*, [1906] 2 Ch. 491, a trade advertisement consisting of a sheet of illustrations is within the definition.

(*f*) For meaning of "separately published," see p. 74, note (*h*).

(*g*) It is submitted that such additions or alterations must be substantial and that the correction of a single mis-spelt word would not be such an alteration as would necessitate a delivery of the book to the libraries. "An edition of a work is the putting of it forth before the public, and if this be done in batches at successive periods, each successive batch is a new edition," and "a new edition is published whenever, having in his storehouse a certain number of copies, the publisher issues a further batch of them to the public": *Reade* v. *Bentley* (1858), 4 K. & J. 656, *per* WOOD, V.C., at p. 667.

The agreement between the author and publisher generally specifies the number of copies to an edition. Encyclopædia of Forms, vol. V., p. 333 *et seq.* Sect. 15.

SECTION XVI.

Special Provisions as to Certain Works.

Works of joint authors.

16.—(1) In the case of a work of joint authorship, copyright shall subsist during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer (*a*), and references in this Act to the period after the expiration of any specified number of years from the death of the author (*b*) shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first or after the death of the author who dies last, whichever period may be the shorter, and in the provisions of this Act with respect to the grant of compulsory licences (*c*) a reference to the date of the death of the author who dies last shall be substituted for the reference to the date of the death of the author.

(2) Where in the case of a work of joint authorship, some one or more of the joint authors do not satisfy the conditions conferring copyright laid down by this Act (*d*), the work shall be treated for the purposes of this Act as if the other author or authors had been the sole author or authors thereof :

(*a*) This was the case under the old law.

(*b*) S. 3. Proviso. The "period after the expiration," refers to the second or restricted period of copyright. See also s. 5, sub-s. 2. Proviso as to restrictions on assignment.

(*c*) S. 4 on complaint to the Privy Council.

(*d*) See s. 1. If for instance one of the joint authors is an alien.

Sect. 16.

Provided that the term of the copyright shall be the same as it would have been if all the authors had satisfied such conditions as aforesaid (*a*).

(3) For the purposes of this Act, "a work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors (*b*).

(4) Where a married woman and her husband are joint authors of a work the interest of such married woman therein shall be her separate property.

This section so far as relates to the duration of the copyright has already been dealt with under sect. 3 (*c*), in reference to the term during which copyright is to subsist. It is somewhat difficult to construe, and its terms must be carefully observed.

The definition of joint authorship is in accordance with the leading case *Levy* v. *Rutley* (*d*), where it was held that mere alterations or additions or improvements, with or without the author's consent, did not amount to joint authorship. There must be a joint design, and co-operation in carrying out that joint design is required. It is not essential that the execution should be equally divided between the joint authors, for one may write only a small portion of the work (*e*).

Where an author is employed to write a dramatic or musical work, the employer is not a joint author, and the fact that he suggested the subject and made alterations and additions does not alter the case (*f*).

The author of a work is the first owner of the copyright, and in the case of joint authors the copyright vests in them as tenants in common, not joint tenants (*g*).

(*a*) The result is that copyright in a work is not lost by reason of one of the joint authors failing to satisfy the conditions of the Act, but in computing the term of protection he is deemed to have satisfied such conditions.

(*b*) See *infra*.

(*c*) See p. 64.

(*d*) *Levy* v. *Rutley* (1871), L. R. 6 C. P. 523.

(*e*) *Levy* v. *Rutley* (1871), L. R. 6 C. P. 523, *per* BYLES, J., at p. 528. "If the piece had been originally written by the plaintiff and W. jointly, in prosecution of a preconceived joint design, the two might have been said to be co-authors of the whole play, notwithstanding that different portions were respectively the sole productions of either." "Though it may not be necessary that each should contribute the same amount of labour, there must be a joint labouring in furtherance of a common design," *per* KEATING, J., at p. 529.

(*f*) *Levy* v. *Rutley* (1871), L. R. 6 C. P. 523; *Eaton* v. *Lake* (1888), 20 Q. B. D. 378; *Tate* v. *Fullbrook*, [1908] 1 K. B. 821.

(*g*) *Powell* v. *Head* (1879), 12 Ch. D. 686, at p. 689; *Trade*

Any one or more of the joint owners may bring an action for infringement of the copyright (*h*), but one of them cannot grant a licence, or otherwise deal with the entire work without the consent of the others (*i*). And in such a case, though one of the joint authors may have done something which prevented him from suing, the others could sue for their share of the penalty. Sect. 16.

SECTION XVII.

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

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

Auxiliary Co. v. *Middlesborough & District Tradesmen's Protection Association* (1889), 40 Ch. D. 425.

(*h*) *Trade Auxiliary Co.* v. *Middlesborough Association* (1889), 40 Ch. D. 425; *Lauri* v. *Renad*, [1892] 3 Ch. 402.

(*i*) *Powell* v. *Head* (1879), 12 Ch. D. 686; *Lauri* v. *Renad*, [1892] 3 Ch. 402.

Sect. 17.

Sub-section (1) does not apply to artistic works other than engravings. In the case of such other artistic works, therefore, the term of protection is in all cases, for the life of the author and a period of fifty years after his death. In the case of photographs and mechanical instruments, the term is for a period of fifty years from the making of the original negative or plate from which the work was directly or indirectly derived (*a*).

The principle of the marked distinction that is drawn between artistic works, and those which are not artistic, was considered during the Committee stages of the Bill. The reason given was that in the case of paintings, sculpture, and works of art generally, since the original was valuable itself apart from the copyright, to give an extended posthumous production to such works might tend to encourage the owners of such works keeping them hidden from the public in private collections; whereas in the case of works which appear in manuscript form, there was no special value attached to the original apart from reproduction, and therefore, generally speaking, no reason for withholding them from the public.

In the cases to which this section does apply, namely to literary, dramatic, or musical works, or engravings, there is perpetual copyright if the work never be published, since copyright is to subsist until publication. If the work is published, the date of such publication (*b*) is the material factor for the purpose of determining when the copyright in the work is to expire. The proviso under section 3 limits the period of unrestricted copyright to a period of twenty-five years (*c*).

Sub-section (2) provides that in the case of an author's unpublished manuscript, ownership should be *primâ facie* proof only of the possession of the copyright; this was recommended by the Copyright Committee. Under the old law copyright in a posthumous work was the property of the proprietor of the author's manuscript. The result of the change in the law is that mere possession of the manuscript is no longer conclusive proof of the copyright being with the owner of the manuscript. And it may well be that in certain cases copyright might belong to an author's personal representatives, while the manuscript might be bequeathed to some other person (*d*).

(*a*) See s. 19 for mechanical instruments, and s. 21 for photographs.

(*b*) See p. 38, for the date of publication, and s. 1, sub-s. 3.

(*c*) See p. 60, *ante*.

(*d*) See p. 24, note (*d*).

SECTION XVIII.

Provisions as to Government publications.

18. Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.

This section substantially reproduces the old law, that copyright in Government publications belongs to the Crown. The Crown, however, does not enforce the copyright in all cases. In 1887 a Treasury Minute was issued and published as a parliamentary paper (*a*), in which the claim of the Crown is set out. Government publications were classified as follows :—

(1) Reports of select Committees of the two Houses of Parliament, or of Royal Commissions.
(2) Papers required by Statute to be laid before Parliament, *e.g.* Orders in Council, Rules made by Government Departments, Accounts, Reports of Government Inspectors.
(3) Papers laid before Parliament by command, *e.g.* Treaties, Diplomatic Correspondence, Reports from Consuls and Secretaries of Legation, Reports of Inquiries into Explosions or Accidents, and other special Reports made to Government Departments.
(4) Acts of Parliament.
(5) Official books, *e.g.* Queen's Regulations for the Army and Navy.
(6) Literary or quasi literary works, *e.g.* the Reports of the *Challenger* Expedition, the Rolls Publication, the State Trials, the "Board of Trade Journal."
(7) Charts and Ordnance Maps.

The first five of the above classes may be reproduced by any one without restriction, except that in the case of classes 4 and 5 they must not purport on the face of them to be published by authority, except when published by the Government.

(*a*) Treasury Minute dealing with Copyright in Government Publications ordered by the House of Commons to be printed, 13 September, 1887. Parl. Papers, 1887 (335).

Sect. 18.

Further—

(i) Works of literary or quasi literary character which come accidentally within these classes, *e.g.* Reports of the Historical Manuscripts Commission; and

(ii) Reports to Government Departments made for public purposes, by persons of eminent scientific knowledge, who do not wish their reports to be reproduced for the private benefit of an individual publisher; may not be reproduced.

In the case of Classes 6 and 7 the Government retains the copyright, and such publications may not be reproduced.

When the Government desires to reserve their copyright a notice reserving their right is prefixed to the work.

The publication of the "Nautical Almanac" is under the control of the Lords of the Admiralty by virtue of the Nautical Almanac Act, 1828 (*b*).

The Crown also claims the prerogative of granting the exclusive right of printing the authorised version of the Bible, and the Book of Common Prayer. This right has been granted to the Universities of Oxford and Cambridge, and to the King's printer (*c*). No objection is taken, however, to the printing of the Bible with substantial notes (*d*).

The Hebrew Bible, the Greek Testament, and the Septuagint are within the public domain, and they may be published without restriction (*e*).

It must be observed that these rights and claims of the Crown have not been abandoned under this section of the Act, which is "without prejudice to any rights or privileges of the Crown."

(*b*) 9 Geo. IV., c. 68, s. 2. Under this section the Admiralty have the right of causing the Nautical Almanac "or other useful table or tables which 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, free of all stamp duty whatever..." And any person who, without special license or authority, prints, publishes, vends, or causes to be printed, published, or vended, any such almanac or other table or tables shall pay the sum of twenty pounds for every copy with costs, and the proceeds of such penalty are to be paid and applied to the use of the Royal Hospital for Seamen at Greenwich.

(*c*) *Hills* v. *Oxford University* (1684), 1 Vern. 275. The extent to which the University's Patent extends and the opinion expressed that the right was not unlimited. *Baskett* v. *University of Cambridge* (1758), 2 Burr. 661; *Millar* v. *Taylor* (1769), 4 Burr. 2303, at pp. 2329, 2382, and 2403; *Grierson* v. *Jackson* (1794), Ridge, L. & S. 304, 306, 310; *Oxford & Cambridge Universities* v. *Richardson* (1802), 6 Ves. 689; *Manner* v. *Blair* (1828), 3 Bli. (N.S.) 391, at p. 402; *The Red Letter New Testament* (1900), 17 T. L. R. 1.

(*d*) *Baskett* v. *Cunningham* (1762), Black. Rep. 370.

(*e*) *Millar* v. *Taylor* (1709), 4 Burr. 2303, *per* Lord MANSFIELD, at p. 2405.

While the Government have the right under this section to enforce their claims, it seems probable that they will not do so otherwise than in the terms of the minute of 1887. Sect. 18.

SECTION XIX.

19.—(1) Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced (*a*), in like manner as if such contrivances were musical works (*b*), but the term of copyright shall be fifty years from the making of the original plate (*c*) from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work, and where such owner is a body corporate the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts.* Provisions as to Mechanical Instruments.

*** Owing to the length of the section, the notes follow each sub-section.**

This sub-section creates new law, records or other contrivances under the old law not being entitled to copyright. It is in accordance with Article 13 of the Berlin Convention, and the recommendation of the Copyright Committee (*d*).

(*a*) Contrivance by means of which sounds may be mechanically reproduced—this does not mean the instrument or mechanism, for such cannot reproduce any sound. What is meant is the interchangeable part in which the music resides, that is to say, the disc, cylinder, or other music roll.

(*b*) See s. 1 and notes, p. 27. *Boosey* v. *Wright*, [1900] 1 Ch. 122, laid down that a record or perforated sheet could not be a copy of a musical work.

(*c*) "Plate" includes any stereotype or other plate, stone block, mould, matrix, transfer, or negative, used or intended to be used for printing, or reproducing copies of any work, and any matrix or other appliance by which records, perforated rolls or other contrivances for the acoustic representation of the work are or are intended to be, made. S. 35, sub-s. (1).

(*d*) *Art.* 13.—The authors of musical works shall have the

Sect. 19.

PROVISIONS AS TO MECHANICAL INSTRUMENTS.

(2) It shall not be deemed to be an infringement of copyright in any musical work (*e*) for any person (*f*) to

Authors of musical works are thus given protection against the adaptation of their works to instruments which can produce them mechanically, and against the public performance of their works by such instruments; and they have the right of authorising the adaptation of their works to such instruments. The term of such copyright does not include the life of the author, but commences "from the making of the original plate." The date of the making of a work is a vague term, which is nowhere defined. It is probably the date when the work is completely finished (*g*).

The definition of "author" as the owner of the original plate at the time when such plate was made must also be observed; with regard to corporations, there is sufficient residence if the corporation has established a place of business within the dominions to which the Act extends. It does not appear that the place of business so established need be the principal place of business, or the place where the administrative business of the corporation is carried on (*h*).

exclusive right of authorising (1) the adaptation of those works to instruments which can produce them mechanically; (2) the public performance of the said works by means of these instruments.

Reservations and conditions relating to the application of this Article may be determined by the domestic legislation of each country in so far as it is concerned; but the effect of any such reservations and conditions will be strictly limited to the country which has put them in force.

The provisions of par. 1 shall not be retroactive, and consequently shall not be applicable in any country of the Union to works which have been lawfully adapted in that country to mechanical instruments before the coming into force of the present Convention.

Adaptations made in virtue of pars. 2 and 3 of the present Article, and imported without the authority of the interested parties into a country where they would not be lawful, shall be liable to seizure in that country.

(*e*) Musical work for the purposes of the provision is defined in Proviso (ii), *infra*. The work may be published or unpublished. This sub-section deals with the infringement of musical works as distinct from other works, *e.g.* lectures which may be mechanically reproduced.

(*f*) Person includes company.

(*g*) As to the date of the making of a work, see p. 34.

(*h*) O. XI., r. 8, *Compagnie Generale Transatlantique* v. *Law*, [1899] A. C. 431; *Dunlop Pneumatic Tyre Co.* v. *Actien Gesellschaft*, [1902] 1 K. B. 342; *Lhoneux, Simon & Co.* v. *Hong Kong and Shanghai Banking Corporation* (1886), 33 Ch. D. 446. "They hire an office, write up their name, and beyond all question, stamp upon themselves and upon their place of business here, the assumption that here they carry on their business," *per* BACON, V.C.

Sect. 19.

PROVISIONS AS TO MECHANICAL INSTRUMENTS.

make within the parts of His Majesty's dominions to which this Act extends records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, if such person proves—

(*a*) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work (*i*); and,

(*b*) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to or for the benefit of the owner of the copyright in the work royalties in respect of all such contrivances sold (*k*) by him, calculated at the rate hereinafter mentioned (*l*):

Provided that—

(i) nothing in this provision shall authorise any alterations in or omissions from the work reproduced (*m*), unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by or with the consent or acquiescence of the owner of the copyright (*n*), or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question (*o*); and,

(*i*) For the meaning of this clause, see the note on the whole sub-section. As to consent, see sub-s. (5).

(*k*) It appears that hiring will be prohibited. In the United States Act the royalties are payable on each contrivance manufactured.

(*l*) Regulations as to notices may be made by the Board of Trade under sub-s. (6) of this section. Sub-s. (3) deals with the payment of royalties.

(*m*) This prevents any alterations, additions, or omissions which might otherwise be made, in order to produce what would appear to be an original work, and so evade the Act. It does not apply to musical works published before July 1, 1912, sub-s. (7).

(*n*) That is to say, unless a licence to so make the works as altered has been previously granted by the owner of the copyright.

(*o*) Whether such alterations are reasonably necessary for the purpose of adapting the work must be a question of fact in each case.

Sect. 19.

PROVISIONS AS TO MECHANICAL INSTRUMENTS.

(ii) for the purposes of this provision, a musical work shall be deemed to include any words so closely associated therewith as to form part of the same work, but shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced (*p*).

The intention of this sub-section is to limit the ownership of the copyright in the sense that, if any owner gives a licence to a manufacturer to adapt his work to a mechanical contrivance for reproducing the work, he is obliged to grant a similar licence on similar terms to *any* manufacturer who chooses to demand it, if such manufacturer pays the prescribed royalties. This in substance adopts the principle of the United States Copyright Act, 1909 (*q*).

The authors of works capable of adaptation can, therefore, control the way in which their works are reproduced, and the character of the instrument which produces them, so that they may be properly and correctly reproduced without bringing discredit upon the composer. They may, if they think fit, decline to allow any mechanical reproduction; but, if they grant a licence to a manufacturer to so reproduce their work, then any other manufacturer may also reproduce the work, without infringement, upon complying with certain conditions as to notice and royalties. The onus of proof is upon the manufacturers to show that they have complied with the conditions.

The conditions are—

(i) that the contrivances which they are producing "have previously been made by or with the consent or acquiescence of the owner of the copyright" (*r*); and,

(ii) that they have given the notices required by the Board of Trade regulations (*s*); and,

(iii) that they have paid the royalties in respect of all contrivances sold as prescribed (*t*).

(*p*) See p. 117.

(*q*) See s. 1 (*e*) of that Act, p. 180, *post*.

(*r*) Para. (*a*). In the case of musical works published before the commencement of the Act, that is, before July 1, 1912, this condition does not apply. Sub-s. (7) (*a*).

(*s*) Under sub-s. (6). It must be observed also that under sub-s. (5) the owner of the copyright is deemed to have given his consent to the making of the mechanical reproductions if he fails to reply to the inquiries which shall be directed by the Board of Trade.

(*t*) Sub-s. (3) prescribes what royalties are to be payable. Sub-s. (7) (*b*) the royalties in the

(3) The rate at which such royalties as aforesaid are to be calculated shall—

(*a*) in the case of a contrivance sold within two years after the commencement of this Act (*u*) by the person making the same be two and one-half per cent. (*x*); and,

(*b*) in the case of contrivances sold as aforesaid after

In any other cases the making of the contrivances is an infringement of the original author's copyright, and it is to be observed that the royalties are payable in respect of contrivances "sold," and, therefore, any making for hire or otherwise appears to be an infringement.

The result is to place all manufacturers of contrivances for mechanically reproducing the work on the same footing. The work however, as reproduced, must be substantially the same as the original, and must not contain alterations or omissions unless they are reasonably necessary to adapt the work to the contrivances, or unless the work as so altered has been previously made by or with the consent or acquiescence of the owner of the copyright.

Proviso (ii) is important. It excludes contrivances for the mechanical reproduction of sounds, from the definition of musical works for the purpose of the section, and the result is that where the author or owner of the original work has consented to the adaptation to a mechanical contrivance by one manufacturer, it will be an infringement for another manufacturer to reproduce or copy the work of the first manufacturer. The second manufacturer must set about doing what the first did, and adapt the work himself. He is not entitled to make use of the other's skill and labour in adaptation. It will be a question of fact in each case whether one mechanical contrivance is a copy of another so as to be an infringement.

case of musical works published before the commencement of this Act. In the latter case no royalties are payable in respect of contrivances sold before July 1, 1913, if such contrivances had been lawfully made, or placed on sale before July 1, 1910.

(*u*) Within two years from July 1, 1912.

(*x*) In the case of musical works *published* before July 1, 1912, sub-s. (7) (*b*) applies, and no royalties are payable in respect of contrivances sold before July 1, 1913, if such contrivances had been lawfully made or placed on sale before July 1, 1910. If the contrivance has been so made or placed on sale before July 1, 1910, and the original work is an unpublished work, it must be published before July 1, 1912.

Sect. 19.

PROVISIONS AS TO MECHANICAL INSTRUMENTS.

the expiration of that period, five per cent. (*y*)

on the ordinary retail selling price of the contrivance calculated in the prescribed manner (*z*), so however that the royalty payable in respect of a contrivance shall in no case be less than a halfpenny for each separate musical work in which copyright subsists reproduced thereon (*a*), and where the royalty calculated as aforesaid includes a fraction of a farthing, such fraction shall be reckoned as a farthing.

Provided that if at any time after the expiration of seven years from the commencement of this Act it appears to the Board of Trade that such rate as aforesaid is no longer equitable, the Board of Trade may after holding a public inquiry, make an order either decreasing or increasing that rate to such extent as under the circumstances may seem just, but any order so made shall be provisional only and shall not have any effect unless and until confirmed by Parliament; but where an order revising the rate has been so made and confirmed no further revision shall be made before the expiration of fourteen years from the date of the last revision.

(4) If any such contrivance is made reproducing two or more different works in which copyright subsists, and the owners of the copyright therein are different persons, the sums payable by way of royalties under this section

(*y*) That is, after July 1, 1914. In the case of musical works, *published* before July 1, 1912, the rate is 2½ per cent. If the work were unpublished the rate would be five per cent.

(*z*) Under the regulations to be prescribed by the Board of Trade. Sub-s. (6). See Preface.

(*a*) If a contrivance reproduces more than one separate musical work in which copyright subsists, the royalty shall be not less than ½*d.* in respect of each such work. This apparently refers to medleys which are made up of a number of compositions or extracts from compositions. Where a contrivance is made reproducing two or more different copyright works, and the owners of the copyright are different persons, the royalties are to be apportioned under sub-s. (4). It may be observed here that sub-s. (3) appears to deal only with contrivances reproducing musical works, including words associated therewith and not as defined in sub-s. (2) (ii).

shall be apportioned amongst the several owners of the copyright in such proportions as, failing agreement, may be determined by arbitration (*b*).

Sect. 19.

PROVISIONS AS TO MECHANICAL INSTRUMENTS.

(5) When any such contrivances by means of which a musical work may be mechanically performed have been made, then for the purposes of this section the owner of the copyright in the work shall, in relation to any person who makes the prescribed inquiries, be deemed to have given his consent to the making of such contrivances if he fails to reply to such inquiries within the prescribed time (*c*).

(6) For the purposes of this section, the Board of Trade may make regulations prescribing anything which under this section is to be prescribed and prescribing the mode in which notices are to be given and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, and any such regulations may, if the Board think fit, include regulations requiring payment in advance or otherwise securing the payment of royalties (*d*).

(7) In the case of musical works published before the commencement of this Act (*e*), the foregoing provisions

(*b*) The wording of this sub-section is to be noticed. It differs from the wording in sub-s. (3): "each separate musical work in which copyright subsists reproduced." The contrivance referred to in this sub-section, that is, any "record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced," is one reproducing two or more different works in which copyright subsists, which may be works of any description and not necessarily musical works, thus, lectures which include addresses, speeches or sermons may be so reproduced. In such cases, if the owners of the copyright are different persons, there is apportionment.

(*c*) This sub-section refers to sub-s. (2) (*a*), under which, if mechanical contrivances have been made by any person with the copyright-owner's consent, any other person may make such contrivances, on giving notice and paying the royalties. Consent is deemed to have been given if the copyright-owner does not reply to the inquiries which the Board of Trade, under sub-s. (6), prescribe shall be made by the person desiring to make the contrivance.

(*d*) This includes regulations prescribing, that inquiries may be made by any person desiring to make the mechanical contrivance, for the purpose of discovering whether the copyright owner has given his consent under sub-s. (5.)

(*e*) Before the 1st July, 1912; this sub-section refers to published

Sect. 19. shall have effect, subject to the following modifications and additions :—

PROVISIONS AS TO MECHANICAL INSTRUMENTS.

(*a*) The conditions as to the previous making by or with the consent or acquiescence of the owner of the copyright in the work (*f*), and the restrictions as to alterations in or omissions from the work, shall not apply (*g*) :

(*b*) The rate of two and one-half per cent. shall be substituted for the rate of five per cent. as the rate at which royalties are to be calculated (*h*), but no royalties shall be payable in respect of contrivances sold before the first day of July, nineteen hundred and thirteen, if contrivances reproducing the same work had been lawfully made (*i*), or placed on sale, within the parts of His Majesty's dominions to which this Act extends before the first day of July, nineteen hundred and ten (*k*) :

(*c*) Notwithstanding any assignment made before the passing of this Act of the copyright in a musical work, any rights conferred by this Act in respect of the making, or authorising the making, of contrivances by means of which the work may be mechanically performed shall belong to the author or his legal personal representatives, and not to the assignee, and the royalties aforesaid shall be payable to and for the benefit of the author of the work or his legal personal representatives (*l*) :

works; the making or issuing of mechanical adaptations is not publication.

(*f*) Sub-s. (2) (*a*).

(*g*) Sub-s. (2) (i).

(*h*) Sub-s. (3) (*b*).

(*i*) "Lawfully made," that is, made without infringement of author's rights.

(*k*) Contrivances placed on sale before the 1st July, 1910, may be of an unpublished musical work, and in such case, the work must be published before the 1st July, 1912.

(*l*) The result is that the author of the work which is mechanically adapted, or his legal personal representatives, gets the benefit of any royalties that may arise.

Sect. 19.

PROVISIONS AS TO MECHANICAL INSTRUMENTS.

(*d*) The saving contained in this Act of the rights and interests arising from or in connexion with action taken before the commencement of this Act shall not be construed as authorising any person who has made contrivances by means of which the work may be mechanically performed to sell any such contrivances, whether made before or after the passing of this Act, except on the terms and subject to the conditions laid down in this section (*m*):

(*e*) Where the work is a work on which copyright is conferred by an Order in Council relating to a foreign country, the copyright so conferred shall not, except to such extent as may be provided by the Order, include any rights with respect to the making of records, perforated rolls, or other contrivances by means of which the work may be mechanically performed (*n*).

(8) Notwithstanding anything in this Act where a record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced has been made before the commencement of this Act copyright shall, as from the commencement of this Act, subsist therein in like manner and for the like term as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived (*o*).

(*m*) This refers to s. 24, sub-s. (1) (*b*), where in the case of existing works, rights or interests which have lawfully arisen, that is to say, arisen under the old law without infringement of the author's rights, are kept alive. See p. 129, *post*.

(*n*) This is in accordance with the Berlin Convention reserving to each country the right to make such provisions as may be determined.

(*o*) Under sub-s. (1) copyright subsists for 50 years from the date of the making of the original plate. This sub-section deals only with the ownership of the copyright of the mechanical contrivance, it has nothing to do with the original musical work.

Sect. 19.

PROVISIONS AS TO MECHANICAL INSTRUMENTS.

Provided that :—

(i) the person who, at the commencement of this Act, is the owner of such original plate shall be the first owner of such copyright (*p*) ; and,

(ii) nothing in this provision shall be construed as conferring copyright in any such contrivance if the making thereof would have infringed copyright in some other such contrivance if this provision had been in force at the time of the making of the first-mentioned contrivance.

SECTION XX.

Provision as to political speeches.

20.—Notwithstanding anything in this Act, it shall not be an infringement of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper.

This section is an enlargement of s. 2, sub-s. (1) (v), under which the publication in a newspaper of a report of a lecture delivered in public, is not an infringement of copyright, unless such lecture is duly prohibited. While under s. 2, sub-s. (1) (i), any fair dealing for the purpose of newspaper summary is in any case allowed (*a*). In the case of political speeches a full report may be published without restriction, and such report cannot be prohibited. But it must be observed that the address must be at a public meeting (*b*). The intention is probably to include meetings open to the general public with or without payment so that any one who wishes may attend, and may demand admission provided that he is willing to pay whatever may be charged for admission but without other restrictions. It may be observed here, that it is doubtful, whether political meetings, where it is announced

(*p*) This provides for assignment.

(*a*) See p. 57, *ante*.

(*b*) Under the law of Libel Amendment Act, 1888, s. 4, a public meeting is expressly defined for the purpose of that Act as "any meeting *bonâ fide*, and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted."

beforehand that admission will be restricted to a political party or group, can be included under the head of public meetings. It is submitted that in the case of any distinction or restriction of this nature, the meeting ceases to be a "public meeting." Sect. 20. — PROVISION AS TO POLITICAL SPEECHES.

What is "an address of a political nature" is a question of fact.

SECTION XXI.

21.—The term for which copyright shall subsist in photographs shall be fifty years from the making of the original negative from which the photograph was directly or indirectly derived, and the person who was owner of such negative at the time when such negative was made shall be deemed to be the author of the work, and where such owner is a body corporate the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts. Provisions as to photographs.

The definition of author as here given is new. Under the old law the author of a photograph was "the person who effectively is, as near as he can be, the cause of the picture which is produced—that is, the person who has superintended the arrangement, who has actually formed the picture by putting it into position, and arranging the place in which the people are to be, the man who is the effective cause of that. Although he may only have done it by standing in the room and giving orders about it, still it is his mind and act, as far as anybody's mind and act are concerned, which is the effective cause of the picture such as it is when it is produced" (*a*).

The author of the work is now the owner of the negative at the time when the negative was made, and copyright dates from the date of the making of the original negative (*b*), and subsists for a period of fifty years from that date (*c*).

(*a*) *Nottage* v. *Jackson* (1883), 11 Q. B. D., *per* BRETT, M.R., at p. 632, and see s. 5, p. 70, *ante*.

(*b*) For the meaning of the date of the making of the work, see p. 34, *ante*. The negative is made when it is completely developed and fixed.

(*c*) For the term of copyright in other works, see s. 3, p. 60, *ante*.

Sect. 21. — PROVISIONS AS TO PHOTOGRAPHS.

In the case of a corporation, it is necessary that it should have established a place of business within the dominions. It is not necessary that this should be the principal place of business (*d*).

For a full discussion of the copyright law relating to photographs, see p. 70, *ante*.

SECTION XXII.

Provisions as to designs registrable under 7 Edw. 7, c. 29.

22.—(1) This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.

(2) General rules under section eighty-six of the Patents and Designs Act, 1907, may be made for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid.

This section is intended to mark the distinction between the law of copyright and the law of design. Under the old law there was no considerable overlapping. Such a division has, however, now become necessary by reason of the inclusion of works of artistic craftsmanship (*a*), and architectural works of art as matter for copyright protection.

Copyright subsists in every original artistic work (*b*). Works of sculpture, including casts and models, works of artistic craftsmanship, and architectural works of art are accordingly protected (*c*). Such of these works, however, as are designs

(*d*) See p. 114 and cases cited.

(*a*) See p. 30 for the meaning of works of artistic craftsmanship.

(*b*) S. 1, sub-s. (1), and notes, p. 28.

(*c*) See s. 35, sub-s. (1) for the definition of artistic works and notes, p. 28. "Any artistic work" includes "works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art, and engravings and photographs."

"Architectural work of art" is defined as "any building or structure having an artistic character or design, in respect of such character or design, or any models for such building or structure, provided that the protection afforded by this Act shall be confined to the artistic character and design, and shall not extend to processes or methods of construction. See s. 35, sub-s. 1, and notes, p. 31.

capable of being registered under the Patents and Designs Act, 1907, will not be protected under the Copyright Act, unless they are not used or intended to be used as models or patterns to be multiplied by any industrial process.

Sect. 22. — PROVISIONS AS TO DESIGNS REGISTRABLE UNDER 7 EDW. 7, C. 29.

The intention is to give protection under this Act to works of fine art, which though capable of being applied to industrial purposes are not used or intended to be so used (*d*). In such cases copyright subsists for a period of the author's life and fifty years thereafter. It remains a question, whether if at any time it is desired to use a design, in which copyright subsists under this Act, for industrial purposes, application can be made to register under the Patents and Designs Act, 1907. There appears to be no reason why this should not be allowed, and in such a case copyright under this act would at once cease, and would subsist only in accordance with the Patents and Designs Act, 1907; that is for a period of five years from the date of the application for registration, with a further extension of two periods of five years each.

Design capable of being Registered.

Design is defined as (*e*)—

> "any design (not being a design for a sculpture or other thing within the protection of the sculpture Copyright Act, 1814), applicable to any article, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical, or chemical, separate or combined."
>
> "'Article' means (as respects designs) any article of manufacture and any substance, artificial or natural, or partly artificial and partly natural."

This definition merely indicates those classes of design that can be registered. A design is not registered generally, but only for particular classes of goods, and it must be new and original (*f*). Any new and original design that has not been

(*d*) Under sub-s. (2) of this section, rules are to be made for determining the conditions under which a design shall be deemed to be used for industrial purposes.

(*e*) Patents and Designs Act, 1907, s. 93.

(*f*) The classes prescribed at present are as follows:—

1. Articles composed wholly of metal, or in which metal predominates, not included in class 2.
2. Jewellery.
3. Articles composed wholly of wood, bone, ivory, papier-maché, or other solid substances not included in

Sect. 22.

DESIGN CAPABLE OF BEING REGISTERED.

previously published in the United Kingdom, may be registered in one or more of the prescribed classes by the proprietor of such design (*g*) upon payment of certain fees. A separate application is necessary in each class, and the requirements necessary upon application are prescribed by rules (*h*). The article or articles to which the design is to be applied must also be stated, and if required, the purposes for which the article is used, and the material of which it is composed.

By registering the design, copyright—which is defined as "the exclusive right to apply a design to any article in any class in which the design is registered" (*i*)—is acquired for a period of five years from the date of the original application for registration, and may be extended for two further periods,

other classes, or of materials in which such substances predominate.

4. Articles composed wholly of glass, earthenware, or porcelain, bricks, tiles or cement, or in which such materials predominate.
5. Articles composed wholly of paper (except paper hangings), cardboard, mill-board or straw-board, or in which such materials predominate.
6. Articles composed wholly of leather or in which leather predominates, and bookbinding of all materials.
7. Paper hangings.
8. Carpets and rugs in all materials, floorcloths and oilcloths.
9. Lace.
10. Hosiery.
11. Millinery and wearing apparel, including boots and shoes.
12. Ornamental needlework on muslin or other textile fabrics.
13. Printed or woven designs on textile piece goods (other than checks or stripes).
14. Printed or woven designs on handkerchiefs and shawls (other than checks or stripes).
15. Printed or woven designs (on textile piece goods or on handkerchiefs or shawls) being checks or stripes.
16. Goods not included in other classes.

(*g*) The proprietor is defined by s. 93 of the Patents and Designs Act, 1907, as follows:—

Proprietor of a new and original design—

(*a*) Where the author of the design, for good consideration, executes the work for some other person, means the person for whom the design is so executed; and

(*b*) Where any person acquires the design or the right to apply the design to any article, either exclusively of any other person or otherwise, means, in the respect and to the extent in and to which the design or right has been so acquired, the person by whom the design or right is so acquired; and

(*c*) In any other case, means the author of the design; and where the property in, or the right to apply, the design has devolved from the original proprietor upon any other person, includes that other person.

(*h*) See The Designs Rules, 1908.

(*i*) S. 93 of the Patents and Designs Act, 1907.

of five years each, on application and payment of the prescribed fees (*k*).

Sect. 22.

DESIGN CAPABLE OF BEING REGISTERED.

The working of the Patents and Designs Act, 1907, was criticised considerably in the course of the evidence given before the Copyright Committee (*l*), by reason of the fact that protection under the Act is only afforded to all articles in the class in which the design has been registered (*m*), and registration in every class is therefore required to secure complete protection. This is often difficult if not impossible, since the design cannot be registered until it has been adapted, and copies made, in respect of all the different purposes for which it can be used. In other words if a design is only registered in one class, there is no remedy if it is taken and adapted to articles included in another class.

In their report the Commissioners throw out the suggestion that the Act should be amended, so that a single registration of a design applied to industrial purposes should carry with it the right to protection, no matter for what purposes the design is to be applied.

It is submitted, that subject to any rules which may be made to the contrary, if a design though registered under the Patents and Designs Act, 1907, in one class, is capable of being adapted to things in another class, and therefore entitled to registration under that other class, if it is not so adapted and registered, and is not used or intended to be used for industrial purposes under the other class of things to which it is capable of adaptation, then, provided that it is an artistic work, it would be entitled to protection under this Act. It is not a design used or intended to be used for industrial purposes until it is applied, as a design, to some article of manufacture within the other class. The design as applicable to things in the other class is new and original, and has not been published (*n*). A person therefore who adapted the design to such another class, would be liable for an infringement of the copyright, since copyright under this Act means the sole right to produce or reproduce the work in any material form

(*k*) S. 53, Patents and Designs Act, 1907.

(*l*) See Minutes of Evidence before the Copyright Committee, 1910, p. 17.

(*m*) *Pearson* v. *Wilkinson* (1906), 23 R. P. C. 738; *Hothersall* v. *Moore* (1892), 9 R. P. C. 27.

(*n*) Compare *Saunders* v. *Wiel*, [1893] 1 Q. B. 470. See also *Re Read* v. *Gresswell's Design* (1889), 42 Ch. D. 260. Where it was held that a design registered in one class cannot be registered as new or original in respect of other classes if they are to be used for the same or similar purposes. But if the purpose for which it is to be used is *different* it can be registered in the other class. See *Walker* v *Hunter & Co.* v. *Falkirk Iron Co.* (1887), 4 R. C. P. 390.

Sect. 22. whatsoever. If this be the case the difficulty under the Patents and Designs Act is removed.

DESIGN CAPABLE OF BEING REGISTERED.

SECTION XXIII.

Works of foreign authors first published in parts of His Majesty's dominions to which Act extends.

23. If it appears to His Majesty that a foreign country does not give, or has not undertaken to give, adequate protection to the works of British authors, it shall be lawful for His Majesty by Order in Council to direct that such of the provisions of this Act as confer copyright on works first published within the parts of His Majesty's dominions to which this Act extends, shall not apply to works published after the date specified in the Order, the authors whereof are subjects or citizens of such foreign country, and are not resident in His Majesty's dominions, and thereupon those provisions shall not apply to such works.

The intention of this Act is that by Order in Council, the benefit of the protection under the Act should be extended to foreign countries when such countries give reciprocal advantages, and it may be assumed that such extension will be made before the Act comes into force (*a*) in favour of those countries that are members of the Copyright Union, so that any author who first publishes in a Union country will be entitled to have the same treatment as if he were a native of that country.

This section gives power by Order in Council to withhold the advantages of the Act, or to withdraw the advantages after they have been conferred, if such a case should arise as to justify the application of the words of the section, where it appears, "that a foreign country does not give or has not undertaken to give adequate protection to the works of British authors."

It is difficult to say in what cases this section would be put into force, or what is to be considered "adequate protection." Whether, for instance, the fact that under American copyright law, copyright does not apply to books of an English author unless they are set up in type, printed, and bound in America,

(*a*) The Act comes into force on July 1, 1912, or such earlier date as may be fixed by order in Council. S. 37.

and any illustrations reproduced there, would be considered a case of inadequate protection and sufficient to justify any action under this section? Where however a foreign country refuses the benefit of the copyright laws to British subjects, it will not have the benefit of this Act. Sect. 23.

SECTION XXIV.

24.—(1) Where any person is immediately before the commencement of this Act entitled to any such right in any work as is specified in the first column of the First Schedule to this Act (*a*), or to any interest in such a right, he shall as from that date be entitled to the substituted right set forth in the second column of that Schedule (*b*), or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder (*c*): Existing works.

(*a*) The rights specified in the first column are the rights with respect to copyright that existed immediately before the commencement of this Act, that is to say, copyright and/or performing right. The term copyright as there used is to include the Common Law right to restrain publication or other dealing with the work, in the case of a work not published before the commencement of this Act, and Statutory copyright wherein, under the old law, depended upon publication. While the term "performing right," in the case of a work not performed in public before the commencement of this Act, includes the Common Law right to restrain such performance in public.

(*b*) The substituted rights are the rights in copyright under this Act except that "in the case of an essay, article, or portion forming part of and first published in a review, magazine, or other periodical or work of a like nature, the right shall be subject to any right of publishing the essay, article, or portion in a separate form to which the author is entitled at the commencement of this Act, or would if the Act had not been passed have become entitled under s. 18 of the Copyright Act, 1842."

(*c*) That is to say, the Act is retrospective and is to be considered as if in force at the time when the work was made for the purpose of computing the term for which copyright subsists.