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THE  
LAW OF COPYRIGHT

IN WORKS OF

LITERATURE AND ART

AND

IN THE APPLICATION OF DESIGNS.

WITH THE STATUTES RELATING THERETO.

BY CHARLES PALMER PHILLIPS,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW:

AUTHOR OF 'THE LAW OF LUNACY.'

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## PREFACE.



THE OBJECT of the author has been to write a book of moderate bulk which should present a concise and connected statement of the whole Law of Copyright in this country.

This volume contains separate chapters on Copyright before and after publication in literary and musical works—in the representation and performance of dramas and musical compositions—on the Copyright of the Crown, and of certain Universities and Colleges—on Copyright in lectures after public delivery—in published engravings—in paintings, drawings, and photographs—in sculpture—in designs (ornamental and useful)—lastly, on international Copyright.

All the important judicial decisions and dicta at law and in equity upon the subject will, the author hopes, be found in the following pages, and in the Appendix are the statutes to which it may be necessary to refer.

16 OLD SQUARE, LINCOLN'S INN :

*October 1863.*

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## ERRATA AND ADDENDA.

- Page 9, line 18, for 'Defendan' read 'Defendant'
- „ 18, „ 4, „ 'Leech' read 'Leach'
- „ 59, „ 3, „ 'right' read 'title'
- „ 60, „ 21, „ 'Baston' read 'Bastow'
- „ 64, note (b), „ 'In Newman v. Tegg, 2 Rup.' read 'Mawman v. Tegg,  
2 Russ. 385.'
- „ 145, line 1, see however as to general issue 24 & 25 Vict. c. 101.

# THE LAW OF COPYRIGHT.

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## CHAPTER I.

### COPYRIGHT-BEFORE-PUBLICATION.

1. *Definition and Nature of the Right.*—2. *Early Discussion of the Right.*—3. *Effect of Publication on the Right.*—4. *Early Decisions on the Right.*—5. *Modern Decisions on the Right.*—6. *Transfer of the Right.*—7. *Disposition in Bankruptcy of the Right.*—8. *Abandonment of the Right.*—9. *Non-existence of the Right in Criminal Works.*—10. *Protection of the Right in Equity and at Law.*—11. *As to the Existence of the Right in Private Letters.*—12. *Exercise of the Right in disregard of Feelings.*

1. THE term Copyright, in its popular, if not in its legal acceptation, includes two rights, which differ widely in their origin, nature, and extent. The frequent application of the term to each of them indiscriminately seems to have tended to an occasional inaccuracy of language in reference to one or other of them, and perhaps to some misapprehension of both. They are, it must always be remembered, distinct and several rights. (a)

1. Definition and nature of the right.

(a) The right to have a particular trade mark to designate a commodity has been occasionally confounded with copyright, but it is no right at all, unless it is

a right which can be said to exist only, and to be tested only by its violation. See *Farina v. Silverlock*, 2 Jur. N.S. pt. 1, p. 1008; 4 Kay & Jo. 650.



Copyright-before-publication is the more ancient of the two. It is the exclusive privilege of first publishing any original and material product of intellectual labour. Its basis is property; a violation of it is an invasion of property, and it depends entirely upon the Common Law; the privilege is simply a right of user, incidental to the property exclusively vested in the absolute and lawful possessor of the material product.

The right exists in every unpublished innocent production of art, literature, or science.

In reference to this copyright, it is right to notice thus early this marked difference between a published and an unpublished work. A work lawfully published, in the popular sense of the word, may be treated differently from a work which has never been in that situation; the former is liable to be translated, abridged, analysed, exhibited in morsels, complemented, and otherwise treated in a manner that the latter is not. (*a*)

The original ideas which spring up in the thoughtful brain of the author, or of the artist, and which he has not divulged, are themselves indeed beyond the reach of the common law of property in this country, because they have no physical existence, and because their incorporeal character excludes the possibility of any satisfactory proof of his sole possession of them; but when any material has embodied those ideas, then, indirectly through that material, the ideas can be and are recognised by the common law. It then protects their privacy, until the material has itself been, by its owner, given to the world.

In the forcible language of *Yates, J.* (*b*) 'ideas are

(*a*) See *Sir J. L. K. Bruce, V.C.*, and Sm. 693.  
in *P. Albert v. Strange*, 2 De G. (*b*) 4 Burr. 2378.

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

If judicial authority be sought for the statement, 'that no property can exist in incorporeal ideas until embodied,' it may be well to look at *Abernethy v. Hutchinson*. (a) In that case Mr. Abernethy, the eminent surgeon, had filed a bill to restrain the publication in the 'Lancet' newspaper of certain lectures delivered by him, orally, to medical students at St. Bartholomew's Hospital. Upon the first argument, Lord *Eldon*, C. refused to grant the injunction, on the ground of copyright, and why? Because the plaintiff was unable to swear that his whole lecture had been reduced to writing at the date of its delivery. In other words, because the invisible ideas of the lecturer could not be treated as property in the legal sense of that word, no invasion of property could be proved. The difficulty there in the way

(a) 1 H. & T. 39, S. C. in 3 Law Geo. Turner, V.C., in *Morison v. J. ch. 209, 213, 219*; and see Sir *Moat*, 9 Hare, 257.

of relief, upon the ground of copyright, was pointed out by Lord *Eldon* plainly enough. He observed: 'Where the lecture is orally delivered, it is difficult to say that an injunction can be granted, upon the same principle upon which literary composition is protected, because the Court must be satisfied that the publication complained of is an invasion of the work, and this can only be done by comparing the composition with the piracy.' It is true that the same judge, afterwards, and on a second argument, granted the relief prayed, but he then granted it on another and very different ground, viz. that of breach of an implied contract between the lecturer and his audience, that the latter would do nothing more than listen to the lecture for their own instruction.

2. Early discussion of the right.

2. Copyright-before-publication was, very many years ago, incidentally discussed in *Millar v. Taylor*; and more recently in *Jeffreys v. Boosey* it is clearly not referable to any consideration peculiarly literary. (a)

*Millar v. Taylor* and *Jeffreys v. Boosey* were decided upon published works, and will therefore find a more fitting place for consideration in a later chapter of this work.

3. Effect of publication on the right.

3. It may, however, here be remarked that the language of the majority of the law lords in *Jeffreys v. Boosey*, and of some of the judges in *Millar v. Taylor*, point to a conclusion that the intent of the publisher of a work of art, literature, or science, cannot limit the extent of its actual publication by him; if any such work be once given by him to the public eye, the ideas embodied therein cease ipso facto to be in his breast only,

(a) See Sir *J. L. K. Bruce*, V.C., in *P. Albert v. Strange*, 2 Do G. & Sm. 696.

and he can no longer insist that the whole world may not share them with him.

Where, however, the exhibition of the work to the public is for a particular purpose only, and that is notorious, a court of equity may restrain any act being an abuse of that exhibition; but this it seems upon the ground only of breach of an implied contract between the public and the exhibitor, for instance, where a picture has been publicly exhibited, but in places only where local regulations forbid copying, a court of equity will restrain copying. (a)

It cannot be objected to the owner of such a work, claiming therein copyright-before-publication, that the work has been published unless the very thing itself has been given to the world, e. g. the publication of an engraving of a picture is no publication of the painting, the publication of an abridgement is no publication of the original work, a publication of a plaster bust is no publication of a statue.

4. The reported cases bearing directly upon the subject of copyright-before-publication are by no means numerous, and it may be observed that in most of them fraud or breach of contract was an element; but it is obvious that a violation of the right may take place without either of those ingredients. The earliest case of such an infringement appears to be *Webb v. Rose*, (b) which was decided in the year 1732. Sir *Joseph Jekyll*, M.R., there granted an injunction against a conveyancer's clerk when he threatened to publish as legal precedents his master's conveyancing drafts, not having obtained

4. Early decisions on the right.

(a) *Turner v. Robinson*, 10 Ir. P. C. octavo ed. 1338. The Reports 'Cases temp. Talbot' seem to have been the piracy.

(b) Cited 4 Burr. 2330; 2 Bro.

the draftman's permission for such a proceeding. *Forrester v. Waller* (a) is another and somewhat similar case which occurred in the year 1741; an injunction then issued against printing, without his consent, the plaintiff's notes of cases; the notes, it is clear, had been obtained in a surreptitious manner. Again, in the year 1754, a clerk of Sir John Strange, while in that gentleman's employ, clandestinely made an abridgement of his master's unpublished MS. cases relating to evidence; Lord *Hardwicke*, C. did not hesitate to restrain the clerk, (b) from publishing them. *Macklin v. Richardson*, (c) decided in the year 1770 by Lords Commissioners *Smythe* and *Bathurst*, is another instance of an injunction against the unauthorised printing and publication of a private work. The subject of the copyright there claimed was Macklin's celebrated farce called 'Love à la Mode.' A peculiar feature in the case was the fact that the play had been publicly acted, and by the plaintiff's permission; the defendants employed one Gurney, a short-hand writer: he took down the words from the mouths of the players, the defendant corrected the short-hand notes by aid of his own memory, published the first act in a number of a magazine, and threatened to publish the second act in the next number. Of course there was a printed or written copy of the play; it was, however, only lent by the author to the prompter during and for the purpose of each performance. The Court restrained the threatened publication, and negatived a plea that the representation on the stage of the

(a) Cited 4 Burr. 2330; 2 Bro. P.C. octavo ed. 1338.

(b) Dr. Paley left certain manuscripts to be given only to his parishioners for their use. A book-

seller having obtained possession of them was restrained from publishing. Cited by Sir S. Romilly, 2 V. & B. 23.

(c) Ambl. 694.

farce was such a publication of it by its author (a) as to estop him from complaining of another kind of dealing therewith, viz. the printing and selling, and so publishing the work. Lord Commissioner *Smythe* said: 'It has been argued to be a publication by being acted, and therefore the printing is no injury to the plaintiff; but that is a mistake, for besides the advantage from the performance, the author has another means of profit, from the printing and publishing, and there is as much reason that he should be protected in that right as any other author.' In like manner the performance at the English Opera of O'Keefe's comedy of the 'Young Quaker,' for the benefit of Maria Kelly, in the year 1820, was restrained by Lord *Eldon*, C. The plaintiffs were the proprietors of the Haymarket Theatre, then the assignees of the copyright in the manuscript. (b)

5. Modern decisions on copyright-before-publication have scarcely been called for. *P. Albert v. Strange* (c) is almost the only modern case on the subject; but in that the whole learning bearing upon this right was most fully brought forward, and one ground of the decision there was 'that any publication which communicates knowledge of a private work is an infringement of the owner's right of property therein, if the publication be against the consent, or without the authority of that owner;' the other ground of decision did not touch copyright, it was breach of trust.

5. Modern decisions on the right.

The facts of *P. Albert v. Strange*, so far as it seems material here to narrate them, were these: Her Majesty

(a) See post.

(b) *Morris v. Kelly*, 1 Jac. & W. 481. It is not quite clear that the manuscript of the 'Young Quaker' had not then been published.

Lord *Eldon's* allusion to *Power v. Walker* rather points to a previous publication.

(c) 2 De Gex & Smale 652; 1 M. & Gor. 25.

and her Royal Consort had, solely for their own amusement, made certain etchings, and from these they had struck off a few lithograph impressions for their own use, but not for the purpose of publication; other impressions they had ordered to be struck off, and some of these latter had been surreptitiously retained by one of the pressmen employed in the operation, and from him, through the instrumentality of a Mr. Judge, they had passed into the possession of one Strange, a London publisher; he (Strange) declared his intention of publicly exhibiting the impressions so improperly obtained, and also of selling to the public a descriptive catalogue of the lithographs. A bill was thereupon filed in the Court of Chancery against him by the Prince; it prayed delivery up to the plaintiff of the impressions surreptitiously taken, an injunction against any exhibition, engraving, copying, publication, or disposition of the same, and any sale, or publication, of the catalogue, also delivery up to the Prince of all copies of the catalogue then in the defendant's possession. On an *ex parte* motion (supported, of course, by affidavit), and upon an undertaking by the plaintiff and his solicitor severally to abide by such order respecting damages as the Court might thereafter make, an interim injunction was granted by Sir *J. L. K. Bruce*, V.C. against the defendant Strange, in the terms of the plaintiff's prayer. The injunction was subsequently extended to Mr. Judge, on proof of his complicity in the matter. After putting in his answer, Strange moved to dissolve the injunction, so far only, however, as it restrained the publication of the descriptive catalogue; his counsel contended in substance that their client's act could not be put higher than a breach of manners, and that it did not amount to an

offence against law; the Vice-Chancellor, however, thought otherwise. He considered that the act of the defendant Strange was not only a breach of manners, but an unlawful interference with another man's civil property, and that the means of composing and forming the catalogue had been obtained unduly, i.e. without the consent of the plaintiff, and without any right—moral, equitable, or legal. He accordingly refused the motion. On appeal, his judgment was affirmed by Lord *Cottenham*, C. that learned judge also coming to the conclusion, that the act of the defendant Strange was an interference with the Prince's property; he, however, observed that the case did not depend solely upon property, because, according to the evidence before him, the possession of the defendant Strange must have originated in a breach of trust. At the hearing of the cause, the defendant Strange consented to a perpetual injunction; the defendant Judge, who had been clearly privy to the surreptitious taking, resisted it, but in vain; his case the Vice-Chancellor characterised as one of entire and undissembled dishonesty. (*a*)

(*a*) By the decree it was declared that the plaintiff was entitled to have delivered to him the impressions (by the answer of Judge admitted to be in his possession) of such of the several etchings in the pleadings mentioned as in the catalogue and in the pleadings were stated to have been etched by the plaintiff; that is to say (they were described by reference to the numbers in the catalogue), and it was ordered that Judge should, within four days after the service of the decree, deliver up the impressions above specified on oath,

and leave them with the Clerk of Records and Writs at the Record Office. And it was ordered that the defendant Strange should, within four days after service of the decree, deliver to the Clerk of Records and Writs, at the said office, the twenty-three copies of the catalogue—being the same as were mentioned in the decree in the other suit of even date. And the decree contained similar directions as to six copies of the catalogue, admitted by Judge to be in his possession. And the Clerk of Records and Writs was ordered to



All to whom the doctrine of copyright-before-publication is interesting and new, and they may be many, should peruse and re-peruse in extenso, both in the regular reports and in the 'Jurist,' the case last cited. The vulgar intrusion of Strange and his co-defendant on the royal privacy awakened much public sympathy at that time for Her Majesty and the plaintiff, and elicited a clear judicial exposition of the principles of law upon which this copyright is based; but, in the legal world at least, those principles had long been well understood, the nature of the right of an author in his unpublished works had long been known to be analogous to the rights of ownership in other personal property.

The following extract from the judgment of the Vice-Chancellor proves clearly the pith of his decision in *P. Albert v. Strange*, and states his view of the law as to the origin, nature, and extent of the right then under consideration: 'Upon the principle, therefore, of protecting property it is that the Common Law, in cases not aided nor prejudiced by statute, shelters the privacy and seclusion of thoughts and sentiments committed to writing, and desired by the author to remain not gene-

destroy these copies of the catalogue, giving notice to the solicitors of the several parties of the time and place at which he intended to do so. And it was ordered that the defendants, their servants, &c., should be restrained from making, or permitting to be made, any engraving or copy of such etchings, or any of them; and from publishing the same, and from parting with or disposing of them, or any of them, except in obedience to the

decree; and from selling, or in any manner publishing, the catalogue, or any work being or purporting to be, a catalogue of the etchings made by the plaintiff. And the plaintiff, waiving any costs against Strange, it was ordered that Judge should pay the plaintiff's costs to the 22nd of May, 1849 (when Judge obtained an order to defend in forma pauperis) Liberty to apply was reserved.

rally known. This has been in effect often judicially declared, nor by any judge more distinctly than by Lord *Elton*, upon several occasions. In particular, in Mr. Southey's case, (a) he said: "It is to prevent the use of that which is the exclusive property of another, that an injunction is granted;" and again, "I have examined the cases that I have been able to meet with containing precedents for injunctions of this nature, and I find that they all proceed upon the ground of a title to the property in the plaintiff." Such then being, as I believe, the nature and foundation of the Common Law as to manuscripts, independently of parliamentary additions and subtractions, its operation cannot of necessity be confined to literary subjects. That would be to limit the rule by its example. Wherever the produce of labour is liable to invasion in an analogous manner, there must, I suppose, be a title to analogous protection or redress. To consider, then, the case of mechanical works, or works of art executed by a man for his private amusement or private use, whatever protection these, or some of these may have by Act of Parliament, they are not, I apprehend, deserted by the Common Law. The principles and rules which it applies to literary compositions in manuscript must, I conceive, be to a considerable extent, at least, applicable to these also. Mr. Justice *Yates*, in *Millar v. Taylor*, said that an author's case was exactly similar to that of an inventor of a new mechanical machine; that both original inventions stood upon the same footing in point of property, whether the case were mechanical or literary, whether an epic poem or an orrery; that the

(a) *Southey v. Sherwood*, 2 of *Queensberry v. Shebbeare*, 2 Meriv. 435, *post*, p. 19; and *Duke Eden*, 329, *post*, p. 15.

immorality of pirating another man's invention was as great as that of purloining his ideas. Property in mechanical works or works of art executed by a man for his own amusement, instruction, or use, is allowed to subsist certainly, and may before publication by him be invaded, not merely by copying, but by description or by catalogue, as it appears to me. A catalogue of such works may in itself be valuable. It may also as effectually show the bent and turn of the mind, the feelings and taste of the artist, especially if not professional, as a list of his papers. The portfolios or the studio may declare as much as the writing-table. A man may employ himself in private in a manner very harmless, but which, disclosed to society, may destroy the comfort of his life, or even his success in it. Everyone, however, has a right, I apprehend, to say that the produce of his private labours is not more liable to publication without his consent, because the publication must be creditable or advantageous to him, than it would be in opposite circumstances. Addressing the attention specifically to the particular instance before the Court, we cannot but see that the etchings executed by the plaintiff and his consort for their private use, the produce of their labour, and belonging to themselves, they were entitled to retain in a state of privacy, to withhold from publication. That right I think it equally clear was not lost by the limited communications which they appear to have made, (a) nor confined to prohibiting the taking of impressions without or beyond their consent from the plates, their

(a) Some copies had been given to a few private friends by Her Majesty and the Prince.

undoubted property. It extended also, I conceive, to the prevention of persons unduly obtaining a knowledge of the subjects of the plates, from publishing (at least, by printing or writing), though not by copy or resemblance, a description of them, whether more or less limited or summary, whether in the form of a catalogue or otherwise. But I am satisfied, I repeat, that the means of composing and forming the catalogue in question must, upon the materials now before the Court, be taken to have been obtained unduly, that is, without the consent of the plaintiff, without that of his consort, and without any right, moral, equitable, or legal. Can I then deny it to be an interference with another's property? I think not. The defendant appears to me to have been seeking to make use for his own purposes of what does not belong to him. That the object of printing and publishing the catalogue was money, was gain, no man, of course, can doubt; and that it would be very saleable: that, were copies of it to be multiplied, edition after edition would find ready purchasers, (with or without the superfluous bait of the copied autograph,) is highly probable, for reasons sufficiently obvious. I do not say on account of the gentle address or graceful indirectness of the compliments, or the service to history of the memoirs, (those are merely the garnish,) but on account of the solid and substantial part of the publication, the simple catalogue. What, however, can be the defendant's right, or that of any person, but the owners of the plates, to this benefit? It is for them to use or bestow, or withhold, nor can a stranger be allowed to say that they do not want it: they alone are entitled to decide whether, and when, and how, and for whose advantage their property shall

be made use of. I think, therefore, not only that the defendant here is unlawfully invading the plaintiff's right, but also, that the invasion is of such a kind, and affects such property, as to entitle the plaintiff to the preventive remedy of an injunction.' (a)

*Prince Albert v. Strange* may be termed the leading case on copyright before publication; but it may be well also to refer to another curious case in Ireland, which occurred in the year 1860. (b) A valuable picture, 'the Death of the Poet Chatterton,' painted by Wallis, had, after public exhibition at the Royal Academy, and elsewhere, been on view for the sole purpose of obtaining subscribers to an engraving of it. A person aware of the qualified purpose of the view, visited the place, minutely studied the picture, and afterwards, at his own house and from his own recollection, arranged figures and furniture, &c., so as exactly to represent the pictured scene in all its details. The ideas so stolen and embodied he then stereoscopically photographed. The Court of Appeal in Chancery scrupled not to restrain a publication of the photographs: one of the learned judges pertinently remarked 'that no court of justice could admit that an act, illegal in itself, could be justified by a novel and circuitous mode of effecting it.' The above-cited decision passed previously to the Act 25 & 26 Vict. c. 68, and when there was no statutory copyright in pictures.

(a) See 2 De G. & Sm. 695. In *Millar v. Taylor*, 4 Burr. 2360, Yates, J. had long ago said: 'If a stranger had taken his manuscript from him (an author), or had surreptitiously obtained a copy of his work, and printed it before him, he might then complain of in-

justice.' See also *Mayall v. Higby*, 1 H. & C. 148, but that was not a question of piracy of copyright, but of wrongful user of a published photograph borrowed for another purpose.

(b) *Turner v. Robinson*, 10 Ir. Ch. R. 510; but see 25 & 26 Vict. c. 68.

It was evidently based on fraud, brought home to the defendant, but as copyright was discussed therein, this brief allusion to it may possibly be excused.

6. Copyright before publication, being an incident to personal property, is assignable; it may also doubtless be the subject of a bequest.

6. Transfer of the right.

On the death of the person to whom it belongs it devolves on his legal personal representative. (a)

After the death of an author, there is some ground for an argument that his executors may consent to the publication of his writing, though he himself never intended them to be published; (b) at all events, unless he has clearly prohibited the publication, they may publish, and their publication will be protected from piracy.

A transfer of the right will not be presumed, unless the intention of transfer is clearly manifested. That intention will not be inferred from a bare permission to take a copy of the subject, especially if the right be of great pecuniary value. A decision of Lord Keeper *Henley*, in a case of the *Duke of Queensberry v. Shebbeare*, (c) in the year 1758, seems to support this statement. There it appeared that Henry Earl of Clarendon, the son of the Chancellor, was, at his death, possessed of an original MS. of his father's History of the Reign of Charles II. In his lifetime he had given permission to Mr. Gwynne to take a copy of the MS., which Mr. Gwynne accordingly did. Mr. Gwynne's son and administrator, afterwards representing that he had a right to print and publish the copy, sold it to

(a) See *Thompson v. Stanhope*, Ambl. 737; *Burnett v. Chitwood*, 2 Meriv. 444, n. a.; Dr. Paley's case, cited 2 Swanst. 419.

(b) *Dodsley v. M'Farquhar*, Mor. Dict. of Decis. 19, 20, app., part 1, p. 1.

(c) 2 Eden. 329.

Dr. Shebbearc. The doctor attempted to print and publish, but was restrained by the Court of Chancery, at the suit of the Duke, as the legal personal representative of the author and of his son Henry. This injunction was afterwards continued to the hearing, the Lord Keeper saying 'that it was not to be presumed that Lord Clarendon, when he gave a copy of his work to Mr. Gwynne, intended that he should have the profit of multiplying it in print—that Mr. Gwynne might make every use of it but that.' This copy led to a great deal of litigation, for Dr. Shebbearc afterwards recovered, before Lord *Mansfield*, a considerable sum against the son and representative of Mr. Gwynne, for having held out to him that he could print and publish it.

One who agrees to write and supply another with a MS., in such a form as to enable the latter to publish it as his own composition, has no just cause of complaint in a Court of Equity if the latter mutilates the MS. This was decided in *Cox v. Cox*. (a) In the same case, Sir *W. P. Wood* intimated his opinion to be that in the absence of a contract for a qualified copyright, the purchaser of an unpublished MS. might mutilate and then publish it: the point did not, however, arise in that case.

7. Disposition  
in bankruptcy  
of the right.

7. The position of an unpublished MS., or other unpublished work, in reference to the creditors of its bankrupt author, has not yet been the subject of a reported legal decision, though it was just touched upon in *Millar v. Taylor*. *Willes*, J. there remarked: 'This is not the case of an unpublished MS., taken in execution by creditors, or claimed by assignees under a commission against a bankrupt author. When a ques-

(a) 11 Hare, 118.

tion of that sort arises, the Court will consider what is right.'

In Mr. Turner's 'Treatise on Copyright,' it is stated that the right before publication adheres to the person of the author, and so escapes the claim of bankruptcy, whatever may become of the materials in which the right inheres. Mr. Bell, the Scotch commentator, also lays it down, that the property of unpublished compositions is not within the reach of creditors. (*a*)

Inasmuch, however, as such a copyright may frequently be converted by its owner into money, and so is in the nature of commercial property, there is some ground for contending that the right is within the reach of an English execution, or bankruptcy, whether the debtor be the author, or only the assign of the unpublished production. The prior intention of the debtor as to the disposition of his property can scarcely override the benefit of his creditors, and although the publication may be painful to him, or even prejudicial to his professional reputation, it is pretty clear that no court of law or equity in England will regard such injury per se as a ground of interference. (*b*) As to any prejudicial effects of such publication, they seem to be only an unfortunate consequence of the debtor's pecuniary embarrassments; if the work be unfinished and the publication be prejudicial only on that account, creditors would scarcely refuse to enter into some arrangement for its completion prior to publication; possibly, too, the author might prevent the use of his name as the parent of the work.

In a suit of *Atcherley v. Vernon*, concerning the will

(*a*) 1 Bell's Com. p. 68.

2 V. and B. 28, and Lord *Eldon*,

(*b*) See Sir *T. Plumer*, M.R., in C., in 2 Swanst. 413, 426.



of Mr. Vernon, the author of 'Vernon's Reports, it seems that this question of publication was, indeed, once discussed at the bar, but the Court passed no decision on it. The case is reported by Mr. Lecch in his 'Modern Reports.' (a) It there appears to have been insisted, by Mr. Atcherley's counsel, that the manuscript reports found in the London house of Mr. Vernon, belonged to his heir-at-law, as guardian of the reputation of his ancestor. It was said that, if the tomb or monument of an ancestor be defaced or destroyed, an action lies for the heir-at-law; and that, by parity of reason, as those manuscripts were intended by the testator as a monument to transmit his learning and reputation to posterity, the law would intrust the heir with the care of them, that they should be printed in such a manner as would be most for the honour of Mr. Vernon's memory; that the printing or not printing these papers might as much affect the reputation of Mr. Vernon as any monument or tomb; that possibly they were not fit to be printed; that possibly they were never intended to be printed; that they were not in the nature of the thing fructuary, and did not, therefore, fall within a clause which gave the residue of the personal estate to trustees. The counsel argued: 'Suppose a man of learning should have the misfortune to die in debt: can the creditors come into this court and pray a discovery of all his papers, that they may be printed for the payment of his debts? And if creditors cannot do this, a fortiori not the trustees in the present case. If a minister of State should die, he may have a great number of papers that may be very curious, may print and sell well; yet, surely, these will not be considered as personal estate and go to the executor. As, therefore, papers found in

(a) 10 Mod. 518.

a man's study, not being in their nature fructuary, are not considered as personal estate, and, in case of no will, would not have gone to the administrators of Mr. Vernon, so they did not pass under that clause where the residue of his personal estate is given to the trustees.' The Court, however, determined nothing in *Atcherley v. Vernon* as to the position of the manuscript reports in reference to publication. All parties consented to have them printed, under the direction of the Court, without making any profit of them.

8. It is clear that an abandonment of copyright before publication must be unequivocal; the mere gift of copies of the work to a few friends is not considered as an abandonment of the right. (a)

8. Abandonment of the right.

A question may hereafter recur, whether circumstances do not justify the conclusion that the original right has been abandoned, and so lost. Should such a question be again raised, it may be useful to refer to *Southey v. Sherwood*. The material circumstances of that suit were these:—In 1794, the poet Southey wrote his poem 'Wat Tyler,' and, by a friend, sent it up to London to Ridgway, the then well-known bookseller and publisher, for his consideration as to printing and publishing. Southey, himself, shortly afterwards followed the work to London, and conferred with Ridgway and one Symonds, as to printing and publishing it, but he soon returned to the country; Ridgway and Symonds were, or seemed to be, at first inclined to publish. The poet living away from town, and being much occupied by various literary works, omitted to ask for the return of his manuscripts. In 1817, the successors in business of

(a) See *P. Albert v. Strange*, 2 De G. and Sm. 686; and see 4 Burr. 2330.

Symonds (then deceased) began to publish the poem, without the sanction or authority of Southey, and, thereupon, that gentleman commenced proceedings in the Court of Chancery against them. Upon a motion in that suit for an injunction to restrain the publication, Sir Samuel Romilly and Mr. Montague, being counsel for the defendants, insisted that the poem, by reason of its libellous tendency, was of such a nature, that there could be no copyright therein. They did not (according to the case as it is reported) object to the abandonment of the right, if any. The plaintiff's counsel contended that their client was entitled to the interposition of the Court, on account of the injury to his reputation, by the publication of a work, the sentiments of which he then disavowed and sought to discountenance. The Lord Chancellor (*Eldon*), at the conclusion of the argument, after alluding to the character of the poem, said: 'If the work be such a one as it has been described to be, it is extraordinary that with the change alleged to have taken place in Mr. Southey's opinions, there should be nothing stated to account for its having been left by him in Mr. Ridgway's hands to the present time, but "that Mr. Southey forgot it." It is impossible that Mr. Southey could have forgotten it. There must have been some other reason. If a man leaves a book of this description in the hands of a publisher without assigning any satisfactory reason for doing so, and has not enquired about it during twenty-three years, he surely can have no right to complain of its being published at the end of that period.' On the next day, Lord *Eldon* having meanwhile looked into all the affidavits, and having read the poem itself, stated that by reason of the character of the work, and

its doubtful claim to be considered property, the original intention to publish, the subsequent abandonment of that intention, and the length of time during which the plaintiff had suffered the work to remain out of his possession without enquiry, he (Lord *Eldon*) could not grant the injunction until Mr. Southey should have established his right to the property by an action. (a) Many circumstances evidently combined to induce the denial of relief in the case just mentioned.

9. No one can have copyright-before-publication in a criminal work (i. e. a work calculated by publication to do injury to society, and to offend against the law).

9. Non-existence of the right in criminal works.

Upon a motion for an injunction to restrain the publication of a literary work, Lord *Eldon*, C., said: 'If upon inspection the work appears innocent, I will act upon that submission; (b) if criminal, I will not act at all; and, if doubtful, I will send the question to law.' (c)

In *Southey v. Sherwood*, (d) in the year 1822, he adhered to that doctrine. The libellous tendency of 'Wat Tyler' appears to have been at least one of the reasons why he then refused to grant the injunction until Mr. Southey should have established his right of property in the poem by an action.

A dictum of Lord Chief Justice *Eyre* is also often quoted and properly so, to show that, in his opinion, the criminality of a work deprived it of the character of property. A Dr. Priestley had brought an action against a hundred for damages sustained by him in a riot at Birmingham, and claimed compensation for (among other

(a) See now 25 & 26 Vict. c. 42.

(c) *Walcot v. Walker*, 7 Ves. 2.

(b) A submission in the defendant's answer.

(d) 2 Meriv. 438, 439.

property alleged to have been destroyed) certain unpublished manuscripts; on behalf of the hundred, it was alleged in reply, that the plaintiff was in the habit of publishing works injurious to the government of the state, but no evidence was produced to that effect; the Lord Chief Justice thereupon observed: 'If any such evidence had been produced, I should have held it was fit to be received as against the claim made by the plaintiff.' (a)

In *Southey v. Sherwood* the criminality of the work was only considered in its bearing on the question of civil interest in Mr. Southey; but a decision more curious than sound is mentioned in a note appended to that case by Mr. Merivale. The decision is attributed to Lord Chancellor *Macclesfield*. According to that note, a bill was brought, in the year 1720, by a plaintiff, as executor of Dr. Burnett, the author of two books, one published in 1692, the other unpublished, to stay the publication of an English translation of both books; the defendant insisted that a translation was no violation of copyright, within the intent of the Act 8 Ann, c. 19; the Chancellor, however, granted the injunction, and (if credit be given to the reporters for accuracy) he said: 'Though a translation might not be the same with the reprinting the original, on account that the translator has bestowed his care and pains upon it, and so, as a translation, the book might not be within the prohibition of the Act; yet, inasmuch as the book contained to his (the Chancellor's) knowledge (he having read it in his study), strange notions, intended by the author to be concealed from the vulgar in the Latin language, in which language it could not do much hurt, the learned being better able to judge of it, it was

(a) Priestley's case cited 2 Meriv. 437.

proper to grant an injunction to the printing and publishing it in English.' He then added, 'that the Court of Chancery had a superintendency over all books, and might, in a summary way, restrain the printing or publishing any that contained reflections on religion or morality. (a)

The law laid down by Lord *Eldon*, in *Walcot v. Walker*, as to granting or withholding an injunction, upon the application of the author of a work, mischievous in regard to the public, was again discussed in *Lawrence v. Smith*, (b) in the year 1822. The plaintiff had delivered at the College of Surgeons, and had afterwards published, a work under the title of 'Lectures on Physiology, Zoology, and the Natural History of Man.' The bill was filed to restrain the defendant from selling a pirated edition, and an ex parte injunction was obtained. The defendant then moved to dissolve the injunction, on the ground that the lectures were so hostile to natural and revealed religion, that they ought to have no protection. The character of the work, in its view of the Scriptures, was much disputed at the bar. Lord *Eldon* dissolved the injunction, and because he doubted whether the lectures did not contradict the Scriptures. His language was: 'The defendant comes into Court under singular circumstances. He says, that the work which he, as well as the plaintiff, has published, is so wrong, so immoral in its nature, that it ought to have no protection. As this Court has no jurisdiction in matters of crime, it has been said,

(a) 2 Meriv. 440, note a. The facts alleged in the report of the case and in the report of the decree, differ from each other somewhat.

As the decree is set forth verbatim, preference has been above given to the facts alleged in the decree.

(b) 1. Jac. 471.

that if the injunction be refused, it has the effect of increasing the number of copies. (a) The answer to that is, that I have nothing to do with it as a crime. The question relates only to a civil right of property. If the one party has that right, the other must not invade it; if he has not that right, the Court cannot give him the consequences that belong to it. Whether, if such a defence were made upon a trial at law, there might or might not be proceedings of a different nature against both parties, that is a question that I have nothing to do with; but the question is, whether it is so clear that the plaintiff has this civil right, that on that ground he is to have relief? If, on reading the plaintiff's work I thought it clear that he had that right, I should feel it necessary to state the grounds of my opinion; for after the argument at the bar, I should be unwilling to part with the subject without telling you the view I take of it. But if I feel a rational-doubt whether an action would lie, it will not be necessary to go into the grounds of that doctrine; it might, perhaps, prejudice the trial if I did. Looking at the general tenor of the work, and at many particular parts of it; recollecting that the immortality of the soul is one of the doctrines of the Scriptures; considering that the law does not give protection to those who contradict the Scriptures; and entertaining a doubt, I think a rational doubt, whether this book does not violate that law, I cannot continue the injunction. The plaintiff may bring an action, and when that is decided, he may apply again.' (b)

From a note by Mr. Jacob in his report (c) of *Lawrence v. Smith*, it appears that in *Murray v.*

(a) And see Lord *Eldon* in 2 Meriv. 438.

(b) See 25 & 26 Vict. c. 42.

(c) 1 Jac. 474, note.

*Benbow*, February 1822, Mr. Shadwell, on the part of the plaintiff, moved for an injunction to restrain the defendant from publishing a pirated edition of Lord Byron's 'Cain,' and that Lord *Eldon*, after reading the poem, refused the motion on grounds similar to those stated in the above judgment. In the same book of reports, and in the same page, it is stated that Sir *John Leach*, V.C.E. dissolved in 1823, on similar principles, an injunction which had been obtained against the publication of a pirated edition of a portion of the poem of 'Don Juan,' ordering the defendant, however, to keep an account. (a)

It may well be doubted whether the above decisions would be considered guides in the present day; the existence of copyright can, however, be safely denied in works the publication of which would offend the law of the land.

Further, it has been held that no copyright can subsist in a book which seeks to obtain a sale by serious deception of the public in respect to authorship. If the misrepresentation be innocent, it is of course immaterial; but when its intent is serious and with a view to profit, the transaction ranges itself under the head of *crimen falsi*. (b)

10. Whether the author of an unpublished innocent work does or does not intend to seek profit by future publication, he is entitled to restrain an infringement of his copyright; because, according to *Prince Albert v.*

10. Protection of the right in equity and at law.

(a) The Acts against blasphemous and seditious libels are 9 & 10 Will. 3, c. 32; 53 Geo. 3, c. 160; 60 Geo. 3 & 1 Geo. 4, c. 8, 9; 11 Geo. 4 & 1 Will. 4, c. 73; 6 &

7 Will. 4, c. 76 The Act against publication of indecent books is 20 & 21 Vict. c. 83.

(b) *Wright v. Tullis*, 1 M. Gr. & Sc. 893.



*Strange*, any interference with his property is an unlawful act. (a)

As an American judge (b) has aptly remarked, 'A defendant is not to be enjoined from doing an act on account of the benefit which he expects to derive therefrom, but on account of the injury which it may occasion to the plaintiff. Here the plaintiff complains that his property is violated. Can the defendant resist the claim of the plaintiff by saying, "True it is I am about violating your property, but I seek not thereby any pecuniary benefit nor any advantage, but the gratuitous pleasure of working an injury." In foro legis the measure of relief or damage must be the same, whether any advantage be contemplated by the wrongdoer or not; while in foro conscientiae his turpitude is surely the greater if none be expected. If a man is to be enjoined to print my letters, when he expects thereby to support his family, à fortiori when his only view is to do me harm.'

An action at law for damages lies after any infringement.

Where infringement was threatened and the plaintiff's legal title was clear, the Court of Chancery always gave relief. Where for any reason, prior to Rolt's Act, (c) the plaintiff's legal title was doubtful, a court of equity declined to restrain until that title had been established, (d) because the relief in equity was only ancillary to the right at law. (e)

(a) See also Lord *Eldon*, C., in 2 Meriv. 437.

(b) See *Denis v. Leclercq*, 1 Martin, 305.

(c) 25 & 26 Vict. c. 42.

(d) It seems that Rolt's Act now compels the Ct. of Chancery

to determine for itself all questions of law and fact. (See *Re Hooper*, 11 W. R. 797.)

(e) *Lawrence v. Smith*, 1 Jac. 471. *Southey v. Sherwood*, 2 Meriv. 435.

11. The application of this copyright to private letters was first judicially considered in England in *Pope v. Curl*, (a) about the year 1741. Lord *Hardwicke*, C., in that case granted an injunction against a republication of the poet's private letters to Dean Swift. The letters had been, in fact, already published, not in England, but in Ireland; therefore the sole question for decision in the suit was copyright after publication, and that, under the statute 8 Anne, c. 19 (to which Act reference will hereafter be made). However, in the course of his judgment, the Chancellor apparently went out of his way to state what he considered to be the doctrine on the subject of copyright in private letters. (b) He observed: 'Another objection has been made by the defendant's counsel, that where a man writes a letter it is in the nature of a gift to the receiver; but I am of opinion that it is only a special property in the receiver: possibly the paper may belong to him; but this does not give a license to any person whatsoever to publish them to the world, for at most the receiver has only a joint property with the writer.' (c)

11. As to the existence of the right in private letters.

In the year 1774 occurred the first case which directly raised the question of Copyright in unpublished letters. It is *Thompson v. Stainhope*, (d) and it came before Lord Chancellor *Apsley*. He is there reported to have restrained on the application of Lord *Chesterfield's* executors, but until the hearing of the suit only, the publication of letters written and sent by that nobleman to his natural son. These letters the Earl had told one of the defendants (his son's widow) 'to keep,'

(a) 4 Burr. 2330; 2 Atk. 342. According to Dr. Johnson, Curl was the victim of Pope in this publication. See Johnson's 'Life of Pope.'

(b) See Lord *Eldon*, C., in 2 Swanst. 425.

(c) 2 Atk. 342.

(d) Ambl. 737.

when she at his desire gave up to him other letters also written and sent by him to his son. Lord Chesterfield had never approved of the publication, on the contrary, in reply to an observation by the widow to the effect 'that they (the letters) would form a fine system of education if published,' his Lordship had said, 'Why, that is true; but there is too much Latin in them.' This case has been often cited at the bar; but when closely examined does not prove much. It ended in a compromise at the recommendation indeed of Lord *Apsley*. (a) His observation at the hearing, 'that it was within the reason of several cases where injunctions had been granted, e. g. the case of Mr. Forrester, of Mr. Webb, of Mr. Pope's letters printed by Curl, and Lord Clarendon's Life (b) advertised to be published by Dr. Shebbeare,' (c) has not that weight which his words generally carry. Those cases have been already cited, and certainly do not involve any question as to the peculiar rights existing in private communications by letter. (d)

Again, and at a day much nearer to our own times, a dispute touching the right to publish confidential correspondence came before Sir *Thomas Plumer*, M.R. Lord and Lady Percival had filed a bill in the Court of

(a) See Lord *Eldon*, C., in 2 Swanst. 426.

(b) It was Lord Clarendon's History of the reign of Charles II., from the Restoration to the year 1667—and not Lord Clarendon's Life; see 2 Eden, 329.

(c) Ambl. 740.

(d) The letters in *Thompson v. Stanhope* had been sold by the widow to Dodsley, the London

bookseller, for 1,575*l.* He afterwards published them in England, with the consent of the Earl's executors. They appeared once more in litigation, and on that occasion became the subject of an interdict against certain Edinburgh printers. (*Dodsley v. M'Farquhar* Mor. Dict. of Dec. 19, 20, app. part 1, p. 1.)

Chancery, praying an injunction against Mr. Phipps, to restrain him from printing or publishing certain letters written and sent by Lady Percival to Mr. Mitford, and from parting with them, or any copies of them, otherwise than to the plaintiffs; these letters the bill alleged to be of a private nature, and confidential between Lady Percival and Mitford. Lord *Eldon*, C., upon an *ex parte* motion had granted the injunction until answer; the defendant Phipps had then put in his answer, and thereby insisted that the letters had reference to articles which Lady Percival had sent through Mitford to Phipps for publication in his newspaper, and that the publication sought to be restrained was necessary to the public vindication of the defendant's character as the owner of that newspaper, publicly discredited by the plaintiffs. Upon an application to Sir *Thomas Plumer*, V.C., to dissolve the injunction, and at the close of counsel's argument, he stated his impression to be, 'That letters had the character of literary composition stamped upon them, so that they were within the spirit of the Act of Parliament protecting literary property: that a violation of the right in letters was attended with the same consequences as a violation of the right in an unpublished MS. of an original composition of any other description; that an injunction restraining the publication of private letters must stand upon the foundation of literary property, not of breach of confidence, not of wounded feelings; and that whatever degree of confidence, of reservation of property, might be implied from the transmission of a private letter, it would be too much to hold that the individual who receives it can in no case use it for the purpose of protecting himself from an unfounded imputation.'

Subsequently, and after a perusal of the bill and answer, the Vice-Chancellor dissolved the injunction, 'because upon the answer the plaintiffs had failed to establish either ground for the interference of a court of equity, copyright, or confidence.' (a)

It may not be amiss to remark that although the circumstances of *Percival v. Phipps* may have justified the decision made therein, there lurks in the language of the Vice-Chancellor, in reference to the Act of Parliament, that confusion between copyright-before-publication and copyright-after-publication, which has been deprecated at the commencement of this work. The decision was in the opinion of Lord *Eldon* simply this: 'Let it be ever so clear that the plaintiffs have either a sole or a joint property in the letters, the Court will not interfere between parties whose acts have supplied reasons for not interfering.' (b)

Once more the question of copyright in letters came before the Court of Chancery; it is reported and was raised in the year 1818. In that case (*Gee v. Pritchard*), on the authority of *Thompson v. Stanhope*, Lord *Eldon*, C. (c) restrained the publication of private letters written and sent by a lady to her husband's adopted son; a motion to dissolve the injunction which had been obtained on an *ex parte* application proved unsuccessful, and the Chancellor continued the relief; he believed that he was bound so to do by the law (although he doubted its soundness) laid down in similar cases in the Court of Chancery, 'that the receiver of a letter had only a joint property with the writer;' and he was also of

(a) *Percival v. Phipps*, 2 V. & B. 19.

(c) *Gee v. Pritchard*, 2 Swanst. 402.

(b) 2 Swanst. 423, 427.

opinion that, even if the defendant had originally had a right of publication in the letters, he had renounced that right.

In this last case, be it noted, the defendant had thought proper to return the original letters to the lady, but to keep copies of them without apprising her, while he assigned as a reason for the return, 'that he was unworthy of the sentiments and expressions of kindness contained in the letters.' So that undoubtedly breach of faith was an element in the case.

The latest case, (not yet reported,) on the subject of letters is the *Bishop of Exeter v. Shutte*. The defendant proposed to publish in a biography of the Bishop private letters written by that dignitary; at the suit of the Bishop he was restrained from so doing.

Of *Gee v. Pritchard*, the case above referred to, it has been said by an American Chancellor, that it may, perhaps, be doubted whether Lord *Eldon* in that case did not to some extent endanger the freedom of the press by assuming jurisdiction of the case as a matter of property merely, when, in fact, the object of the complainant's bill was not to prevent the publication of her letters on account of any supposed interest she had in them as literary property, but to restrain the publication of a private correspondence as a matter of feeling only. Lord *Eldon's* decision in that case has, however, received the unqualified approbation of the learned American commentator on equity jurisprudence, (Mr. Justice *Story*,) as the Chancellor himself could not but admit. (a)

A Scotch decision has also extended relief by interdict to assignees of copyright in private letters

(a) See *Brandreth v. Lance*, 8 Paige, 2, 8.

against a person who proposed, without authority from the writer, to publish them. The letters had been addressed and sent by the writer to a lady. The author was Robert Burns, the Ayrshire poet; the letters were confidential, and written by him to his 'Clarinda;' she, it may be observed, consented to their publication.

It is distinctly stated in 'Morison's Dictionary of Decisions' that in the case last cited there was little difference of opinion upon the Bench, and that the ground upon which the Court seemed to pronounce its decision was 'that the communication in letters is always made under the implied confidence that they shall not be published without the consent of the writer, and that the representatives of Burns had a sufficient interest for the vindication of his literary reputation to restrain the proposed publication.' (a)

Notwithstanding the above dicta of Lord *Hardwicke* in *Pope v. Curl*, and the decision in *Thompson v. Stanhope* (which last manifestly proceeded upon an imperfect recollection of the prior decisions upon private letters) (b) it may, perhaps, be fairly questioned, even now, whether a court of equity in England would not view the publication of a private letter by its lawful receiver rather as a breach of contract or trust on his part, than as a violation of copyright, or an invasion of property. (c) Lord *Eldon*, it is clear, entertained very grave doubts of the law enunciated somewhat unneces-

(a) *Cadell v. Stewart*, Mor. Dict. of Dec. app. part 1, p. 16.

(b) See also Sir *J. Romilly*, M.R., in *Howard v. Gunn*, 2 New Rep. 256; and as to the property in letters sent for insertion in a newspaper, see *Davies v. 'Witness'*

*newspaper*, 1 Jur. N. S. pt. 2, p. 523.

(c) See, however, Bell's Principles of Law of Scotland, p. 518. He says that the law of England denies the right to publish letters on the ground of property alone.

sarily in *Pope v. Curl* by Lord *Hardwicke*, and to others it has seemed rather inexplicable that a joint property in a letter should exist in its writer and receiver, for the paper is but a chattel, and the property therein must, it seems, pass on delivery; (a) the nature of a private letter may, indeed, explain its transfer, and so in equity control the use of the chattel by its receiver, but it can hardly operate in contradiction of the legal consequences of the act of transfer, so as to divide the property in the letter between the possessor and his correspondent, or even to constitute the receiver simply a depositary in trust. Lord *Eldon* himself said in *Gee v. Pritchard*, that the receiver of a letter might destroy it; (b) this militates with the notion of the joint property of the sender and receiver, and is also opposed to any idea of fiduciary ownership in the latter, though the Chancellor there repudiated the idea of giving relief on the ground of breach of trust, and carefully guarded himself against any imputation of interference, because the letters were written in confidence: his judgment seems solely directed to the circumstances of that case 'wherein the purpose of public justice publicly administered, according to the established institutions of this country, required the production of letters at the cost of wounding the feelings of individuals.' (c) The language of

(a) *Oliver v. Oliver*, 10 W. R. 18. During the transit of a letter by post, the property is in the Postmaster-General.

(b) Lord *Mansfield* also, in *Millar v. Taylor*, alluding to the transcript of Lord *Clarendon's* History, in *D. of Queensberry v.*

*Shebbearc*, said: 'Mr. Gwynne might have thrown it into the fire if he pleased.' 4 Burr. 2397.

(c) An injunction was, it seems, afterwards granted in Ireland, and also by Lord *Eldon* himself in this country, restraining the publication of private letters from an



Sir *T. Plumer*, in *Percival v. Phipps*, appears to be capable of the same explanation, and the decision in *Prince Albert v. Strange*, already referred to, also tends to show that against the unauthorised publication of private letters by their possessor a court of equity may and will interfere upon the ground of breach of contract or trust, so that the writer of a private letter is not by any means remediless against its unauthorised publication.

To sum up, the conclusion seems to be this: if the property in the paper, the substantial element of a letter, pass by transmission or delivery, the right of publishing the ideas expressed upon that paper must pass with the property in the paper itself, however liable that right may be to restriction in its exercise by a court of equity, where publication would involve a breach of contract or confidence. (a)

old lady under the influence of a weak attachment to a young man who had contracted, for money paid him, not to publish, but to deliver up the letters to the lady. 2 V. & B. 23, 27. This decision was clearly founded on contract.

(a) The communication in private letters is, of course, always made under the implied confidence that they shall not be published without the consent of the writer. (Mor. Dict. of Dec. 19, 20; app. pt. i. p. 16.) As to the old Roman right of property in letters, &c., the Civil Law says, Digest. lib. xli. titl. i. § 9: 'Quâ ratione autem plantæ, quæ terra coalescunt, solo cedunt, eadem ratione frumenta quoque, quæ sata sunt, solo cedere intelliguntur. Cæterum sicut is qui in alieno solo ædificavit, si ab

co dominus soli petat ædificium; defendi potest per exceptionem doli mali, ita ejusdem exceptionis auxilio tutus esse poterit qui (in) alienum fundum sua impensa consecit. Literæ quoque, licet aureæ sint, perinde chartis membranisque cedunt, ac solo cedere solent ea, quæ ædificantur aut seruntur. Ideoque si in chartis membranisque tuis carmen vel historiam vel orationem scripsero, hujus corporis non ego, sed tu dominus intelligeris. Sed si à me petas tuos libros, tuasve membranas, nec impensas scripturæ solvere velis, potero me defendere per exceptionem doli mali utique si bonâ fide eorum possessionem nactus sum.' Cicero, in his second Philippic on M. Antonium, writes: 'At etiam litteras quas me sibi

12. In closing this chapter, it may be laid down as a rule, open to no exception, that possible injury to the feelings of others, from an exercise of this copyright, is not per se regarded in an English court of equity: the possible effect on reputation, unless connected with property, is not a ground of relief there, though it may be an ingredient for that court to consider when the question of a right of property is raised. (a) Adverting to letters between friends or relations upon their private concerns, Sir *T. Plumer*, M.R. once remarked: 'It is not necessary here to determine how far such letters falling into the hands of executors, assignees of bankrupts, &c. could be made public in a way that must frequently be injurious to the feelings of individuals;' but he followed up this language by observing, 'I do not mean to say that would afford a ground for a court of equity to interpose to prevent a breach of that sort of confidence, independent of contract and property.' (b)

12. Exercise of the right in disregard of feelings.

Lord *Eldon*, in *Gee v. Pritchard*, (c) repudiated, and that most distinctly, any notion of interference by the Court of Chancery with a publication, simply because it might wound feelings; and it seems abundantly clear from

misisse diceret recitavit, homo et humanitatis expert et vitæ communis ignarus. Quis enim unquam qui paullum modo honorum consuetudinem nosset, litteras ad se ab amico missas, offensione aliqua interposita, in medium protulit palamque recitavit? quid est aliud tollere e vitâ vitæ societatem, quam tollere amicorum colloquia absentium? quam multa joca solent esse in epistolis, quæ pro-

lata si sint inepta esse videantur? quam multa seria, neque tamen ullo modo divulganda? . . . Quod scribam tanquam ad civem, tanquam ad bonum virum; non tanquam ad sceleratum et latronem.'

(a) See *Clarke v. Freeman*, 11 Beav. 112.

(b) 2 V. & B. 28.

(c) 2 Swans. 413, 426.

all the reported decisions that, except upon the ground of property, or of breach of contract or trust, no English court of law or equity will give relief in the case of an unauthorised publication.

In a Scotch text book of great authority ('Bell's Principles'), it is, however, stated that the Court of Session has always held itself competent to protect epistolary correspondence, not on the ground of copyright, but of right on the part of the writer to protect his reputation and his privacy, and that a like power has been exercised by the Court of Justiciary. (a)

The Act 3 & 4 Will. 4, c. 15 enacted that from and after the passing of that Act (June 10, 1833) the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed and not printed and published by the author thereof or his assignee, or which thereafter should be composed and not printed or published by the author thereof or his assignee, or the assignee of such author, should have as his own property the sole liberty of representing or causing to be represented such production at any place or places of dramatic entertainment whatsoever in any part of the British dominions.

This enactment seems to be simply declaratory of the common law.

(a) An agent who has written and sent a letter expressly on behalf of his principal, and relating solely to that principal's affairs, cannot, of course, afterwards obtain relief from a court of equity, upon the ground that in fact the letter was his own private letter. *Howard*

*v. Gunn*, 2 New Rep. 256. It is equally clear that no person has a right to open private letters not addressed to him, and that the Court of Chancery will grant an injunction against such a proceeding. *Scheile v. Brackell*, 11 W. R. 797.

## CHAPTER II.

## COPYRIGHT-AFTER-PUBLICATION.

1. *Origin and Present Foundation of the Right.* — 2. *Extent and Operation of the Right.*

1. THE Act 8 Anne, c. 19, was the first statutory dealing here with Copyright-after-publication. As its name implies, the right commences from the moment the eye of the public is allowed to rest upon any subject. The Act of Anne only dealt with literary works. It was by Lord *Hardwicke*, C. styled 'An universal patent for authors.' But there is the authority of Lord *St. Leonards* for saying that this patent was not scientifically framed, and its ambiguous language certainly did not tend to allay the great conflict of opinion which prevailed in the last century, and even now may be said to exist, as to the origin of the right. 'Perhaps,' said an American judge (*M'Lean*), in allusion to that conflict, 'no topic in England has created more discussion among literary and talented men than that of the literary property of authors. So engrossing was the subject for a long time as to leave few neutrals among those who were distinguished for their learning and ability.' (a) In the time of Lord *Mansfield*, C.J. the weight of authority was apparently in favour of the foundation of the right in common law;

1. Origin of the right.

(a) In *Wheaton v. Donaldson*, 8 Pet. 655.

modern judicial opinions lean, however, to its statutory creation.

A glance at the cases wherein the arguments on both sides of the question have been raised and are now recorded may be useful, but their general tenor can thus be stated. The advocates of the common law origin have based their conclusions on the broad principles of right and wrong, which, rooted in natural equity, must, they say, govern civilised society. According to their view, 'the author of incorporeal ideas cannot claim the exclusive possession of those ideas after an authorised publication; but as a fair pecuniary return for his industry, he is exclusively and perpetually entitled to multiply copies of that which embodies his ideas, be it a book or any work of art; and the publication and sale by him of a single copy does not prejudice that right, because his intention and an equitable view of the transaction forbid such a construction. The answer generally given to this reasoning has been 'the interests of society over-ride the abstract rights of individuals; a perpetual copyright would be harmful to society; moreover, the absolute transfer of a chattel invariably passes at common law the entire property therein; in the absence of any restriction arising from express contract, or necessary implication, every use also of the chattel. There is no express contract between the author and purchaser of an ordinary publication that the latter shall not multiply it if he pleases, and the common law, in its hatred of a perpetual monopoly, will not imply such a contract.'

Perhaps the earliest reported dicta which touch the question are in *Midwinter v. Hamilton*. About the year 1746, Daniel Midwinter, Andrew Millar, and other

London booksellers, libelling upon the Act 8 Anne, c. 19, raised an action (*a*) in the Court of Session in Scotland against Hamilton and Balfour (Edinburgh booksellers), and Andrew Stalker (a Glasgow bookseller), by reason of their having printed, or having brought from England and published in Scotland, certain books the copyright property of the pursuers. The claim in the action was, that the defenders ought to pay the statutory penalties or damages for every surreptitious copy sold by them, and forfeit the remaining copies to be destroyed. In their process, however, the pursuers restricted their claim to the damages, and offered to prove the number of copies sold. They put the claim upon this footing: that by the Act of Anne a property was given to authors in the books published by them, which property of itself was sufficient to found a claim for damages, because every proprietor was entitled to damages at common law against those who encroached upon his property. The Court of Session ultimately decided that the action did not lie for damages. (*b*) The Court, in pronouncing its judgment, expressed an opinion that antecedent to the Act 8 Anne, c. 19, an author had no such property in a book composed and published by him, because 'the thought of an author's mind did not admit the notion of property, more than the invention of any machine or of gunpowder.' This judgment was appealed to the House of Lords; their decision clearly did not proceed upon the origin of

(*a*) *Midwinter v. Hamilton*, Mor. Dict. of Dec. 19-20, p. 8295. It was alleged, but not sufficiently proved in this case, that Mr. John Gray's executors had previously obtained damages in an action in England against James Watson

for printing and publishing the opera of 'Polly,' or the second part of the 'Beggar's Opera,' in violation of the Act of Anne.

(*b*) See, however, *Cadell v. Robertson*, 5 Paton, 493.

copyright. The Lords do not appear to have even adverted to it. (a)

The question of property at common law in a literary work was afterwards discussed in the year 1761, in *Tonson v. Collins*, (b) upon the copyright of the 'Spectator,' and in the Court of King's Bench. That was, however, a collusive action. Lord *Mansfield*, C.J. suspected the collusion, and dealt with the litigation on that footing only.

The question was too important long to remain in the background, and it was again brought forward in *Millar v. Taylor*. (c) That was an action directed by the Court of Chancery, (d) and brought in the King's Bench, for the violation of a copyright which had survived the statutory period of protection then afforded to published literary works. The question was there ably argued, twice in the court of law, by very eminent counsel for the plaintiff and for the defendant. Upon the trial the jury found by a special verdict these facts, viz.: that the work alleged to have been pirated (Thomson's 'Seasons') was an original composition by a natural-born subject resident in England; that it was first published in London, and by the author; that Millar had, in the year 1729, purchased the work for valuable consideration from the author, and had ever since sold it as his own property, and exposed for sale a sufficient number of copies of the work at a reasonable price; that before the reign of Queen Anne (i.e. before any Act of Parliament had dealt with the subject) it was usual to purchase from authors the perpetual copyright of their books, and to assign the same from

(a) Mor. Diet. 19, 20, 8315.

(b) 1 W. Bl. 301, 321, 345.

(c) 4 Burr. 2303.

(d) *Osborne v. Donaldson*, 2 Eden; S. C. 2 Bro. P. C. 129, Toml. ed.

hand to hand for valuable consideration; and to make the same the subject of family settlements; that the Stationers' Company, in order to secure the assignment of copyright so far as in them lay, had passed bye-laws (set forth in the verdict) for a registry of books: that the work in question was upon purchase, and before publication or sale by the defendant Taylor duly entered in the register of the Stationers' Company as the sole property of the plaintiff Millar; and that Taylor had, in the year 1763, without the license or consent of Millar, published, exposed to sale, and sold in England, several copies printed without his license or consent, whereby he (Millar) had been and was damnified. As to the legal liability of Taylor upon these facts, the jury prayed the advice of the Court. The four judges of the Court of Queen's Bench were divided in opinion: Lord *Mansfield*, C. J. and *Willes* and *Aston*, JJ. ruled in favour of the right at common law, and therefore for the plaintiff. *Yates*, J. differed from his learned brethren. A writ of error was afterwards brought, but the plaintiff in error, after assigning errors, suffered himself to be non-prossed, and the Lords Commissioners then granted an injunction in support of Millar's right thus adjudged at law.

The decision in *Millar v. Taylor* was followed, as of course, by the Court of Chancery in *Donaldson v. Beckett*. (a)

About this period (that is to say in the year 1773) passed a contrary Scotch decision in an action of *Hinton v. Donaldson*. That action was brought in the Court of Session (b) in virtue of the pursuer's supposed common law copyright in an edition of Stackhouse's 'History of the Bible.' The Court, after a full discussion of the

(a) 4 Burr. 2408.

(b) Mor. Dict. of Dec. 19-20, p. 8307.



question of copyright at law, came to the conclusion that no such right existed in authors or publishers, and assoilzied from the action.

An appeal was taken from the decree in *Donaldson v. Beckett* (in the year 1774) to the House of Lords: all the judges were then directed by the House to deliver their opinions upon five questions, viz.: (a)—1. Whether at common law an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent? 2. If the author had such right originally, did the law take it away upon his printing and publishing such book or literary composition, and might any person reprint, and sell for his own benefit, such book or literary composition against the will of the author? 3. If such action would have lain at common law, is it taken away by the statute 8 Anne; and is an author by the said statute precluded from every remedy except on the foundation of the statute, and on the terms and conditions prescribed thereby? 4. Whether the author of any literary composition and his assigns had the sole right of printing and publishing the same in perpetuity by the common law? 5. Whether this right is in any way impeached, restrained, or taken away by the statute 8 Anne? Upon these questions Lord Mansfield did not deliver an opinion to the House because he was himself a peer; but it is stated in Burrows' report of the case that the Chief Justice did not swerve from the opinion which he had given in the Court of Queen's Bench; the other eleven judges delivered their opinions seriatim. On question 1, ten judges against one

affirmed the copyright at common law there referred to, i. e. copyright-before-publication; eight affirmed, one denied that an action did lie for an invasion of the right; two affirmed that it did lie only when the invasion was coupled with fraud or violence. On question 2, seven judges against four replied in the negative. On question 3, six against five judges were of opinion that the act of Anne abolished the common law copyright-after-publication; six against four were of opinion that there was no remedy for an invasion of the right except upon the act of Anne, and on the terms and conditions prescribed thereby; one thought that there might be a remedy in equity upon the Act, independent of the statutory terms and conditions. On question 4, seven judges against four replied in the affirmative. On question 5, six judges against five replied affirmatively. The House then, on the motion of Lord *Camden*, seconded by Lord *Apsley*, C. reversed the decree below, and decided that whether copyright after publication in literary works did or did not previously exist at common law, the Act of Anne then in force had abolished the common law right. This decision of the House of Lords has never been reversed, and it is still law.

The question of property at common law in copyright-after-publication was, moreover, touched upon in Scotland in the year 1787, in *Cadell v. Anderson* (a) upon an alleged violation of the copyright in Blackstone's published 'Commentaries,' also in *Payne v. Anderson*. (b) In the latter case the Court of Session expressed its opinion that at all events literary property was not then protected by the common law. In the

(a) Mor. Dict. of Dec. 19-20, p. 8311. (b) *Ibid.* p. 8316.

year 1811, in *Cadell v. Robertson*, (a) the House of Lords decided that an action did lie for damages, although the book was not entered pursuant to the Act of Anne. Lastly, the origin of the right was incidentally discussed in *Jeffreys v. Boosey*. (b) The Act of Anne has since

(a) Piracy of Burns' works, Mor. Diet. of Dec. app. part 1. p. 18; S. C. 6 Pat. 403.

(b) 4 H. L. Ca. The arguments for and against the common law origin in *Millar v. Taylor* and *Jeffreys v. Boosey* were as follow:—

## FOR.

1. Long user of the right prior to the Act of Queen Anne.

2. Recognition of the right in ordinances of the Stationers' Company.

3. A recognition of the right in a royal proclamation of September 25, 1623.

4. Recognition of the right in ordinances of Parliament during the usurpation.

5. Recognition of the right in decrees of the Star Chamber.

6. Milton's speech in 1644,

## AGAINST.

1. No user by individuals is evidence of a general right, and no user of a right affecting an art (printing) not immemorial in this country is evidence of a legal customary right.

2. Those ordinances were by-laws of a corporation, only addressed to, and affecting its members; their enactment rather implied that such a right was not recognised at law; a corporation cannot create a new kind of legal property.

3. That proclamation only enforced a Star Chamber decree in support of the privileges of the Stationers' Company, who were but literary constables for the suppression of seditious or improper books.

4. Those ordinances were directed to political objects, and did not in fact recognise the existence of such a right.

5. These decrees emanated from an illegal and arbitrary court in its exercise of a political and criminal jurisdiction, and did not touch any civil rights of subjects inter se, or recognise this right.

6. A somewhat vague dictum by

been to a certain extent repealed, and other statutes giving further protection to published works of literature

upon an ordinance of Parliament against unlicensed printing, wherein he spoke of 'the just retaining of each man his several copy, which God forbid should be gainsaid.'

7. The recognition of the right in the Licensing Act 13 & 14 Car. 2.

8. *Atkinson v. Stationers' Company*, Carter, 89.

9. *Roper v. Streater*, Skinner, 234.

10. Dicta of the Court in the *Stationers' Company v. Seymour*, 1 Mod. 256.

11. The language of one of the cases given to certain members of Parliament in support of a bill introduced in 1709, for securing the property of copies of books to the rightful owners.

12. The jurisdiction exercised by Chancery against the violation of the right, since the Act of Queen Anne, and without regard to the statutory terms and conditions (see *Eyre v. Walker*, *Motte v. Faulkner*, *Walthoe v. Walker*, *Tonson v. Walker*, *Tonson and another v. Walker*), which jurisdiction could stand on no other footing than the original common law right, or the statutory confirmation for a term of that right.

13. The *Stationers' Company v. Parker*, Skin. 233.

a great author, whose opinion on a point of law, even if more clearly proved, could not per se carry much weight.

7. That act only supported the privileges of the Stationers' Company, and did not recognise the right.

8. That was a case of Crown right, based on prerogative, and did not decide general right.

9. That was a case on the law patent, and not on the common law right of a subject.

10. Those dicta had reference to the law patent, not to the common law.

11. The language of persons anxious to get the statutory security of a penalty.

12. The Court of Chancery could and did give relief only upon the right created by the Act of Queen Anne; the terms and conditions of that Act merely applied to statutory actions for penalties. *Motte v. Faulkner*, *Eyre v. Walker*, *Tonson v. Walker*, and *Tonson and another v. Walker*, were injunctions on the statutory right. *Walthoe v. Walker*, and *Eyre v. Walker*, were moreover only interim injunctions, and therefore did not decide or profess to decide the legal right.

13. That was a case of Crown right and of patent law, not of general common law right.

and art have been successively passed; but that no common law right results after the expiry of the pre-

14. A judicial dictum in *Manley v. Owen*, cited 4 Burr. 2320, 2404.

15. *Webb v. Rose*, *Pope v. Curl*, *Queensberry v. Shebbeare*, and *Forrester v. Waller*.

16. The existence of copyright-before-publication.

17. The existence of Crown copyright-after-publication.

18. The preamble of the Act of Queen Anne, 8, c. 19, declaratory of a general common law right.

19. The original title in committee of the Act of Queen Anne as a bill to secure the undoubted property of copies for ever, and the change of that title in Parliament.

20. The technical recognition of the copyright at law by the enacting words of the Act 8 Anne, c. 19.

21. Principles of natural justice and public policy, which principles gave to an author a property in the fruit of his mental labour, although such fruit might not have all the characteristics which were attributed to property long established by legal precedent.

22. The recognition by the common law of all principles of natural justice.

23. The plain, though tacit intent of an author in publication of his work, and the absence of any express renunciation by him

14. The dictum had reference to a customary and exclusive right in the Lord Mayor of London.

15. *Webb v. Rose*, *Queensberry v. Shebbeare*, and *Forrester v. Waller* were all cases of copyright before publication.

16. That right is very distinct from copyright-after-publication, and stands on principles wholly different.

17. That is a prerogative right.

18. The preamble was the reverse of such a declaration.

19. The ultimate change of the title was evidence of the denial by Parliament of the existence of such a property at law.

20. From the title to the end that Act was a plain declaration that the right did not exist at common law.

21. Incorporeal ideas could not in their nature be the subject of property; therefore an author could not suffer legal injury in his property by an invasion of his ideas; further, to give a property in all ideas, however mean, would lead to absurdity.

22. The common law did not claim so wide a field.

23. Publication of a work embodying ideas ipso facto makes them common stock, and irrevocably lays them open to the world.

sent statutory right, and that no such common law right co-exists with the statutory seems now to be indisputable. (a)

2. Admitting copyright-after-publication at the present day to be simply a creature of statute law, its nature, extent, and operation must of course be examined by reference to that law. By several Acts of Parliament this exclusive privilege has been conceded to workmen in many different fields of mental labour; to various artists as well as to the composers of literary and musical works; but, unfortunately, though the several Acts have a certain degree of family likeness to each other, their features are so far dissimilar, that the law regulating copyright in the various offspring of the busy brain must be looked for in many scattered pages of the Statute Book. The only safe path in the further consideration of copyright law now seems to be to adhere to the course taken by the Legislature, and so separately to treat of the privilege as it exists in the several subjects to which it now extends.

2. Nature, extent, and operation of the right.

in the act of publication of a just control over his property.

No tacit reservation by the publisher can control the necessary consequences of his act. A man cannot retain what he parts with.

24. Patent right.

24. Patent right and copyright stand on different foundations, and arguments taken from the former cannot be applied to the latter.

See also *Cadell v. Robertson*, 5 Pat. 504, n.

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(a) See judgment in *Reade v. Conquest*, 9 C. B. n. s. 755; Right Honourable *T. B. E. Smith*, M.R., 10 Ir. Ch. R. 121. (See, however, *Boosey v. Tollicn*, 5 C. B. 476.)

## CHAPTER III.

COPYRIGHT-AFTER-PUBLICATION IN LITERARY AND  
MUSICAL WORKS.

1. *Present Regulation of the Right.* — 2. *Definition of the Right.* — 3. *Non-existence of the Right in Criminal Works.* — 4. *Duration of the Right.* — 5. *Nature of the Right.* — 6. *Registry of each Subject of the Right.* — 7. *Necessary Deposit and Delivery of Copies of every Publication, Literary or Musical.* — 8. *Assignment of the Right.* — 9. *Warranty on Sale of the Right.* — 10. *The case of Rendo v. Bentley.* — 11. *Licenses to Exercise the Right.* — 12. *To whom the Right may belong.* — 13. *What amounts to an Infringement of the Right.* — 14. *As to Piracy by Quotation.* — 15. *As to Piracy by Abridgement or Digest.* — 16. *As to Piracy by Translation or Retranslation.* — 17. *No Piracy, save by Multiplication of Copies.* — 18. *Pictorial Embellishment excuses not Piracy of Letter-press.* — 19. *As to Piracy of Musical Compositions.* — 20. *Intention not necessary to Piracy.* — 21. *Remedy at Law for Infringement of the Right.* — 22. *Relief in Equity against Infringement of the Right.* — 23. *Infringement of the Right by Importation.* — 24. *Forfeiture of Piratical Work to Proprietor of Copyright.* — 25. *Abuse of the Right.* — 26. *Operation of Talfourd's Act as to earlier Copyrights.* — 27. *The Right in Encyclopedias, Periodicals, Serials, Reviews, and Magazines.*

1. Present regulation of the right.

1. COPYRIGHT-after-publication in literary works is now regulated by an Act 5 & 6 Vict. c. 45 (commonly called Talfourd's Act), which, beginning with a recital 'that it is expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the world,'

repeals the former legislation on the subject, except so far as the continuance of either of the previous Acts (a) might be necessary for carrying on, or giving effect to, any proceedings at law or in equity pending on July 1, 1842 for enforcing any cause of action or suit, or any right or contract then subsisting.

It was proposed to include engravings in this Act; they were, however, omitted by the advice, it is said, of the late Sir Robert Peel, who then contemplated further legislation as to copyright in works of the fine arts.

2. The definition of this right is given by the Act 5 & 6 Vict. c. 45. It is the sole and exclusive liberty of printing, or otherwise multiplying copies of any subject to which the word copyright is in that Act applied. The word is there applied to a book only, viz. every book published prior to July 1, 1842, and then entitled to copyright, and every book thereafter published. By every book (b) is meant and included every volume, part or division of a volume, pamphlet, sheet of letter-press, (c) sheet of music, (d) map, plan, or chart, separately published. No other work, therefore, than such a book can be the subject of this copyright.

2. Definition of the right.

This definition does not extend to prints or designs separately published; but where designs form part of a book, in the text of which a person has copyright under the Act of Victoria, that copyright extends to any illustrations in the book as well as to the letter-press. This, at least, was the opinion expressed by

(a) The previous Acts are in the appendix, and are 8 Anne, c. 19; 41 Geo. 3, c. 107; 54 Geo. 3, 156.

(b) See 54 Geo. 3, c. 156, and *White v. Geroch*, 2 B. & Ald. 300.

(c) See *Hine v. Dale*, 2 Campb. 27, n.; *Clementi v. Goulding*, 2 Campb. 25; 11 East, 244.

(d) Written music was held to be within the Act of Anne (*Bach v. Longman*, Cowp. 623).



Sir *J. L. K. Bruce*, V.C. upon a motion to restrain the piratical publication of an original work embracing letter-press and illustrations. The original work referred to ('The Comical Creatures from Wurtemberg') contained twenty illustrations (drawn from the stuffed animals contributed by Herman Plocquet to the Exhibition of 1851), and a story of 'Reynard the Fox.' The alleged piracy was a number of a serial work entitled 'The Story Book for Young People, by Aunt Mary.' In the original work the illustrations were actually printed on the same paper as the letter-press itself, but that fact does not seem necessary to bring the picture-part of a story-book within the Act. (*a*)

A book to be within copyright legislation need not consist of original or speculative matter; (*b*) mere compilation and arrangement, (*c*) as in a Court Calendar or Almanack; the mere results of enquiry, as in a Road Book or Guide Book, and so on, may be the subjects of copyright. (*d*) The Reports show that a spelling book, (*e*) a book of elementary lessons in arithmetic, (*f*) a map, (*g*) an annotated catalogue, (*h*) a book of chronology, (*i*) have each of them been held to be within the enactments of the Legislature upon literary property; a mere collec-

*Bogue v. Houlston*, 5 De G. 275.

(*b*) Lord *McKenzie*, 20 Dec. of Court of Sess. 2d series, p. 1161, note.

(*c*) Sir *John Leach*, in *Burfield v. Nicholson*, 2 S. & S. 7.

(*d*) Dec. of Sess. 2d series, p. 1161, note; Lord *Deas*, *ibid.* p. 1160; and see *Taylor v. Bayne*, Mor. Dict. of Dec. 19-20; app. pt. 1. p. 7; and *Carnan v. Bowles*, 2 Bro. C. C. 80 and Story, 3; *Gray*

*v. Russell*, 1 Story, 11; and *Emerson v. Davies*, 3 Story, 781.

(*e*) *Lennie v. Pillans*, S. & D. 416; *Constable v. —*, 3 S. 216.

(*f*) *Emerson v. Davies*, 3 Story, 768; and see *Baily v. Taylor*, 1 Tamlyn, 305.

(*g*) See Lord *Eldon*, in *Wilkins v. Aiken*, 17 Ves. 425.

(*h*) *Hotten v. Arthur*, 11 W. R. 934.

(*i*) *Trusler v. Murray*, 1 East, 363, n.

tion of receipts for cookery, a task requiring no mental labour, cannot, it has been said, claim copyright. (a)

‘In truth,’ writes *Story, J.* (b) ‘in literature, in science, and in art, there are and can be few if any things which, in an abstract sense, are strictly new and original throughout. Every book in literature, science, and art borrows, and must necessarily borrow and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known, and used, and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are more or less a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copyright which was not new and original in the element of which it is composed, there could be no ground for any copyright in modern times; and we should be obliged to ascend very high even in antiquity to find a work entitled to such eminence.’

Another learned writer (*Burton*) has still more broadly laid it down ‘that books are like medicine, which the apothecary composes by pouring from one phial into another.’ This dictum, however, should perhaps be restricted to books in the nature of compilations.

A work already given to the world cannot, of course, be again published; the previous publication abroad of a book disqualifies it for copyright under the Act of

(a) See Lord *Eldon, C.*, in *Rundell v. Murray*, Jac. 314.

*Story*, 779; and see same *Judge* in *Gray v. Russell*, 1 *Story*, 16.

(b) In *Emerson v. Davies*, 3

Victoria: this is no new doctrine. Long prior to the operation of that Act it had been held that a foreign publication vitiated a claim to copyright here. (a)

If, however, the publication here and abroad be simultaneous, the publication abroad will not stand in the way of copyright in this country. (b)

3. Non-existence of the right in criminal publications.

3. The right does not subsist in any book of which the publication is itself an offence against the law. This was the decision of the Court of King's Bench in *Stockdale v. Onwhyn*. (c) An action had there been brought for the purpose of recovering compensation in damages for piracy of a publication entitled 'The Memoirs of Harriette Wilson.' The work was libellous and licentious. *Abbot*, C.J. said 'it would be a disgrace to the common law could a doubt be entertained upon the subject.' The printer of the book above referred to bringing an action for his bill against the publisher was also non-suited by *Best*, C.J. (d) who said that it would be strange if a man could be fined and imprisoned for doing that for which he could maintain an action at law. The printer and publisher were of course participes criminis, but the Chief Justice, quoting Lord *Kenyon*, met that objection by saying, 'I will not sit here to take an account between two robbers on Hounslow Heath.'

4. Duration of the right.

4. The statutory period of duration of this copyright in a book published since July 1, 1842, or published thereafter in the lifetime of its author, is the life of such author and the further term of seven years commencing

(a) See *Clementi v. Walker*, 2 B. & Cr. 861; *Guichard v. Mori*, 9 Law, J. ch. 227; and *Hedderwick v. Griffen*, S. & D. 383.

(b) *Erle*, J. at *Nisi Prius*, in *Cocks v. Purday*, 2 C. & K. 269.

(c) 5 B. & Cr.

(d) *Popleton v. Stockdale*, R. & M. 337.

at his death; if, however, the term of seven years expires within forty-two years from the first publication (*a*) of the book, the right endures for such forty-two years.

The period of duration of the right in every book published since July 1, 1842, or published thereafter, but after the death of its author, is forty-two years from the first publication of the book.

The period of duration of the right in every book published prior to July 1, 1842, and in which copyright then subsisted, is the same as that of a book published after July 1, 1842, where the old copyright belonged on that day in whole or in part to a publisher or a person who had acquired it for other consideration than that of natural love and affection. The author of the book, or, if he on July 1, 1842, was dead, his executor, administrator, or next of kin entitled to administration, and the proprietor of the old right, must, before the expiration of such right, consent to accept the benefits of the Act of Victoria in respect of such book, and cause a minute of such consent to be entered in a certain form in the book of Registry at Stationers' Hall; failing so to do, the property in such book under the Act only lasts during the term of the ancient right therein.

The right so limited in duration ought, perhaps, to satisfy the fair claim which every busy brain has to the fruit of its own toil. This it must, however, be admitted is not the unanimous verdict (*b*) of the legal or literary world; but the limit which would satisfy every mind it would be difficult to fix.

(*a*) A sale of copies of a MS. is a publication of the MS. See *Abbot, C. J. in White v. Geroch,* 2 B. & Ald. 298.

(*b*) See *Williams on Personal Property,* p. 202.

The late Mr. Bell, in the last edition (a) of his 'Principles of the Law of Scotland,' writes: 'Although the foundation on which a right of exclusive privilege may be argued at common law is the same in the case of a mechanical invention and of a literary composition, there is a remarkable difference in the consideration on which the limited monopoly of each ought to stand. In the arts the public is concerned in the invention being opened to them at no very distant period, for no use being derivable from the invention without the absolute possession of the individual machine or manufacture, the public is entirely in the power of the monopolist, and yet the invention would probably have been made by others if not restrained. But in the case of a book, not only is it impossible that any other person could have composed the same book, but it is a kind of production of which the public has the benefit by the knowledge diffused; and the value of which, and consequently the power of keeping up extravagant prices, is restrained by the interest of the author himself. There are not, therefore, the same reasons for limiting the monopoly of an author as there are in setting bounds to that of the inventor.'

The difference pointed out by the learned writer no doubt exists to a certain extent, and cannot be wholly disregarded.

It was argued at the bar of the Court of Session, in *M'Lean v. Moody*, (b) in the year 1858, that the object of the statute of Victoria was to encourage literary merit, that intellectual labour constituting authorship

(a) P. 517.

(b) Dec. of Ct. of Sess., vol. xx.  
2d series.

was alone thereby protected, that there could be no authorship without an author, and that the life of the author afforded the only criterion which the statute gave for measuring the endurance of the privilege, and that without the statutory means of measuring the privilege the privilege itself could not exist. This argument Lord *Deas* pronounced unsound; he declared it to be his opinion that the Act did not confine the privilege to cases in which there was a known author, whose life should afford a measure for the endurance of the privilege; that the work might be the joint production of two or more authors, whose contributions to it were undistinguishable, so that the life of one of them could not be the criterion for measuring the privilege; that a person might find a MS. in his ancestor's repositories, or get a gift of it, and publish it, and he might be entitled to copyright, although he could not tell who was the author, nor whether the author was living or dead; that the Crown might get up a publication, and be entitled to publication, and yet the Crown never died: that it was assumed in section 16 of the Act that there might be cases in which the first publisher might be entitled to copyright although no author had been or could be named; that the endurance of the privilege in such cases must be for forty-two years after the first publication.

5. The nature of this right is that of personal property. It is transmissible by bequest, and, in case of intestacy, it is subject to the same law of distribution as other personal property; it is a local right only, embracing Great Britain and Ireland, the islands of Jersey and Guernsey, the British dominions in the East and West Indies, and the colonies, settlements, and possessions of

5. Nature of the right.

the British Crown, acquired on, or since, the first day of July 1842, or which hereafter may be acquired. (a)

The absence of any intention on the part of an author to publish his literary production will not, it seems, prevent his executors from consenting to and authorising the publication; and this copyright may be acquired in a work so submitted to the world. This conclusion may be gathered from the report of the Scotch case of *Dodsley v. M'Farquhar*. (b) It there appears that the work now known under the title of 'Lord Chesterfield's Letters to his Son' was published by the assignee of the son's executrix, with the consent of the Earl's executors. Neither the Earl nor his son had given any assent whatever to that proceeding. Dodsley, the London bookseller, was the assignee, and he obtained an interdict against M'Farquhar and others who had in Edinburgh pirated the work.

6. Registry of every subject of the right.

6. One of the provisions of the Act 5 & 6 Vict. c. 45, is for registry; the object of such registry is clearly to prevent, as far as possible, any offences against the Act through ignorance. (c) The enactment (d) declares, that a book of registry, wherein may be registered the proprietorship in the copyright of books and assignments thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such

(a) 5 & 6 Vict. c. 45, s. 3.

(b) Mor. Dict. of Dec. 19-20, p. 8308.

(c) See also 8 Anno, c. 19, s. 2. To provide the means of discovering the authors of every publication, in order that they might be made answerable for its contents, the Act 39 Geo. 3, c. 79, has also directed that all parties concerned

in bringing a publication into the world, whether printers or publishers, shall be made known. Therefore a printer, who sends out his work without his name, can never recover for his labour or materials used in printing. *Beasley v. Bignold*, 5 B. Ald. 335.

(d) 5 & 6 Vic. c. 45, s. 11.

copyright shall be kept at the Hall of the Stationers' Company, by an officer appointed by the company, for the purposes of that Act; that the book shall at all times be open to the inspection of any person, on payment of one shilling for every entry which shall be searched for, or inspected, in the book; and that such officer shall give a copy of any entry in such book (certified under his hand, and impressed with a stamp of the company), to any applicant, on payment of five shillings.

The Act further provides that such copies, so certified and impressed, shall be received in evidence in all courts and in all summary proceedings, and shall be *primâ facie* proof (*a*) of the proprietorship or assignment of copyright, or licence, as therein expressed, but subject to be rebutted by other evidence; and in the case of dramatic or musical pieces, shall be *primâ facie* proof of the right of representation or performance, subject to be rebutted as aforesaid.

The Act makes (*b*) a false entry in the book of registry a misdemeanour, and permits (*c*) the proprietor of copyright in any book to enter therein the title of his book, the time of its first publication, the name and place of abode of its publisher, and, lastly, the name and place of abode of the proprietor of the copyright, or of any portion of the copyright; this upon payment of five shillings to the officer of the Stationers' Company. The Act also permits such registered proprietor to make entry of any assignment of his interest, or any portion of his interest, in the copyright; this entry also on

(*a*) *M'Lean v. Moody*, Dec. in Ct. of Sess. vol. xx. 2d series.

(*b*) 5 & 6 Vict. c. 45, s. 12.

(*c*) *Ibid.* s. 13.



payment of five shillings. The Act gives, in a schedule thereto, the forms of such entries.

Previously to the Act 5 & 6 Vict. c. 45, although there was no entry of a work at Stationers' Hall, a person entitled to the copyright therein might protect his right by action or suit; but, prior to registration, he could not recover the statutory penalty for violation of his right. The Act of her present Majesty has, according to its construction by Vice-Chancellor *Kindersley*, made an alteration in the law in this respect: (a) the 24th section of the Act declares that no proprietor of copyright in any book, published since July 1, 1842, can maintain any action or suit, or any summary proceedings, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made in the book of registry of the Stationers' Company of such book, pursuant to the Act.

A separate article for a periodical publication is not a book to be registered under this section. (b)

To whatever extent a second edition published after the passing of the Act 5 & 6 Vict. c. 45, of a copyright work published before the Act, is substantially a new work, to that extent it cannot be protected until registration. This was decided by Sir *R. Kindersley*, V.C., upon a bill filed (by John Murray, of guide book celebrity, against Mr. Bogue, the publisher) to restrain the piracy of the plaintiff's 'Handbook for Travellers in Switzerland.' (c)

(a) Sir *R. Kindersley*, V.C. in *Murray v. Bogue*, 1 Drew, 364.

(b) *Murray v. Maxwell*, 3 L. R. T. n. s. 466 Ch.

(c) *Murray v. Bogue*, 1 Drew, 364; but see *Beckford v. Hood*, 7 T. R. 628; *Novello v. Sudlow*, 16 Jur. 689.

Any person associated by the proprietor of a copyright with himself in an entry in the Book of Registry has a *prima facie* right to sue jointly with him in respect of a violation of the right. (a)

By the Act of Victoria, it is further enacted (s. 14) that if any person shall deem himself aggrieved by any entry made under colour of that Act in the Book of Registry, he may apply by motion to the Court of Queen's Bench, Common Bench, or Exchequer, in term, or by summons to any Judge of such Court in vacation, for an order that such entry may be expunged or varied; and upon any such application, such Court or Judge shall make such order for expunging, varying, or confirming such entry, either with or without costs, as to it or him shall seem just. And the officer appointed by the Stationers' Company for the purposes of that Act shall, on the production to him of any such order for expunging or varying any such entry, expunge or vary the same according to the requisitions of such order.

The evidence adduced in support of such application should be as direct and clear as possible.

A rule nisi (b) was obtained in the Queen's Bench, under section 14, by one Davidson, calling on Robert Cocks to show cause why certain entries in the Book of Registry should not be varied or expunged. The rule was obtained upon a simple affidavit of belief by Davidson that the persons named in the entries were not the authors. Cocks, by his counsel, refused to give any undertaking not to use the entries as evidence on the

(a) *Stevens v. Wildy*, 19 L. J. Ch. n. s. 190. (b) 2 Ell. & Bl. 577.

trial of an action brought by Cocks against Davidson, for violation of the copyright to which the entries referred. Lord *Campbell*, C.J., in giving judgment said: 'We are not prepared to expunge these entries, but we think that there is enough to justify us in ordering "proprio vigore," and without consent, that the rule be enlarged until the trial of an issue in which Cocks shall be plaintiff, and on the trial of which he shall not use these entries as evidence.' (a)

This course the Court of Common Bench declined to follow in a subsequent case (b) as being beyond their power, and refused to expunge an entry because its falsity was not clearly proved.

In the last case, it was also mooted whether the party showing cause was a party aggrieved within the meaning of the Act 5 & 6 Vict. c. 45, s. 14, the fact being that at the date of the piracy, the name of another person, his agent, was, by mistake, entered in the Book of Registry as proprietor, though the error had since been rectified.

In *ex parte Baston* (c), upon the application of A., the sole registered proprietor of a copyright, which application A. supported by an affidavit of his pro-

(a) The following order is reported to have been made:—'The rule shall be enlarged until the trial of an issue in which Cocks shall be plaintiff and Davidson shall be defendant; and the question to be tried shall be, "whether there was any copyright in all or any, and which of the pieces of music in question; and whether Cocks was proprietor of the copyright in all or any, and which of

the pieces." The entries made at Stationers' Hall shall not be set up at the trial of the issue, and the proceedings in the action between the above-mentioned parties shall be stayed, unless Cocks elects, within a week, not to use the entries, or any of them, at the trial.'

(b) *Ex parte Davidson*, 18 C. B. 310.

(c) 14 C. B. 631.

prietorship and belief, 'that B., under colour of an agreement with him for publication, had caused an entry to be made in the Book of Registry,' a rule absolute to expunge the entry was granted by the Court of Common Bench.

It seems that neglect in registry on the part of the officials at Stationers' Hall may deprive an author of the benefit of the Act as against the public. (*a*)

If the defendants in an action for piracy object the non-registration of the original work at Stationers' Hall pursuant to the Act, they should, it seems, distinctly plead such non-registration. (*b*)

7. A very few words may suffice upon the parliamentary provisions for the deposit and delivery in certain quarters of copies of every subject of literary copy-right.

7. The necessary deposit and delivery of copies of every literary publication.

In return for the statutory protection, and to secure a deposit accessible to literary persons for books which may be of such considerable price as not to be easily attainable by scholars of ordinary means, (*c*) the Legislature requires the publisher of every literary work to deliver a copy of the work at the British Museum, and a fixed number of copies after demand at Stationers' Hall; it also declares the mode of delivery, and enforces that delivery by penalty; the requisitions are contained in ss. 6, 7, 8, 9, and 10 of the Act 5 & 6 Vict. c. 45. (*d*)

(*a*) *Cassell v. Stiff*, 2 Kn. & East, 321; and *Le Blanc*, J. *ibid.* Jo. 79. 328.

(*b*) *Chappell v. Davidson*, 18 C. B. 194.

(*c*) See 8 Anne, c. 19, s. 5; and Lord *Ellenborough*, C.J., in *Cambridge University v. Bryer*, 16

(*d*) See appendix. See also, 54 Geo. 3, c. 156, s. 2, and *British Museum v. Payne*, 4 Bingh. 540, as to delivery of part of a work; and 5 & 6 Vic. c. 45, s. 2, 'book.'

8. Assignment  
of the right.

8. The next point perhaps for consideration is the assignment of literary copyright.

Every registered proprietor may assign his legal interest, or any portion of his interest in the copyright by any writing in pais, (a) or by an entry in the Book of Registry; the particulars of entry are the date of the entry, the title of the subject, and the names and places of abode of the assignor and assignee; the form of the entry is given in the schedule to the Act 5 & 6 Vict. c. 45. An assignment so entered is effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty. It is expressly declared by the Act that an assignment by deed would not be more effectual by way of estoppel. (b) Want of express consideration cannot, therefore, be objected to such an assignment.

In Viner's 'Abridgement,' it appears that a bill was filed that the plaintiff might be quieted in the enjoyment of the right of sole printing Dr. Pridcaux's 'Directions to Churchwardens,' and for a perpetual injunction against the defendant to prevent his printing and publishing the same. An objection by the defendant that he had title by plaintiff's delivery of a copy to the original printer was over-ruled by Lord *Macclesfield*, C. such qualified delivery of a copy not being in the nature of an assignment of the right.

A simple assignment of the copyright in any book

(a) See 8 Anne, c. 19; *Davidson v. Bohn*, 6 C. B. 456; *Cumberland v. Copeland*, 7 H. & N. 118; and *Parke, B. in Jeffreys v. Boosey*, 4 H. L. C. 931. But see also Lord *Ivory*, in *Jeffreys v. Kyle*. 18 Dec.

of Ct. of Sess. 2d series, p. 911. See also 8 Jur. n. s. pt. II. p. 148. A writing attested by two witnesses was formerly necessary.

(b) 5 & 6 Vict. c. 45, s. 13.

consisting of a dramatic piece or musical composition does not convey to the assignee the right of representing or performing such piece or composition, unless entry of that intention is made in the Book of Registry. (a) The decision in *Cumberland v. Planché* (b) appears to have led to the enactment of this law.

The House of Lords held in the year 1859, upon a bill of exceptions that a pursuer in the Court of Session claiming as the assignee of a copyright might, the primâ facie evidence of his proprietorship having been rebutted, support his title without production of a formal deed of assignment attested by two witnesses. (c)

A legal assignment must it seems be in writing; this was the opinion of the Court of King's Bench in an action on the case (d) brought in the year 1814, when the Act 8 Anne, c. 19, was in full operation; the reasons given by Lord *Ellenborough*, C.J. and *Dampier*, J. for the decision, were 'that the Act 8 Anne, c. 19, having required that the consent of the proprietor, in order to authorise the printing or reprinting of any book by any other person should be in writing, the con-

(a) *Ibid.* s. 22; and see Lord *Eldon*, C. Jac. 315; *Morris v. Kelly*, J. & W. 481; *Moore v. Walker*, 4 Camp. 9.

(b) 1. A. & E. 580. The Ct. of K. B. there decided that the assignee of the copyright in a play printed and published within ten years before 3 & 4 Will. 4, c. 15, was an assignee of the right of representation.

(c) *Kyle v. Jeffrys*, 21 Dec. of Ct. of Sess., 2d series, p. 18.

(d) *Power v. Walker*, 4 Campb. 8,

& s. c.; 3 M. & S. 7; *Clementi v. Walker*, 2 B. & Cr. 861. Lord *Eldon* refused an injunction to an assignee of copyright when the bill did not state an assignment in writing. He afterwards assumed the assignment upon an affidavit that the plaintiff could not say whether there ever had been any written assignment by the author to this deponent's vendor, but that his vendor had assigned to him by deed. *Morris v. Kelly*, 1 I. & W. 481.

clusion from it seemed almost irresistible that the assignment must also be in writing, for if the license, which is the lesser thing, must be in writing, à fortiori the assignment, which is the greater thing, must be.'

The provisions in the Acts 8 Anne, c. 19, and 5 & 6 Viet. c. 45, on this subject, as to the necessity of writing, are similar. (a) Lord *Eldon* (b) thought it would be difficult to maintain that there must be an assignment in writing between a bankrupt and his assignees. Clearly it is not necessary in that case.

The absence of an assignment in writing must be specially pleaded at law, (c) unless, of course, admitted by the other party. (d)

As to the extent of an assignment in general terms it appears that an author was not presumed to have assigned his contingent right in case of his surviving the first statutory term of copyright given by the Act 8 Anne, c. 19, unless the assignment was so specially expressed. (e)

It has never, however, been decided at law or in equity that an assignment of the copyright must be by deed, and a deed seems unnecessary, (f) though a contrary opinion is attributed to *Tindal*, C.J. in *De Pinna v. Polhill*. (g) In reference to an assignment of the right, a deed is referred to in the thirteenth section of

(a) See Sir *W. P. Wood*, V.C. in *Cassell v. Stiff*, 2 Ka. & Jo. 279; *Lover v. Davidson*, 1 C. B. N. S. 182.

(b) In *Newman v. Tegg*. 2 Rup.

(c) *Barnett v. Glossop*, 1 Bingham. N. C. 633; *Latour v. Bland*, 2 Stark, 382; *De Pinna v. Polhill*, 8 C. & P. 78; *Cocks v. Purday*, 5 C. B. 860.

(d) *Moore v. Walker*, 4 Campb. 9 n.

(e) *Rundell v. Murray*, Jac. 315. See also *Carnan v. Bowles*, 2 Bro. C. C. 80.

(f) *Wightman, J.* in *Jeffreys v. Boosey*, 4 H. L. Ca. 891; *Stevens v. Benning*, 1 Ka. & Jo. 168 S. C.; 6 De G. M. & G. 223.

(g) 8 C. and P. 78.

the Act of Victoria, that seems to have reference only to the doctrine of estoppel.

Since the repeal of the Act of Anne, an assignment in writing need not, it seems, be attested; (a) this proposition has been disputed in a legal journal. (b)

In *Jeffreys v. Boosey*, (c) Lord St. Leonards, Sir F. Pollock, L.C.B. and Parke, B. expressed decided opinions against the validity of an assignment limiting the enjoyment of a copyright as to locality; but under the Act 5 & 6 Vict. c. 45, s. 13, it is clear that an assignment may be valid limiting the enjoyment in point of time. (d)

In *Howitt v. Hall*, (f) there was a sale for four years of an English literary copyright; and a question arose, 'whether by the terms of the agreement between the author and his assignee, the latter could, after the four years, sell copies of an edition printed and published by him within that period. The only evidence in writing of the agreement was the following memorandum signed by the author and addressed to the publishers:— 'Gentlemen, I confirm the agreement entered into with you by Mrs. Howitt, on March 14, 1854, for the publication of a "Boy's Adventures in Australia," being copyright of four years from that date;' there was also a receipt (g) for the money paid for the copyright and sole right of sale for four years. Sir

(a) *Crompton, Erle, Wightman*, JJ. *Parke, B. Jervis*, L.C.J. 4 H. L. Ca., 855, 881, 891, 931, 943.

(b) See 8 Jur. N. S. pt. 2, p. 148. And see *Power v. Walker*, 3 M. & S. 8; and *Bohn v. Davidson*, 6 C. B. 458. Lord Ivory, in *Jeffreys v. Kyle* (18 Dec. of Ct. of Sess. 2d series, p. 911), and others have thought that *Power v. Walker* as well as *Bohn*

*v. Davidson* were wrongly decided; but see Lord St. Leonards, 4 H. L. Ca. 995; and *Alderson*, B. 4 H. L. Ca. 915.

(c) 4 H. L. Ca. 933, 940, 993.

(d) See *Maule, J.* in *Davidson v. Bohn*, 6 C. B. 458.

(e) 10 W. R. 381.

(f) See *Latour v. Bland*, 2 Starkie, 382.



*W. P. Wool*, V.C. held that the purchase of the copyright carried with it the right of printing and publishing, and that the defendant was entitled to continue selling after the expiration of the four years' term the stock printed by him under his purchase. In answer to a suggestion that the effect of such a sale might be to destroy the copyright in the author altogether, as the publisher, who had purchased the copyright for a limited period only, might, during that period, print off copies enough to last for all time, the Vice Chancellor said: 'A nice question might, indeed, arise as to the number of copies of which an edition might consist; but a publisher was not likely to incur the useless expense of printing copies enough to exhaust the demand for all time, and have them lying upon his hands unprofitably. Besides this, even if the effect of a sale for four years might operate in this way to deprive the author of all copyright in his work, the answer was that he had not guarded himself against such a contingency.'

Where, in an action for piracy, it appeared that the work alleged to be pirated had been for several years sold by the defendant, with the acquiescence of the plaintiff, *Abbott*, J. thought it might be inferred that the defendant once had authority to sell, but that it was impossible thence to infer for what time that authority might have been given, and whether it subsisted at the time of the publication of which the plaintiff complained. (a)

An agreement in writing between an author and publisher, (b) 'that the latter should print, reprint, and

(a) *Latour v. Bland*, 2 Stark. 382; and see *Rundell v. Murray*, Jac. 311.

(b) As to account of profits between author and publisher, see a recent case, *Barry v. Stevens*, 31 Beav.

publish his book, and that he and they should equally share the net profits of the publication, and that he should write, and they should print and publish on the same terms any subsequent edition of the book which the public might require, and that if all the copies of any edition should not be sold within five years from publication, the publishers might sell the remaining copies in order to close the account,' is not a contract for an assignment of the copyright, but a mere personal contract not assignable by either party. (a)

A contract for the sale of copyright is enforceable in equity. (b)

In *Leader v. Purday*, (c) which was an action upon the case for an infringement of copyright, the defendant objected that the plaintiffs agreed to assign it to one of them : this objection was overruled; it was at law and when equitable pleas were unknown there.

In the Court of Chancery it has always been held sufficient if the plaintiff established an equitable title to the copyright violated. (d)

It was considered in *Cocks v. Purday*, (e) that a sale

258. Sir J. Romilly, M.R. observed : ' I am very far from saying that the author of a book may not come into a court of equity for an account, when such an account is refused.' In that case he refused the relief prayed, because it amounted to a mere money demand, which could be dealt with at law, and a reference on the subject was then pending at law. The issue of an edition of a work as an edition by its author, when it is not so, may lead to an action for damages by him against the publisher. (*Archbold v. Sweet*, 5 C. & P. 219.)

(a) *Stevens v. Benning*, 1 Ka. & Jo. Affirmed on appeal, 6 De G. M. & G. 223. An action lies for damages against an author failing to supply a publisher with MS. according to contract. (*Gale v. Leckie*, 2 Stark. 107; but as to specific performance of such a contract, see *Clarke v. Price*, 2 Wils. C. C. 157.)

(b) *Thomblson v. Black*, 1 Jur. 128.

(c) 7 C. B. 14.

(d) *Sweet v. Shaw*, 3 Jur. 217; *Sweet v. Maugham*, 4 Jur. 456.

(e) 5 C. B. 885.

of the copyright in an unpublished musical work by the author (a foreigner), the sale being evidenced by writing and valid abroad, so vested the interest of the vendor in the purchaser afterwards publishing in England as to make the latter an assignee of the copyright within the meaning of section 3 of the Act 5 & 6 Vict. c. 45; but, in *Jeffreys v. Boosey*, common law Judges were divided on this point, and Lord *St. Leonards* held it to be perfectly clear, that no assignment of an English copyright could be held good in this country, unless it satisfied the requisition of the law of England in respect to an assignment of such copyright. Sir *J. Coleridge*, J. in the same case, was of opinion that the sale abroad gave an inchoate right to the purchaser. The decision, however, of the House of Lords in *Jeffreys v. Boosey* (a) overruled the actual decision in *Cocks v. Purday*.

For an instance of a limited assignment of copyright *Sweet v. Cater* may be looked at. (b) That case proceeded upon a written agreement between Lord *St. Leonards* (then Sir *E. Sugden*) and Mr. *Sweet* (the law bookseller and publisher). The agreement ran as follows:—‘The Right Honourable Sir Edward Sugden having prepared a new edition (the 10th) of the “Treatise of the Law of Vendors and Purchasers,” and S. Sweet being desirous of purchasing the same, it is agreed that Messrs. Hansard shall print 2,500 copies of the work in type and page corresponding with the 6th edition of the “Treatise of Powers,” at the sole cost of S. Sweet, and S. Sweet shall pay to Sir E. Sugden for the said edition, the sum of        ’. (the sum to be paid, and the

(a) 4 H. L. Ca. 977.

(b) 11 Sim. 573.

instalments by which it was to be paid, were then mentioned): the first instalment was to be paid in cash as soon as the edition was ready for publication, the second instalment by a bill payable four months after date, the last instalment by a bill payable eight months after date; both bills were to be dated at the time the edition was ready for publication; the work to be divided into three volumes, and to be sold to the public for 3*l.* in boards; but, should it exceed 111 sheets or 1,776 pages, a proportionate increase to be made in the charge to the public, and a proportionate addition to the consideration to be paid to Sir E. Sugden by S. Sweet; fifteen copies in boards to be delivered to Sir E. Sugden, free from all charge or expense.' The bill (to restrain the defendant from piracy of the treatise) was demurred to for want of equity, on the ground that the plaintiff had a mere license under the agreement to publish and sell 2,500 copies, not even an exclusive license for any definite time, and therefore no interest, legal or equitable, in the copyright. Sir *L. Shadwell*, V.C.E. (without hearing the plaintiff) overruled the demurrer, because he considered that under the agreement Sweet was an assign of the copyright in the limited sense of having the exclusive right to publish and sell the whole edition of 2,500 copies.

9. It seems that there are no reported judgments on the extent to which the law implies a warranty upon the sale of a copyright, therefore the point must be decided by analogy to the sales of other personal property. *Sims v. Marryat* (*a*) is, however, a case where an express warranty was collected from the language

9. Warranty on sale of the right.

(*a*) 17 Q. B. 281.

of a letter and receipt which passed between the vendor and purchaser of a copyright.

10. The case of *Reade v. Bentley*.

10. Attention may here, perhaps, be properly called to *Reade v. Bentley*. (a) There were two agreements in that case, exactly similar, between the plaintiff and defendant, relating to two different works. The agreements were couched in the following language:—‘It is agreed that Rd. Bentley shall publish, (b) at his own expense and risk, a work at present entitled, &c.; and after deducting from the produce of the sale thereof the charges for printing, paper, advertisements, embellishments (if any), and other incidental expenses, including the allowance of ten per cent. on the gross amount of the sale for commission and risk of bad debts, the profits remaining of every edition that shall be printed of the work are to be divided into two equal parts, one moiety to be paid to C. Reade, and the other moiety to belong to Rd. Bentley; the books sold to be accounted for at the trade sale price, reckoning 25 copies at 24, unless it be thought advisable to dispose of any copies or of the remainder at a lower price, which is left to the judgment and discretion of Rd. Bentley.’ The defendant had stereotyped the works, had published a first edition of the earlier work at a price fixed by himself and the plaintiff, a second edition of that work at a lower price fixed by himself alone, three editions of the later work at a price fixed by himself and the plaintiff, and a fourth edition at a lower price fixed by himself alone. On the defendant’s communicating to the plaintiff his intention of publishing another edition of both works at a still

(a) 4 Ka. & Jo. 656.

(b) Publication of a book by its author or his assignee, in breach of

his agreement with another person, may be restrained. *Brook v. Wentworth*, 3 Austr. 881.

lower price, the plaintiff gave to the defendant notice of his objection to such a publication; the defendant persisted in his intention, and thereupon the plaintiff filed a bill against him, and thereby prayed that the joint adventure, or partnership, between himself and defendant might be dissolved; that accounts might be taken, and that it might be declared that he (the plaintiff) was absolute owner and proprietor of the copyright; that the agreements might be delivered up to be cancelled, and that the defendant might be restrained from publishing, &c. any new editions of the works without the plaintiff's written sanction or consent. Sir *W. P. Wood*, V.C. made the declaration prayed, and decreed the consequent accounts, but gave no costs, the whole litigation having arisen, in his opinion, from the defective form of the agreement, for which both plaintiff and defendant were to blame. In the course of his judgment, the learned Vice-Chancellor observed: 'The question then was as to what is the exact character of the contract. It had been said that it was a simple agency, but clearly it was something more than that, the publisher taking upon himself the whole risk of bringing out the work, while a mere agent never embarked in the risk of the undertaking; then it had been regarded partly as a joint adventure, and partly as a license to publish, which, according to the defendant's contest, was irrevocable . . . The plaintiff contended that the defendant's duty had been fulfilled when any one edition had been published; but that, as to the particular edition, he could not interfere with that edition after expense had been incurred upon it. If, however, the plaintiff were not entitled to exercise a control and determine the arrangement as to any subsequent edition, he would be in this position,

that he would not be able to assert any right of publishing his works himself, and would in effect have parted with the copyright for the life of the defendant. At all events, the contract would be personal and would not extend to the defendant's representatives; but during the defendant's own life, the plaintiff's interest would have become divested, and all right of interference gone so long as the defendant was ready and willing to publish continued editions. At the same time, the author would not be able to compel the publisher to publish any second edition, which would be leaving the author in a position of great hardship. The publisher was the proper person to fix the price, as he had been at the expense of advertisements, agency, printing, and paper; then, as to the time of bringing out a fresh edition, the publisher might not refuse definitely so to do, but might think that the proper period had not yet arrived. If the proper person to fix the price, it must be held by a parity of reasoning that the publisher was the proper person to fix the time, though this result would be one of considerable hardship and difficulty upon the author, if he had no power of determining the arrangement. On the other hand, when was the author's right of determining the arrangement to commence? The publisher had expended his capital and given the benefit of his talents and position, considerations by no means to be overlooked, with the expectation that the work would run to several editions. The defendant also relied upon the circumstance that he had stereotyped the work, a process in itself involving considerable expense. The Court did not concur in the plaintiff's view that there had been any fraud in stereotyping the work; it would not be influenced by the accident of its

being in stereotype rather than moveable type, and was equally powerful to restrain any unfair use of the one or the other. The period fixed by the word edition seemed to refer to the time for having a periodical statement of accounts and profits. It was said that when the work was stereotyped, the edition, in the technical sense, was at an end; a question of right like this was not, however, to be governed by the pedantry of etymology, but by the facts of the case. He (the Vice-Chancellor) apprehended that, if a publisher chose to print 20,000 copies, keeping in his storehouse a large quantity, and periodically issuing them to the world, by thousands, for instance, every such issue would be an edition. There would be no substantial difference between this course and printing a new set of 1,000 for an issue. The profits of every edition meant that the time at which each edition was issued was the period for taking and terminating the accounts. No new expense had been incurred in printing or embellishment since the second edition of the earlier work and the fourth of the latter work. On a balance of the difficulties, it appeared that the onus was thrown upon those who contended that the necessary construction of this agreement, which on the face of it contained no such stipulation, was a parting by the author with all control as to all publication and all right to determine the arrangement, a conclusion to which the Court could not come.'

Whether a purchaser of a foreign work can here insist on copyright therein, when an unauthorised publication of the work in this country has preceded a written assignment of the right to himself, was a



question which, in *Chappel v. Purday*, (a) Lord Abinger, L.C.B. thought too important and too doubtful to be decided on a motion for an injunction.

11. Licenses to exercise the right.

11. There is no statutory enactment as to the form of licenses affecting this copyright; but, as already stated, they should be registered at Stationers' Hall. (b)

A license to print a book ordinarily conveys by the trade custom the privilege of printing a certain number of copies, called an edition.

12. To whom the right may belong.

12. The only persons who can lay claim to this copyright are, in the case of a book published before July 1, 1842, the proprietor on that day of the copyright therein or his assigns; and in the case of a book since published, the author or his assigns. No other person can claim this right.

The only qualification of the word 'author' in the Act 5 & 6 Vict. c. 45, seems to be the decision of the House of Lords in *Jeffreys v. Boosey*. (c) It was there ruled that a foreigner, although he be the author of a book first published here, is not, if absent from this country at the date of publication, an author within the protection of our copyright law.

That case was determined upon the Acts 8 Anne, c. 19, & 54 Geo. 3, c. 156; but the Act 5 & 6 Vict. c. 45 is open to the same construction (as to the claim of a foreigner to copyright here) as that put upon the earlier Acts.

(a) 4 Y. & C. 485, but see now *Jeffreys v. Boosey*, 4 H. L. Ca.

(b) 5 & 6 Vict. c. 45, s. 11. For an instance of an agreement to sell a certain number of copies of a work, see *Benning v. Dove*, 5 C. & P. 427. A reprint of a portion of a work, to replace copies destroyed by fire when in the publisher's

hands, is not an edition entitling the editor to insist on superintending its issue, and receiving remuneration. (*Blackwood*, 1860, p. 142.) As to an implied license prior to the Act of Victoria, see *Sweet v. Archbold*, 10 Bingham. 133.

(c) 4 H. L. Ca. 977.

Contrary doctrine had been previously held by the Court of Common Bench in *Cocks v. Purday*; (a) in that case the decision was given upon the authority of *D'Almaine v. Boosey*, (b) *Bentley v. Foster*, (c) the expression of judicial opinion in *Clementi v. Walker*, (d) and upon the principle of our law, that an alien may in this country acquire personal rights, and may in this country maintain personal actions in respect of injury to such rights.

Prior to the decision in *Cocks v. Purday*, Sir L. Shadwell had, however, observed in *Delondre v. Shaw* (e) (not a copyright case be it remarked, but a motion to restrain the imitation of trade marks): 'The circumstance that he was the inventor of the seals will not justify the Court in interposing in his behalf, for he

(a) 5 C. B. 860.

(b) 1 Y. & C. 288. *D'Almaine v. Boosey* was only a decision by the Court of Exchequer that an English assign and first publisher in England of the musical composition of an alien may bring an action on the case against any one pirating the composition in this country. Lord Abinger, L.C.B., had, however, observed in his judgment therein: 'The point whether the copyright of a foreigner is protected at all in this country does not arise in the present case, because the plaintiff D'Almaine is not a foreigner.'

(c) 10 Sim. 329. *Bentley v. Foster* was a motion to dissolve an injunction restraining the defendant from pirating a work, the copyright of which the plaintiff, an English-

man, had purchased of a citizen of the United States of America resident there. Sir L. Shadwell, V.C.E., observed in that case, that protection was given by the law of copyright to a work first published in this country, whether written abroad by a foreigner or not; but as the question was legal, he directed the plaintiff to try it at law, and meanwhile he continued the injunction; the plaintiff brought the action, and the defendant consented to a verdict against himself.

(d) 2 B. & Cr. 861, by Bayley, J.: 'that after publication abroad, copyright was acquired by first publication in England, if the publication here followed promptly the foreign publication.'

(e) 2 Sim. 240.

was a foreigner, and the Court does not protect the copyright of a foreigner.'

After the decision in *Cocks v. Purday*, in the Court of Common Bench, a motion was heard in a case of *Chappel v. Purday* by the Court of Exchequer; (a) the motion was to dissolve an injunction obtained ex parte by a plaintiff to restrain a defendant from publishing and selling the overture and airs of an opera composed abroad by a foreigner there resident; the plaintiff, though the purchaser and first publisher in England of the overture and airs, had omitted to get a conveyance to himself of the copyright therein until after their publication in England by another; the only point decided in that case was apparently this: 'that the question involved in the application was too important and too doubtful for an interlocutory order.' In delivering judgment, however, Lord Abinger, L.C.B. expressed his own individual opinion that a foreigner, author of a work unpublished abroad, might communicate such right as he had therein abroad to any British subject, at least, for the period prescribed by the statute of Anne.

In *Boosey v. Davidson* (b) the Court of Queen's Bench had given judgment expressly in accordance with the decision in *Cocks v. Purday*, but did not more particularly state the grounds of its judgment. In the subsequent case of *Boosey v. Purday*, (c) the plaintiff as assign and first publisher in England of an opera composed abroad by a foreigner, had brought an action on the case for infringement of his copyright therein in this country; the judgment was delivered by Sir F.

(a) 4 Y. & C. 485.

(c) 4 Exch. 145.

(b) 13 Q. B. 257.

*Pollock, L.C.B.* The Court of Exchequer had there held that the Copyright Acts give no property in England to a foreigner composing a work abroad; that a foreigner, therefore, could transfer no such right to the plaintiff.

*Boosey v. Jeffreys* followed this last decision: it was an action on the case brought in the Court of Exchequer in order that the matter might be taken by way of appeal to the House of Lords; it was tried by *Rolfe, B.* (now Lord *Cranworth*). The following facts then came out: an opera had been composed at Milan, by an alien; the composition gave to its author a copyright at Milan, assignable by him; he had at Milan, and according to Milanese law, assigned his right in part of the opera to another alien there, who had afterwards in London, and by deed, assigned his interest to the plaintiff, but for publication in the United Kingdom only. The plaintiff had been born in England and was resident here; he had been the first publisher in England of the work of which he had duly registered himself assignee. The defendant had also published and sold here copies of the opera. *Rolfe, B.* in conformity with the decision in *Boosey v. Purday*, directed the jury to find for the defendant: a bill of exceptions to that direction was tendered, and the Court of Exchequer Chamber declared the direction to be wrong: (a) the grounds given for the reversal were that the British Parliament could legislate within British territory for aliens, and if it used general words, which would cover aliens as well as natural-born subjects, it must be presumed to be legislating for aliens; that the words of the Copyright Act were general; that

(a) *Boosey v. Jeffreys*, 6 Exch. 593.

the Act 8 Anne, c. 19, was for the encouragement of learning (see title of the Act 8 Anne, c. 19), and that it was consistent with the uniform policy of Parliament to promote the importation of foreign literature.

The cases of *Cocks v. Purday* and *Boosey v. Purday* had been brought to the notice of Sir J. L. K. Bruce, V.C. in *Ollendorff v. Black*, (a) upon a motion by the plaintiffs to restrain the defendant from selling an edition of a work written by one of the plaintiffs, a German, and first published in London while the author was temporarily resident there; that learned Judge granted the motion, expressing on the occasion his preference for the decision in *Cocks v. Purday*, and founding thereon, to some extent, his judgment, but distinguishing the case then before him from *Boosey v. Purday* by this point of difference, viz. that in *Ollendorff v. Black*, the first publication in England took place when the author, though domiciled abroad, was in England.

From the judgment of the Court of Exchequer Chamber in *Boosey v. Jeffreys* a writ of error was brought in the House of Lords, (b) and after taking the opinion of the Judges, (c) the House, in *Jeffreys v.*

(a) 4 De G. & Sm. 209.

(b) Pending the appeal from the judgment of the Court of Exchequer Chamber, a somewhat similar case, *Buxton v. James*, 5 De G. & Sm. 80, was decided by Sir J. Parker, V.C., upon the authority of that judgment. The Vice-Chancellor on that occasion observed that he had himself never doubted the law as laid down by the Exchequer Chamber in *Boosey v. Jeffreys*.

(c) The following statement and questions were submitted to the judges for their opinions:—

#### STATEMENT.

Vincenzo Bellini being an alien friend, while living at Milan composed a literary work, in which, by the laws there in force, he had a certain copyright. He there, on the 19th February 1831, by an instrument in writing, bearing date on that date, not executed in the

*Boosey*, reversed the judgment of that Court, and affirmed the ruling of the Court of Exchequer. The Law Lords who spoke were Lord *Cranworth*, C.,

presence of or attested by two witnesses, made an assignment of that copyright to Giovanni Ricordi, which assignment was valid by the laws there in force. Ricordi afterwards came to this country, and on January 9, 1831, by a deed under his hand and seal, bearing date on that day, executed by him in the presence of and attested by two witnesses, for a valuable consideration, assigned the copyright in the said work to the defendant in error, his executors, administrators, and assigns, but for publication in the United Kingdom only; the said defendant then printed and published the work in this country before any publication abroad; the plaintiff in error, without any license from the defendant in error, then printed and published the same work in this country.

#### QUESTIONS.

1. Did this publication by the plaintiff give to the defendant any right of action against him?

2. If the assignment to Ricordi had been made by deed under the hand and seal of Bellini, attested by two witnesses, would that have made any and what difference?

3. If Bellini, instead of assigning to Ricordi, had, while living at Milan, assigned to the defendant in error all his copyright by deed, similar in all respects to that executed by Ricordi, would that have made any and what difference?

4. If the work had been printed and published at Milan before the assignment to the defendant, would that have made any and what difference?

5. If the work had been printed and published at Milan after the assignment to the defendant, but before any publication in this country, would that have made any and what difference?

6. If the assignment to the defendant had not contained the limitation as to publication in this country, would that have made any and what difference?

7. Looking to the record as set out in the bill of exceptions, was the learned judge who tried the cause right in directing the jury to find a verdict for the defendant?

The substance of the several answers of the judges was as follows:—*Crompton*, J.: He thought it unnecessary to consider either the possible effect of the decision in *Jeffreys v. Boosey* upon our literary relations with other countries, or the existence of a common law copyright anterior to the Act 8 Anne, c. 19, or the rights of an author against parties having illegally or surreptitiously taken or used his manuscripts or copies: copyright was a territorial monopoly, bounded and regulated by the Copyright Acts, and not a property derived from or carved out of a general right of property or foreign copyright; publication was

Lord *Brougham*, and Lord *St. Leonards*: they were unanimous as to the reversal.

the commencement and foundation of English copyright (*Beckford v. Hood*, 7. T. R. 620); by publication was meant a bona fide publication in this kingdom; the right might be acquired by a foreign author, although he resided abroad, and did not personally come to England to publish. *Clement v. Walker* had tacitly recognised this last conclusion to be law, if such was not law. A foreigner residing at Calais, and composing a work there upon an English subject and for the English reading market, could not write to his agent in London to publish it, and so acquire copyright, but might acquire it by crossing to Dover and sending his publication thence to be published in London during his stay here. There was nothing in the Act 8 Anne, c. 19, to exclude friendly foreigners; if the Act was to be read, inserting 'British' before 'author,' it would also seem necessary to insert 'British' before 'assigns,' otherwise a British author could not assign the right to a foreigner; such foreigner could not assign it to a British subject; and there would be created by the Act, contrary to the general rule of law, a species of personal property which an alien friend would be incapacitated from taking; it was improper to introduce into an Act words, when the intention of Parliament was not more clearly expressed than in the Act 8 Anne, c. 19. The answer to the query,

'Why is the publication to be construed British, and the author not to be construed British?' was this: 'the publication being made the commencement of the period of the monopoly, and that publication giving rights confined to Britain, and the enactments as to the entries at Stationers' Hall, and the obligation imposed of delivering copies to British institutions, together with the authority of *Clementi v. Walker*, satisfactorily show that the publication must be intended to be in England, whilst there seems nothing in the Act to show that the Legislature, in using the words "author" and "assigns," had any intention of restricting the place of composition or the personal capacity of the author or assigns:' it was not clear if a composition like that in *Boosey v. Jeffreys* had occurred to the Legislature, it would have excluded it; *Bentley v. Northouse*, Moo. & Mal. 66; *Milne v. Graham*, 1 B. & Cr. 192; *De la Chaumette v. Bank of England*, 2 B. & Ald. 385 (cases which established the application of the general words in the Act 3 & 4 Anne, c. 9, to notes and endorsements abroad), opposed a limited construction of similar words in the Act 8 Anne, c. 19: there was no absurdity in giving copyright to a foreigner having his work first bona fide published here: the alleged presumption in favour of legislation by Parliament for British subjects only, and the

Lord *Cranworth*, C. in moving the reversal, said, in effect, that the Act 8 Anne, c. 19, must be construed

unlikely of an enactment in the reign of Queen Anne to protect foreign productions, were insufficient reasons for restricting the general words, for the Act 8 Anne, c. 19, protected foreign productions only as English publications. That an assignee might acquire copyright by first publication was clear from the words of the Act 8 Anne, c. 19: the author or his assignee shall have the sole liberty, &c. from the day of the first publication.' The assignment of English copyright must be such as our law required, because the right was local, and created or regulated by statute law; but the attestation of two witnesses to such assignment was unnecessary since the Act 54 Geo. 3, c. 156; the decision to the contrary in *Davidson v. Bohn* was wrong. With these observations, *Crompton*, J. coupled these categorical answers to the questions: 1. Although on the state of facts assumed, Bellini appeared to him an author who might have sent his work over here for first publication, yet that it did not sufficiently appear that there was any sufficient assignment of his right to publish, so as to obtain English copyright. It was stated with reference to the first question, that Bellini had, by the law of Milan, a right to a certain copyright, by which he (*Crompton*, J.) understood some copyright in a foreign country, to be enjoyed there according to the

law of the country; but to what extent or for what time, did not appear; and it was stated that the assignment was of that copyright; Bellini's right to clothe himself with the English monopoly arose from his authorship, and not at all as being parcel of or carved out of any foreign copyright. Could an assignment, stated to be of foreign copyright, pass a right under the English statutes? On the supposition, then, that the assignment mentioned in the first question was intended to apply to the foreign copyright solely, he (*Crompton*, J.) answered the first question in the negative, on the ground that the assignment referred to in that question did not appear to be an assignment of any English right. 2. If the assignment by Bellini had been by deed attested by two witnesses, the defect in the title would not be cured, as the assignment was stated to have been of the foreign copyright, and did not appear to have included any other right. 3. If Bellini had assigned either to Ricordi or immediately to the defendant in error by deed, similar in all respects to that executed by Ricordi, and therefore comprising and assigning the right as to this country, the defendant in error would have had a good title to the copyright. 4. If the work had been printed and published at Milan before the assignment, the right to publish in England so as to acquire the English copyright



as referring to the authors being British subjects, i. e. at least within the Queen's dominions, and so owing to

would have been lost. 5. The same consequence would have ensued, if the publication at Milan had been made after the assignment, but before the publication in England. There would have been nothing in the assignment of the English copyright to prevent the publication at Milan, and that publication not giving the monopoly in England, would make it lawful to publish the foreign work in England, and if once lawful for any one to publish, the right of acquiring the English copyright in the work, was gone. 6. The limitation of the exercise of the right to this country did not seem material. If the right was an entire right it could not be divided, so, for instance, as to make an assignment of English copyright to one person in Yorkshire, and to another for Middlesex, and in such case there would be great difficulty. In the present case, the right of the author to the English copyright was an entire thing under our municipal statutes, and was not parcel of or derived out of anything else; the author in this case had the right here as author, and not by the law of Milan, and if, having that entire thing under our law, he, by assignment, passed that right as to this country, there was no subdivision of the copyright, unless, indeed, the Act 54 Geo. 3, extending the privilege to all the British dominions, might make a difference in

that respect. *Lastly*, The question upon this record arose upon a bill of exceptions to the ruling of the learned judge directing a verdict for the defendant below. The Act 6 & 6 Vict. c. 45, s. 11, made the copy of the entry *prima facie* evidence of the title of the plaintiff, who was, therefore, entitled to the verdict unless his title was destroyed by the defendant's evidence. If the supposed defect in the plaintiff's title depended only upon the form or nature of the assignment, his *prima facie* title might not be so entirely destroyed as to warrant the direction that the finding must be for the defendant, as though the proof of such defective assignment might be strong and cogent proof that there was no other, yet, as it was not found that there was no other, there would be evidence both ways, and the direction could only be supported if there was no evidence for the consideration of the jury. As to the supposed defect on the ground of the author being an alien, and not having been in this country, as that fact was directly negatived, the defect, if available, would directly negative the title of the plaintiff, and the direction to find for the defendant would be right. As, under the circumstances stated in the record, the title might be gained by the foreign author or his assignee, and an assignment in writing, though without witnesses, would be suffi-

her temporary allegiance; because *prima facie* the Legislature of this country must be taken to make laws

cient, and as the assignment in question, though ambiguously stated in the bill of exceptions, might have been sufficiently general to pass to the assignee the right of clothing himself with the English copyright (as from the recital of it in the deed to the plaintiff it seemed really to have been), and as there was nothing to negative the *prima facie* title of the plaintiff under the entry in this respect, by showing that there had not been a sufficient assignment by this or some other instrument, the statement upon the record not being inconsistent with the existence of a good assignment, the learned judge was not right in directing the jury to find a verdict for the defendant. — *Williams, J.* : 1. The publication by the plaintiff in error gave to the defendant in error a right of action against him. The authorities in favour of the proposition 'that a foreign author might gain an English copyright by publishing in England before any publication abroad, though he might be resident abroad at the time,' were not mean. Neither to the counsel nor to the judges in *Clementi v. Walker* did the doctrine occur that 'copyright could not be gained by a foreigner who was resident abroad at the time of the publication,' though this doctrine would have disposed of one point at least in that case. In *D'Almaine v. Boosey*, Lord Abinger, L.C.B., granted an injunction to protect

the copyright of a foreigner who had first published in England. In *Chappel v. Purday*, Lord Abinger, L.C.B. adhered to his decision in *D'Almaine v. Boosey*. In *Bentley v. Foster* the precise point arose, and Sir L. Shadwell, V.C.E., there said that, in his opinion, protection was given by the Law of Copyright to a work first published in this country, whether it was written abroad by a foreigner or not. In *Chappel v. Purday*, Sir F. Pollock, L.C.B. stated the result of the decisions to be, that if a foreign author, not having published abroad first, published in England, he might have the benefit of the Copyright Acts. The decision in *Cocks v. Purday* was, that an alien amy, resident abroad, being the author and first publisher in England of a work not previously published abroad, had a copyright therein, whether composed here or abroad; and that decision was followed in *Boosey v. Davidson*. The only authority conflicting with these cases was an intimation by the Court, in *Chappel v. Purday*, that, on a proper construction of the Copyright Acts, a foreign author, or the assignee of a foreign author, could not gain English copyright; and a decision to that effect in *Boosey v. Purday*. There were no words in the Act 8 Anne, c. 19, which confined its benefits to British subjects by birth or residence; though the context, and other provisions of the Act, showed

for its own subjects exclusively, and where, as in the Act 8 Anne, c. 19, an exclusive privilege was given to a

that the publication must be British. The title of that Act did not require such a construction of its provisions; and Parliament might legislate for foreigners in respect of the legal consequences in Great Britain of an act done in Great Britain. The Legislature could scarcely mean that a foreign author should have no copyright if he remained at Calais, but should gain it if he crossed to Dover, and there gave directions for, and awaited the publication of, his work; or that a foreign author, who, during a residence in England, had composed a work which was afterwards first published in England by his order and at his expense, should have no capacity to acquire a copyright therein, if the exigencies of his affairs constrained him to quit England just before the work was published; but that a foreign author, who, during his residence abroad, had composed a work which was afterwards first published in this country, should have the copyright if he happened to come to England just before the publication, and abided here till it was complete. Harsh consequences would also result from such construction to the trade of booksellers (for whose protection, as well as for authors', the Act purported to be passed); for if a bookseller should purchase a literary work in manuscript from a foreign author resident here in

England, the copyright would be lost to the bookseller if the author should choose to leave this country, and be absent from it even without the knowledge of the bookseller at the time of publication; and if the bookseller should think it best to publish the work in several volumes, at several times (as it had happened in many well-known instances), he might have copyright in some of the volumes, and not in others—because the existence or non-existence of the right would vary with the accident of the author's being, or not being, in this country at the dates of the respective publications of the volumes. Further, no little difficulty would arise in deciding on the rights of the bookseller, supposing the author were to die between the time of selling his work to the bookseller and the time of the publication of the work in England. The defendant in error was the assignee of the author, because the law of Milan recognised in Bellini an assignable right of property in an unpublished work, which right Bellini, in conformity with that law, assigned at Milan to Ricordi, by whom the monopoly only in England was duly assigned to the defendant. The assignment to the defendant was not void, because limited to the English copyright. An English author might limit the right of his assignee to publication in Great Britain,

particular class at the expense of the rest of Her Majesty's subjects, the object of giving that privilege must be taken

and there was no distinction on this point between an English and a foreign author. 2, 3. If the assignment to Ricordi had been made by deed, under the hand and seal of Bellini, attested by two witnesses, or if Bellini, instead of assigning to Ricordi, had, while living in Milan, assigned to the defendant his copyright by deed similar in all respects to that executed by Ricordi, that would have made no difference, provided the supposed assignments had been operative according to the laws of Milan. 4, 5. If the work had been printed and published at Milan before the assignment to the defendant, or after the assignment to the defendant, but before publication in this country, the defendant by his subsequent publication in England would have gained no copyright. The reasons for this opinion may be found fully and clearly stated in the judgment of the Court of Exchequer, delivered by Chief Baron Pollock, in *Chappel v. Purday*. 6. If the assignment to the defendant had not contained any limitation as to publication in this country, that would have made no difference. *Lastly*, Looking at the record as set out in the bill of exceptions, the learned judge who tried the cause was wrong in directing the jury to find a verdict for the defendant.— *Erle, J.*: 1. The publication by the plaintiff gave to the defendant a right of action against him. (1.) All authors

had by common law copyright and all other rights of property in their written works. (2.) The statute of Anno embraced alien authors and their assigns first publishing in England. In support of proposition (1): the origin of an author's property in his work was in production; the subject of the property was the order of words in the composition, not the words, nor the ideas expressed by the words. The nature of the property was analogous to property in other personalty, and extended beyond the right to control copies after publication of the work in print, to which right only the Act 8 Anne, c. 19, related: thus an author had, for wrongful abstraction of copies of his unpublished works, remedies analogous to those of an owner of other personalty in like case; he might prevent publication, claim copies wrongfully made, sue for damages, and stop the sale of copies wrongfully made and published abroad and innocently imported. The right of an alien or native author in respect of publication here of his private work wrongfully copied abroad would be equally protected, because it was a personal right, based on principles common to all nations who read, and analogous to the right of an alien while residing abroad to prohibit the publication here of words defamatory of his character (see *Pisani v. Lawson*, 6 Bingh. N.C. 30). The right of disposition of an

to have been a national object, and the privileged class must be confined to a portion of that community for

unpublished work was similar to the right of disposition of other personalty; the disposition might be absolute or qualified in any degree. Publication did not affect the author's common law right, because the printing, i.e. copying, had no legal effect upon the previous right to control copying, and because a contrary doctrine would make the labours of an author profitless in a pecuniary point of view, and would, to that extent, discourage productions useful to the community. Objectors to the common law right of an author after publication relied mainly on three grounds: *first*, that copyright after publication could not be the subject of property; *second*, that copyright was a privilege of prohibiting others from the exercise of the right of printing, and a monopoly lawful by statute; *third*, that by publication the property of the author was given to the public. Now, as to the *first* objection, copyright could be the subject of property; it was a claim to the order of words, which order had a marked identity and a permanent endurance. It was also indeed a neutral abstraction, but that might be property, e. g. a right to a flow of water. It might be that in an early stage of society nothing was property which could not be earmarked and recovered in detinue or trover, but this was not true in a more civilised state of society. As property must precede the violation of it, so the rights of property

must precede the remedies for violation of such rights. To seek, therefore, the law of the rights of property in the law of procedure for the remedies for their violation was the same mistake as to suppose an ear-mark is a cause not a consequence of property in the ear. The difference in the judgments of *Yates, J.* and *Lord Mansfield* on this point was the difference between following precedent in its unimportant forms and in essential principles: if precedent in its unimportant forms was to be followed, there was no precedent, of course, relating to printing before printing was known; printing, however, was but a mode of production: if the growth of law could be traced in words actionable or indictable, there should be similar growth of law in respect of the interest connected with the investment of capital in words. In other matters the law had been adapted to the progress of society, according to justice and convenience, and by analogy it should be for literary works, then they would become property with all its incidents, on the most elementary principles of securing to industry its fruit and to capital its profits. As to the *second* objection, copyright was property, not a personal privilege in the nature of a monopoly; a printer might not print everything published; the supposition of the objector was that there was a demand for books; that the supply was produced by labour,

the general advantage of which the enactment was made; publication of a work was the overt act, esta-

skill, and capital for the sake of profit; that the profit began to arise upon the sale of the production; and that, as soon as the sale had commenced, the law gave to the printer an equal right to the profits with the producer, i. e. the law gave up the most important production of industry to spoliation: a printer might not print anything already in print; he might (see Stationers' case, 1 Mod. 256) print all that had been made common, but not that which had remained enclosed; he clearly might not print words of blasphemy, sedition, or defamation, and he might not infringe the Queen's copyright; his liberty of printing was so far restrained, the principle of liberty in printing would not be more invaded if restricted also as to the property of an author. As to the *third* objection: to say that by publication an author intended a gift to the public was contrary to fact, and to say that publication operated in law as such gift was begging the question. In the argument of Wedderburn in *Tonson v. Collins*, in the judgments of Lord Mansfield and of Aston and Willes, JJ., in *Millar v. Taylor*, and in the summing up of the argument on this point in *Donaldson v. Beckett*, 2 Bro. P.C., 129, the governing question was whether authors had a perpetuity of copyright since 8 Anne. *Donaldson v. Beckett* decided that the Act 8 Anne, c. 19, had restricted the right to the period therein men-

tioned, but left the question of copyright at common law undecided; authorities preponderated in favour of copyright at common law. The cases prior to Charles II., cited in *Millar v. Taylor* and *Donaldson v. Beckett*, though not decisions upon the right, were good evidence that the right was from the beginning of printing known and supported: the Act 13 & 14 Car. 2, c. 33, s. 6, also recognised the right, and in 16 Car. 2, *Roper v. Streater* (Skinn. 234), decided that the assignee of the executor of an author had copyright in his law reports against the law patentee—a decision indeed reversed, but only on the ground of the character of the reports. The Act 8 Anne, c. 19, was decisive that copyright existed previously thereto; it spoke of it as having been the subject of sale and purchase, therefore as property, and of the then usual manner of ascertaining title to it. Each of the Acts 13 & 14 Car. 2, c. 33, and 8 Anne, c. 19, secured it against piracy, and referred to registration as a mode of proving the right. The Act 8 Anne, c. 19, was for the encouragement of both readers and authors, and arose from their conflicts; for the clause therein which appeared to promote the interest of authors by vesting their property in them for a term, and giving them stringent remedies for its protection, contained the expression which in *Donaldson v. Beckett* was held to have destroyed the perpetuity of

blishing authorship ; then copyright arose ; if a foreign author was not then in this country he was not a

their property—a result so inconvenient that the Legislature had since twice interposed to extend the term. All the actions on the case, and all the injunctions for infringement of copyright during the first fourteen years after publication, were authorities that the right had continued at common law since the Act 8 Anne, c. 19, no otherwise affected thereby than limited in duration, for if the Act created a new right for 14 years, it created also a new remedy, which would be the only remedy ; and the point on which the plaintiff succeeded in *Beckford v. Hood*, viz. that the new remedy did not extend beyond 14 years (but see *Beckford v. Hood*, 7 T. R. 620, the plaintiff had copyright for 28 years; the piracy was not within 14 years of the first edition), would have been of no avail in reasoning for the 14 years. In the conflict ending with *Donaldson v. Beckett*, the great majority of the judges were for copyright at common law—3 to 1 in *Miller v. Taylor*, 10 to 1 in *Donaldson v. Beckett*. The judgment of *Yates, J.*, in *Miller v. Taylor*, was the sole judgment against such copyright. Lord *Kenyon* extra-judicially expressed his concurrence in the opinion of *Yates, J.*, but his judgment in *Beckford v. Hood* was inconsistent ; admitting the common law remedy, he derived the right from the Act 8 Anne, c. 19 : Lord *Ellenborough's* opinion, incidentally expressed in

*Cambridge University v. Bryer*, 10 East. 317, also seemed against such copyright ; but the opinions of Lords *Kenyon* and *Ellenborough*, so extra-judicially expressed, are outweighed by Lord *Mansfield's* judgment in *Miller v. Taylor* : those successors of Lord *Mansfield* had turned away from that source of the law to which he habitually resorted with endless benefit to his country. The absence of any record of an action on the case for infringement of copyright prior to the Act 8 Anne, c. 19, was no presumption against the right, if piracy was then rare, or if a more ready remedy then existed : now printing was here originally controlled by the tyrannical Star Chamber, the High Commission Court, &c., and even in the reign of Charles II. the number of printers was limited by an Act to 20 ; further, it was noticed by *Willes, J.* in *Miller v. Taylor*, that in Queen Anne's reign the poverty of the pirates was such as to make an action for damages against them futile, and that therefore the booksellers petitioned for the Act 8 Anne, c. 19. Even if copyright after publication was derived only from the Act 8 Anne, c. 19, the plaintiff below had a cause of action, for that Act did not express an intention to destroy the property which an author clearly had before publication (*P. Albert v. Strange*, 1 M. & G. 25) : effect could be given to all the provisions

British subject, and therefore not a person within the protection of the Act: from this view the apparent

of the Act, without coming to that conclusion. The right to prohibit piracy was incidental to the ownership of the property in the work pirated: ownership prohibited user of property against the owners' will; even if the Act annulled the property after publication, it left the property before publication as it was: it touched not the plaintiff, an assignee before publication. The Act was intended to encourage learning, and to induce learned men to write useful books: now learning was encouraged by supplying the best information at the cheapest rate; therefore the learner should have free access to the advances in literature and science to be found in the useful books of learned men of foreign nations. This was the scope of the Act: it was not to be supposed that the Legislature regarded all foreign literature as bad, and all British productions as good, or that it planned the release of British authors from competition with foreigners, or the restriction of readers to British productions inferior to foreign and dearer, or a small premium to British authors of mediocrity at the cost of depriving British printers and booksellers of the profit from printing and selling excellent works by foreigners. If such was its plan, the Act did not execute it. It provided for 'authors,' a word which had relation to works exclusive of country. The construc-

tion 'British authors' emanated from the Court in *Chappel v. Purday*, but though years had since elapsed, no one could, with practical precision, express in what sense the authors must be British. Perhaps Irish authors were not excluded, but how were they included in British authors? Perhaps alien authors in British allegiance by residence in Britain, were included; but if so, what residence would qualify? Must it be during education, so that the mind should be British, or during composition, so that the work should be British? No; that construction was too vague to be practical. If an alien author within our frontier at the publication or assignment of his work was British within the Act, this inconsistency resulted, that the Legislature planned a British monopoly, and made it defeasible by any alien who would go through a senseless formality; further, such construction would be too vague for practice, as to the subject of copyright, for ancient MSS. by foreign authors, if now transcribed and published in England, would be thereby excluded from copyright, unless the transcriber of a difficult MS. being equal in merit with an author should be considered as an author; but to what practical uncertainty would this lead? If a collection of letters, &c. of a distinguished foreigner might be published with notes and narrative, and so be



absurdity resulted, that a foreigner having composed a work at Calais gained a British copyright if he crossed

protected, was not the protection illusory, if the letters might be transcribed and published with other notes and narrative? In short, the construction of the plaintiff in error was wrong, because it was contrary to the general rule requiring effect to be given to words according to their ordinary acceptation; because it was contrary to justice and expediency, in depriving learners of information, and booksellers of profit; and because it gave to British authors a protection from competition which was more degrading than gainful to them. The opposite construction gave no extra-territorial effect to the Act. The copyright at Milan of the alien author in his MS. which was assumed in the question was recognised in England on the authorities collected in *Cocks v. Purday* (5 C. B. 860); the MS. was by him assigned at Milan, brought to England by the assignee before publication abroad, and then by him assigned to the plaintiff before publication, i. e. before the statutory term of copyright began; the plaintiff published here, and after such publication claimed the operation of the Act in England to protect his right here; in so doing, he only claimed an intra-territorial effect from the Act. If the Act made void the assignment in Milan, it would have an extra-territorial effect, by depriving an alien abroad of a personal right in England, which, but for the Act,

the common law would have given him here. 2. If the assignment from Bellini had been by deed under the hand and seal of Bellini, attested by two witnesses that would not have made any difference. The assignment by Bellini was valid by the law of Milan, therefore valid in England: even if the law of England operated in respect of the assignment it was valid, for since the Act 54 Geo. 3, c. 156, s. 4, no attestation was necessary. That Act was not on this point adverted to in *Davidson v. Bohn*, 6. C. B. 466. 3. If Bellini, instead of assigning to Ricordi, had, while living at Milan, assigned to the defendant in error all his copyright by deed, similar in all respects to that executed by Ricordi, that would not have made any difference: the assignment in the form valid at Milan would be valid in England, so would an assignment in the form valid in England, if made to an Englishman, to be used in England. 4. If the work had been printed and published at Milan before the assignment to the defendant, that would have made a difference: it would have defeated the right of the plaintiff below. There was no copyright in England for a work already published abroad: this proposition of law was recognised by the Act 8 Anne, c. 19, s. 7, and by the statutes on international copyright. 5. The same answer as to 4: the lawful publication abroad would

to Dover and there first published his work, whereas he would have no copyright, if he should send it to an agent

defeat any claim to copyright in England. 6. If the assignment to the defendant had not contained the limitation as to publication in this country, that would not have made any difference; the owner of copyright might dispose of the whole or any part of his interest as he might choose. *Lastly*, Looking to the record as set out in the bill of exceptions, the learned Judge who tried the cause was not right in directing the jury to find a verdict for the defendant.—*Wightman, J.* : 1. The plaintiff had right of action against the defendant. Ten if not eleven judges against one judge in *Donaldson v. Beckett* were of opinion that by the common law the author of a literary composition was entitled, from composition, at least, till publication, to the incorporeal right, to the sole printing and publishing such composition, and by the Act 8 Anne, c. 19, from first publication for and during the term specified in that Act and the Act 54 Geo. 3, c. 156: an alien might in England hold and defend all other personal property, therefore he might hold and defend this incorporeal right, for it was merely personal property (*Tuerloote v. Morrison*, 1 Bulstr. 134; *Pisani v. Lawson*, 8 Scott, 182; Anon. Dyer, 2. b.) The Act 8 Anne, c. 19, recognised proprietors at common law of literary property, and contained no language indicative of exclusive benefit to authors being British sub-

jects: it also professed to be an Act to encourage literature and learned writers, and referred not to country or persons. To limit the Act to native authors would be to lessen its beneficial operation; first publication in England of a work by a foreign author was not a matter 'extra fines,' therefore the municipal law might deal with it. Bellini, as an author, had in his work an incorporeal right, recognised by the law of England; he assigned that right to Ricordi. Upon modern authority (*Chappel v. Purday*, *D'Almaine v. Boosey*, *Cooks v. Purday*, *Boosey v. Davidson*, *Boosey v. Purday*) there was a preponderance in favour of the proposition that a foreign author resident abroad could by first publication in England acquire a copyright here; the assignment by Ricordi was valid by the law of Milan, and in England attestation was unnecessary since the Act 54 Geo. 3, c. 156. 2. 3. It would not have made any substantial difference in the case if the assignment to Ricordi had been by deed attested, or if the assignment had been direct at Milan from Bellini to Boosey, by deed attested. 4, 5. If the work had been printed and published at Milan before the assignment to Boosey, or after the assignment to him, but before publication here, neither the author nor his assignee would have been entitled to copyright in England: first publication

to publish for him; but this was not really absurd, for whenever it was necessary to draw a line, cases border-

in England was essential to statutory protection of copyright. *Chappel v. Purday* decided that. First publication at Milan by the author after assignment would not have wronged Boosey, as the assignment to him was limited to publication in England. 6. The limitation in the assignment made no difference under the circumstances of the case. A first publication in England under such an assignment would entitle the assignee to the benefit of the statute. No terms, however general, could restrain a publication abroad where the English law had no operation, and there was no rule of law which would make such a restricted assignment invalid, though it might be that, as far as copyright in the British dominions was concerned, a restricted assignment would exhaust the whole power of the assignor, and that he could not make another assignment to take effect in another place. *Lastly*, Looking to the record as set out, the learned Judge who tried the cause was wrong in directing the jury to find a verdict for the defendant.—*Maule, J.*: 1. The publication by the plaintiff in error gave the defendant in error a right of action against the plaintiff. 2. It would have made no difference, supposing the other circumstances in the first question to be the same. 3. It would have made no difference. Question 2 did not state that such a deed would have been operative

by the law of Milan; but as the subject of it was expressed to be and actually was the right of publishing, or that of acquiring of such right by proper means in the United Kingdom only, and as the deed was in a form which, by the law in this country, was proper to operate on such a subject, and was executed by an author on whom the Acts conferred the British right and the power of transferring it, such deed was effectual for the purpose of constituting an assignee within the Acts. 4, 5. In the cases supposed in these two questions, the defendant in error would have had no right of action against the plaintiff in error. 6. Whether the words limiting the right to the United Kingdom were or were not contained in the assignment, the defendant in the case supposed in the first question would have had a right of action against the plaintiff. *Lastly*, The learned Judge was not right in directing a verdict for the defendant. Copyright, in common acceptation, comprehended (1) the right belonging to an author *before* publication, i. e. the right to publish or not, as he thought fit, and to restrain others from publishing; (2) the right belonging to an author *after* publication, i. e. the right to re-publish and to restrain others from re-publishing. The right *before* publication arose out of the nature of the thing, as the right of exclusive use of personal chattels arose out of

ing it on either side were so near to each other, that it was difficult to imagine them as belonging to separate

their nature in respect of their mode of acquisition and capacity of exclusive use. This part of copyright not only existed at common law, but it must be presumed to exist in Milan, and in every country where it was not shown to be restricted. The right *after* publication had not the same origin: it rather derogated from the natural right of the owner of a copy of a published book to make what use he would of his own property. It was unnecessary to decide whether this right existed at common law; but it was very clear that no such right existed there in respect of the first publication in England of a book which had been *previously* published in a foreign country. To admit such a right would imply that the law gave without any distinction to a republisher of a book, which anyone might and could re-publish, the same monopoly as to an author of an unpublished work. Whatever might be the common law, a right *after* a first publication was given by the Acts 8 Anne, c. 19, and 54 Geo. 3, c. 156, and to aliens as well as natives, for the right was a personal right, and an alien might exercise any such right; further, the Acts did not expressly exclude aliens. Assuming that the intent of the Acts was restricted to the encouragement of British industry and talent (which was contrary to his, J. Meule's, belief), the general words of the Legislature could not

be construed so narrowly. The gift by Parliament of copyright to a foreign author publishing in this country was within the province of Parliament: it was a dealing with British interests, and a legislation for British persons. The general words in the Act with respect to the extent of the sole liberty of printing were necessarily confined to the local jurisdiction of the Legislature; further, they were explained by the words prohibiting importation; but the words 'author,' 'assignee,' and 'assigns' naturally comprehended aliens. *Lastly*, To deny copyright to an alien would be an inconvenient exception to the rule which, in personal matters, placed an alien in the same situation as a natural-born subject. Bellini was, therefore, within the Acts of Anne and George 3; his copyright included the right *before* publication; Bellini duly assigned it to Ricordi; he acquired by the assignment the right of obtaining to himself, or his assignees, by a first publication, the sole liberty of printing here, and he duly assigned it to the defendant; the words of limitation did not prejudice the assignment to the defendant, because, if omitted, the assignment would have passed no greater British right. — Coleridge, J.: 1. The defendant had a right of action against the defendant in error. 2, 3. No. 4. If the work had been printed and published at Milan before the

classes, however distinguishable they might be. If the object of the Act 8 Anne, c. 19, was to give at the

assignment to the defendant it would have made a difference, for that publication would have made it lawful for anyone to publish in England. Bellini or his assignee in Milan had not directly copyright in England. If either of them brought an unpublished manuscript to England, then the English copyright arose; but if the manuscript had been published before, and so put within the power and the right of all other persons as to copyright out of the Milanese territory, Bellini or his assignee would have been on the same footing as any one of the public; an Englishman would have had the same right to publish Bellini's work as he would to publish Dante's, and that state of things was inconsistent with any exclusive right in Bellini or his assignee. 5. Same answer as to question 4. 6. The limitation as to publication in this country made no difference. *Lastly*, The learned Judge was wrong in directing the jury to find a verdict for the defendant. Assuming that 'a certain copyright' in the statement made a copyright without any limitations in the contract material to be stated, that 'copyright' was used in the sense in which an English judge would define it according to English law to an English jury, and that Ricordi was an alien friend. Ricordi when he came to England was the owner of two distinct properties, a manuscript (i. e. a per-

sonal chattel), and a copyright (i. e. an incorporeal right to sole printing and publishing); as an alien, he could by the law of England hold and defend such properties; he was, therefore, in respect of them, in the same position as a natural-born subject. It was objected that from its nature the property in a Milan copyright was confined to Milan; further, that a prior publication abroad prevented an alien any from having a copyright in England, whereas it had not that effect in regard to a natural-born subject. Now, to rob the alien in England of the MS. was indictable; he might also sue for it here in detinue or trover. It was also admitted that he might prevent anyone from seeing, reading, or multiplying copies of it; yet if this last should be done unlawfully, because he had no right to multiply copies exclusively, it was a 'damnum sine injuria'; yet an alien any correspondent abroad of an Englishman might, being in England, restrain by injunction a publication here by the Englishman of the correspondence, and get an account of the profits of such publication, and on the ground of his (the alien's) property therein. The argument on the intra-territorial operation of municipal laws was beside the case. Ricordi's rights in England were not founded on Milan law: he was by the Milanese assignment the lawful owner as against Bellini, and

expense of British subjects a premium to those who laboured, no matter where, in the cause of literature,

through him against all the world of the MS., with all the rights incident to such ownership by English law. As such owner, he therefore acquired (setting aside his foreign origin) the exclusive right of multiplying copies of the MS., with the necessary remedies for the vindication of that right in our courts of law. That copyright for the author of a literary or musical composition existed by the common law, unless taken away by the Act 8 Anne, c. 19, or some succeeding Act, was settled by *Millar v. Taylor*, and the opinions of the majority of the judges in *Donaldson v. Beckett*. Next, the foreign origin of Ricordi was immaterial at common law, because in regard to such property he was by that law in the same situation as a natural-born subject. Then how was the case affected by statute law? That law applied, or it did not. If it applied, the case was within the new statutory right; if it did not apply, the right at common law remained. It would be simply unreasonable and unjust to say, 'you are not within our contemplation for the purpose of protecting the new right, but you are for that of extinguishing the old.' If the right of an alien in England existed at common law, the construction of the statute was immaterial; if the right did not exist at common law, why was Ricordi, being in England, excluded when it was admitted that if Bellini had

been here he might, within the Acts of Anne and George, have assigned to Ricordi? The Act of Anne spoke of books already printed, and of books not printed and published. In both cases it was silent as to any special form of assignment, and used words which embraced assignees in law and by devolution; because in the penal clause an exception was made in favour of those who were licensed by a consent in writing, attested by two witnesses. It was held in *Power v. Walker* and *Davidson v. Bohn*, that an assignment must be so attested; the reason of those decisions was anything but satisfactory. The judgments in *Millar v. Taylor* and *Donaldson v. Beckett* left many supposable cases undecided. Suppose the case of a purchaser, prior to the Act 8 Anne, c. 19, from a legatee, or executor, or administrator after it passed, surely the Act did not affect their title because derived from an instrument unattested by two witnesses. The language of those judgments showed that the judges had in contemplation only the precise cases before them; those judgments, therefore, did not govern the present case. The principle of those judgments was this: 'where the assignee and the licensee both claim under instruments executed in England, let the requirements of the statute as to one govern in regard to the other;' but where one purchased or acquired, or became

there was no adequate reason for the exception which it was admitted on all hands must be introduced against

assignee of the author's right in a country in which the statute had no operation, the ground of the reasoning failed. Suppose an English owner of English copyright licensed, at Milan, by an unattested document valid there, another person to print and sell in England—could it be maintained that the printing and selling would be piratical, and within the penalty clauses of the Acts of Anne and George? Ricordi was, by a document valid at Milan, substituted for the author. He claimed to have been clothed by that document with the author's rights; so that when he (Ricordi) came to England, he was, by the joint operation of it and the English law, entitled to the statutory rights. He was clearly within the enabling words of the statute: he was the 'assignee of an author,' and it had not been decided that 'assignee' must in all cases mean, 'assignee under an instrument in writing attested by two witnesses:' larger words and less restrained the Legislature could scarcely have used. On what sound principle was restraint by implication to be imported? *Chappel v. Purday* differed from the present case, inasmuch as there the composition at the date of its assignment had been published in Paris, and so made common in England, and was therefore not a subject of copyright. There was a remarkable and not immaterial inaccu-

racy in the reported judgment in *Chappel v. Purday*, 14 M. & W. 316. The question was stated to be, 'whether a foreigner, residing abroad and *composing* a work, had a copyright in England?' And that was answered by saying, 'that a foreign author residing abroad, and there *publishing* a work, had not any copyright here;' as if composing and publishing were the same thing. Dicta in that judgment as to the intent of the British Legislature in the Acts of Anne and George were not law. It would be more true to say that the statutes were intended to extend to all persons who could bring themselves within their requirements. Many of those might be inapplicable to a foreign author resident abroad. Thence it was logical to infer that the statutes were not made for *him*; but it was illogical to infer that the *assignee*, whether British subject or not, of a foreign author might not come within their protection. The supposition was not absurd that the author could possess a subject-matter which, from his personal incapacity to comply with the English municipal law, might be no property in him here, yet which he might pass to another in whom it might be property. There was no legal or philosophical ground for narrowing the construction of large statutory words capable of a liberal construction; and the political or economical ground, 'that the more

those who not only composed but published abroad. If 'author' in the Act 8 Anne, c. 19, included 'foreign

tightly we draw the limits round the law of copyright, the more likely we were to induce foreign governments to enter into treaties for international copyright,' could not influence a court of law in determining the common law or the construction of an Act. *Cocks v. Purday* went beyond what was necessary for the present case. The grounds of that decision were that an alien any, the author of a work unpublished elsewhere, and first published by him in England, had copyright in it by our law, and that any claiming under him, by an instrument valid for the purpose, where made before publication, and first publication here, was an assignee within the Act 5 & 6 Vict. c. 45, s. 3. The language of that Act was not more favourable than the Acts of Anne and George to foreign authors, but the language of the Acts of George and Victoria as to licenses was less restricted than that of the earlier Act, inasmuch as they did not require the attestation of witnesses.—*Alderson, B.*: 1. No. 2. If the assignment to Ricordi had been made as suggested, it would have removed one difficulty in the case; but the result would have been the same—the plaintiff could not have recovered. 3. No. 4. It seems admitted by the Court below that, according to the previous cases, a previous publication abroad would have put an end to the plaintiff's right. But why should

it do so if a foreigner and a British subject are in *pari casu*, as the Court below seemed to say they were? A publication by an English author abroad did not prevent his acquiring a copyright in England. It might possibly affect its duration; for the statute of Anno did not date the commencement of the term given from the first publication in England, but from the first publication. The clauses as to entry in Stationers' Hall, which no doubt pointed to a publication in England, were added to give a new and further remedy against those who infringed the right; and this remedy could not be had till that was done. The fact that a previous publication abroad took away the right of a foreigner seemed to show that the law only applied to persons who, when they *first* published in England, had the right of then acquiring an English copyright. This qualification was everywhere, at all times, and under all circumstances possessed by a British subject; but if it was not possessed by an alien any till he came to England with an unpublished work, he could not, if he had before published it abroad, acquire by a publication here a copyright in England: this was admitted to be so in fact, and this seemed to show that the English subject and the alien any were not in *pari casu* till the latter came to this country. 5. The same answer as to question 4.



authors living and composing abroad,' why should 'first published' be not equally extended? There was no

6. The suggested fact would make a difference, for then it would have been an assignment of the copyright, and not a mere license to publish; but, as in the second question, it only removed one out of several objections to the plaintiff's case. *Lastly*, The direction of the Judge and the verdict were right. The question 'whether copyright, i. e. the sole right of multiplying copies of a published work, existed at common law, or was created by statute,' was beside the present case; it was strange to discuss the question in the case of a foreigner who, while abroad, was not subject to the common law, and it seemed settled that copyright was created or now depended on the Act of Anne. An Act was territorial, and extended only to persons under allegiance of this country, unless a contrary construction of the Act was shown to be necessary. Such contrary construction of the Act 8 Anne, c. 19, cannot be shown to be necessary; therefore this copyright (which was a profitable monopoly) must be regulated by the Act 8 Anne, c. 19. An alien may might make himself capable of obtaining this right by coming to England and first publishing his work here, but until he did so he had not the right, ergo could not transmit it. Copyright was different from the ownership of a MS., and from the power over its first publication. The Act gave to the author and the assignee copy-

right, not in respect of his possession of the MS., but of his right to multiply copies of it: if the author had not this right until he became a British subject (and he did not become such subject before he assigned), his assignment was inoperative: that was the case here. Further, Bellini had copyright in *Austria*: this only he assigned to Ricordi; Ricordi affected to assign to Boosey a different right (no part of his Austrian copyright), i. e. a right of solely publishing in *England*: even if Ricordi's assignment had been general, it was at most a local license to Boosey by the assignee of the copyright, together with a covenant that he (Boosey) should alone be allowed to publish the work here. Now such a license could not, or in any event could not in *his own name* maintain this action. Further, Ricordi was not Bellini's agent: the assignment to Ricordi was also bad, because unattested; on this point *Davidson v. Bohn* was decisive. An alien may might maintain an action here for injury to his personal property or to his person, but in that action the property of the alien was admitted, here it was not. The dictum of Lord *Thurlow* when counsel in *Tonson v. Collins* was no authority. *Bach v. Longman* proved only this, that in arguing that case, Baron *Wood* said nothing about a point which had no relation to the point there in question.

analogy between copyright and patent right, for the Act 21 Jac. 1, c. 2, though it limited the exercise by

The dictum of Lord *Abinger*, in *D'Almaine v. Boosey*, was only to this effect: 'that a foreigner *residing here* and publishing might have a copyright.' *Clementi v. Walker* might be classed with those authorities; the cases in *Simons* might be set off against each other. In *Chappel v. Purday* there was a distinct opinion on this subject, which was questioned in *Cocks v. Purday*, but in neither of those cases was there a *decision* on it. *Boosey v. Davidson* simply followed *Cocks v. Purday*.—*Parke, B.*: 1. The defendant in error had no right of action against the plaintiff in error. 2, 3. The attestation of the deed in each case would have made no difference. 4, 5. No. 6. If the assignment to the defendant in error had not contained the limitation as to the publication in this country, it would have made no difference in that respect, as the defendant had no copyright to assign, but if he had such a right, it was the statutory right, by 54 Geo. 3, c. 156, to the sole privilege of printing copies in the United Kingdom, or any part of the British dominions; that was an *indivisible* right, and the owner of it could not assign a part of the right, as to print in a particular county or place, or do anything less than assign the whole right given by English law. It was analogous to an exclusive right by patent, which could not be parcelled out, though licenses under it might. *Lastly,*

Looking at the Record as set out in the bill of exceptions, the learned Judge who tried the cause was perfectly right in directing the jury to find a verdict for the defendant: the only doubt arose from the form of the question lastly proposed. In the record a certified copy of the register book of the Company of Stationers was stated to have been produced, and that by the 5 & 6 Vict. c. 45, s. 11, was made *prima facie* proof of the proprietorship therein expressed; thereon arose a question whether the other evidence produced by the plaintiff below did rebut it. The evidence of Bellini, a foreigner, did, however, rebut it, for a foreigner resident abroad could not have English copyright. The evidence set out on the bill of exceptions sufficiently rebutted the title of the plaintiff, because it appeared that he claimed under the said partial assignment. Copyright might be understood in two senses: 1st, an author's common law right to his MS., and to the actual copies thereof made by himself; 2nd, the exclusive right of multiplying copies of a MS. Copyright in the second sense was alone now for consideration. Its existence at common law was not the question in the present case, but the rational view of the subject. The weight of authority and the opinions of foreign judges administering English law were against its existence. The opinions of Lord *Kenyon* in

the Crown of its claim to grant to any person (native or foreigner) a monopoly, left the persons unto whom the

*Beckford v. Hood*, of Lord Ellenborough in *Cambridge University v. Bryer*, and of the majority of the American judges in *Wharton v. Peters*, 8 Peters, 591, were all against its existence; certainly it could not exist in favour of an alien, for the common law did not extend to aliens; further, an alien could not claim it on principles of natural law, or by the comity of nations: the only question then was, 'could an alien claim it under the statute law, i. e. under the Acts 8 Anne, c. 19, and 54 Geo. 3, c. 156?' There had been no decision on this question. *Tonson v. Collins* and *Bach v. Longman* were no authorities on the point. In *Tonson v. Collins*, counsel remarked, that if authors resident in England composed a work, it mattered not as to the right to copyright whether they were natural-born subjects or not. In *Bach v. Longman*, counsel did not object to the plaintiff's common law right, but it did not appear that Bach was an alien or non-resident in England at the date of the publication of his work; he was, indeed, organist in the Chapel Royal, and probably resident here. Further, the objection would not have been tenable, because the sole issue in that case was, 'whether a musical composition was a work within the Act 8 Anne, c. 19.' *D'Almaine v. Boosey* was no authority: it was decided hastily, and on a mistaken impression of *Bach v. Longman*. The dictum of

Sir J. Shadwell, V.C.E. in *Delondre v. Shaw* was no authority, and it was contradicted by his dictum and conduct in *Bentley v. Foster*. *Clementi v. Walker* only decided that an assignment by an alien author of his copyright in England was ineffectual, if a prior publication abroad had occurred. *Page v. Townsend* was no authority: it was decided upon the Acts for the protection of engravers. The Legislature had no power over persons beyond its jurisdiction, and must be presumed to legislate for the benefit of those only who owed obedience to our law, and therefore were entitled to protection under it. General words might have a limited construction: 'person' in the Legacy Acts had been construed 'English domiciled subject.' (*Thompson v. Advocate-General*, 12 Cl. & Fin. 1; *Attorney-General v. Forbes*, 2 Cl. & Fin. 48; Lord Cottenham, C. in *Arnold v. Arnold*, 2 M. & Cr. 270.) The construction which was in Queen Anne's reign put on the Act 8 Anne, c. 19, must be adhered to; the Parliament of Queen Anne could scarcely have meant to encourage foreign authors at the expense of the British public. The clear intention and expressed object of that Act was the encouragement of British authors, not of book importers; in the category of British authors were included, not merely subjects of the Crown by

grant might extend untouched; further, it was no objection to a patent that the subject of it had been in

birth, but by domicile or residence, or even perhaps by personal presence at the time of first publication, for even these last owed temporary allegiance. It might be easy for an alien to procure the title by journeying to England and remaining for a short time, and so to evade the intention of the Act, but in Queen Anne's reign that would have involved much cost and trouble, and some now: that could only be an argument against construing the Act in favour of aliens coming here not to reside, but merely to publish. The construction of the Patent Acts was inapplicable to the Copyright Acts: there might be a patent of a manufacture new only within the realm. (*Edgebury v. Stevens*, 2 Salk. 447.) The gift of a patent might also perhaps be to an alien resident abroad, and for this reason, viz. prior to 21 Jac. 1, c. 3, the Crown might by prerogative have given a monopoly to 'anyone who had brought a new invention and new trade within the kingdom' (Clothworkers of Ipswich case, Godb. 252), and the grants excepted by that Act from abolition were not expressly restricted to subjects: further, an author had a right; the gift of a patent was in the discretion of the Crown. If aliens living abroad could obtain copyright under the Acts of Anne and George by first publishing in England, they might, by a simultaneous publication abroad and in England,

put an end to the advantages which this country could offer to a foreign country (e. g. to the States of America, which recognise no copyright but in their citizens) as an equivalent for a copyright in that country; however, that argument of political expediency must not affect a judicial construction of Acts of Parliament. Even if the above reasoning was incorrect, and Bellini had an English copyright, he, according to the statement introducing the 1st question, assigned his *Milanese* copyright only to Ricordi; if Bellini did in terms assign the English copyright, the assignment was not void, as not made in the presence of two witnesses: the Act 54 Geo. 3, c. 156, by implication repealed the clause in the Act 8 Anne, c. 19, which was the ground of the decision in *Power v. Walker*, avoiding such an assignment; *Davidson v. Bohn*, indeed, occurred after the Act 54 Geo. 3, c. 156, but that Act was not noticed in that case, probably because the assignment there was *before* the Act. Although by international law, generally speaking, personal property passed by transfer conformable to the law of the domicile of the proprietor, yet, if the law of any country required a particular mode of transfer with respect to any property having a locality in it, that mode must be adopted (*Story's 'Conflict of Laws,'* ss. 383, 398; Lord *Kenyon*, in *Hunter v. Potts*,

public use abroad, but previous publication abroad confessedly interfered with copyright in this country.

4 T. R. 182, 192). This copyright was of a local nature, and therefore must be transferred in the English way.—Sir Fred. Pollock, L. C. B.: 1. Assuming the facts stated in this question to be true, the publication by the plaintiff in error did not give the defendant in error any right of action against him. 2, 3, 4, 5, 6. Assuming the facts to be true which in questions 2, 3, 4, 5, 6, respectively were supposed, they would not have made any difference. *Lastly*, Looking to the record, the learned Judge who tried the cause was right in directing the jury to find a verdict for the defendant—now the plaintiff in error. The weight of authority was against the existence of copyright at common law. *Willes, J.* was in error when in *Taylor v. Millar* he argued that it should be held to exist at common law, because, on principles of private justice, moral fitness, and public existence, the right ought to exist there; the common law could not create new rights and limit and define them. This was not indeed the argument for the defendant in error: his ground was that an author had the same property in his composition, being his own creation or work, as a man had in any physical object produced by his personal labour. But if such a property existed at common law, it must commence with the act of composition, be independent of reduction into writing, and be liable to be withheld from or

offered at an unreasonable price to the public. It must exist in every offspring of man's imagination, however important or mean, e.g. in the discovery of the scientific man, or in the grimace of the clown. Copyright did not exist at common law. What was the true construction of the Copyright Acts? They did not apply to a foreigner resident abroad or his assigns (see the judgment in *Boosey v. Purday*). English statutes had no force beyond the realm, not even to bind British subjects, unless expressly mentioned, or necessarily implied. It was therefore a rule in construing statutes not to extend them beyond the realm. An alien resident here was the Queen's subject, owing obedience to the law, and therefore entitled to the benefit of it; not so an alien abroad. It was conceded that if a foreign author first published his work abroad he could not have copyright in England; but why? if such author was within the Act. The third section of the Act (which section conferred copyright) made no distinction in words between a publication 'in the lifetime of the author' in this country and anywhere else: again, the sixth section, as to delivery of copies to the British Museum, seemed to confine the operation of the Act to the British dominions. The tenor of all the Copyright Acts showed that a foreign author resident abroad was not in the contemplation of the framers. If

There was nearly an equal array of authorities on the one side and on the other. His (the Chancellor's)

Bellini had any English copyright, it being 'personal property' by the Acts, his assignment, valid by the law of Milan, was sufficient. It was doubtful whether copyright could be partially assigned; certainly here the proprietor of copyright could not assign it with reference to one county to one person, and with reference to another county to a different person, so as to give to each a right to maintain an action for infringing the copyright. The Act 54 Geo. 3, c. 156, in force at the time of this transfer, made copyright commensurate with the British dominions; so it was indivisible into parts according to local boundaries, the assignment to the defendant in error could therefore operate as a license only, which would not enable him to sue as proprietor. A publication at Milan, subsequent to the assignment, but before publication here, would have defeated it.—Sir *John Jervis*, C.J.: 1. No; because the question assumed that Bellini only assigned to Ricordi the copyright which Bellini had by the law of Milan; and further, because Bellini had under the circumstances stated no copyright in England, which he could assign. 2. No; because, first, two witnesses would not be required to attest the assignment of an English copyright, if Bellini had such copyright to assign; secondly, because Bellini did not profess to assign the English copy-

right, if he had it; and thirdly, because he had no English copyright which he could assign. 4, 6. No; because Bellini under the circumstances having no English copyright to assign, it was immaterial whether the work was published abroad or after the assignment, and before publication in this country. In *Clementi v. Walker* it was decided that a prior publication abroad would prevent a foreign author resident in this country from having copyright here. 6. No; under the particular circumstances of this case, because Bellini had no English copyright to assign. *Lastly*, Yes; because technically the assignment to Ricordi passed only the Milanese copyright, and because substantially Bellini had no English copyright to assign; the certified copy of the register, by 5 & 6 Vict. c. 45, *prima facie* evidence of proprietorship in copyright, was rebutted by other evidence upon the record. A slip in the bill of exceptions, however, decided the writ of error: it was in the bill stated that Bellini assigned to Ricordi the 'said' copyright, which must be referred to the copyright previously alluded to, i. e. the Milanese copyright. Passing over this slip, the assignment was not void because unattested; the necessity for attestation was abolished by the Act 54 Geo. 3, c. 156, which, in enacting that all booksellers and others who printed

opinion was founded on the general doctrine, that a British statute must *primâ facie* be understood to

and published *without* the consent in writing of the proprietor should be liable to an action, was inconsistent with the Act 8 Anne, c. 19, and so by implication repealed it, and the reasoning in *Power v. Walker* and *Davidson v. Bohn* on the Act 8 Anne, c. 19, from a license to an assignment, was applicable to a case within the Act of George. As to the main point, 'copyright' must here be considered only as the exclusive right to multiply copies of a manuscript, not as a right to the manuscript itself, or any copy or copies of it: this right attached not to chattels, the exclusive privilege of making them was not an incident to the property in them; but sprung from the prerogative of the Crown. It was not necessary then to decide whether a British author had copyright at common law; but he (the Chief Justice) agreed with Lord Kenyon in *Beckford v. Hood*, Lord Ellenborough in *Cambridge University v. Bryer*, and the majority of the American judges in *Wheaton v. Peters*, that no author had. At all events, the common law was confined to British authors and authors resident in England, and within the protection of the law of this country. Was the right conferred upon a foreigner resident abroad by statute law? No; the question turned on the construction of the Act 8 Anne, c. 19. In expounding it, policy must be disregarded; the intention

of the framers must, if possible, be arrived at. Statutes in general applied only to those who owed obedience to the laws, and whose interests it was the duty of the Legislature to protect. With aliens resident abroad the Legislature had no concern. The Act of Anne did not show that it was intended to apply to all authors, foreign or British, wherever resident; the object of the Act was the advancement of learning, by rewarding authors, at the cost of the public. In the case of British authors, the object of the Act might be worth the price paid by the public for it. But Bellini had a Milan copyright, deemed at Milan a sufficient encouragement for the advancement of learning. It might be that a simultaneous publication in every country in Europe would more richly reward an author. But such a publication was not contemplated by Queen Anne's Parliament. Having that Milan encouragement, why should Bellini be encouraged to publish here works (which might be imported) at the cost of the British public? It was asked, 'why, if a foreigner might acquire the right by coming to England, might he not have it while resident abroad?' The answer was, 'whilst he was out of the realm, he was not subject, nor entitled to, the benefit of the laws of this kingdom.' It was urged 'that copyright was analogous to patent right, and that the same

legislate for British subjects only, and there were no special circumstances in the Act 8 Anne, c. 19, leading to the notion that a more extended range was meant to be given to its enactments.

Lord *Brougham* argued that copyright was the mere creature of legislative enactment, and had no existence at common law: that therefore it could not be that

construction should be put upon the several statutes applicable to each.' No; it was held that the words in the Act 21 Jac. 1, c. 3, 'new' manufactures within the realm, meant manufactures known abroad, but 'new within the realm,' because the latter manufactures had been the subject of grants of monopolies at common law, and the words of the Act did not expressly exclude them; but there was no copyright at common law for foreign authors which could give a larger meaning to the natural import of the words of the Act 8 Anne, c. 19. The assertion in *Tonson v. Collins*, by counsel, that 'if an author, resident in England, composes a work, it is immaterial whether he is an alien or a British subject,' was not in point. *Bach v. Longman* was also no authority. It was not objected there, that the plaintiff was a foreigner; but the only point for determination was 'whether a musical book was within the statute.' *D'Almaine v. Boosey* was decided upon a misunderstanding of *Bach v. Longman*, and was therefore inconclusive. Vice-Chancellor *Shadwell's* opinions in *Dilondre v. Shaw* and *Bentley v.*

*Foster* contradicted each other. *Clementi v. Walker*, so far as it went, was an authority for the plaintiff in error. The point there decided was that a prior publication in France destroyed any copyright which a foreigner coming to this country might have here; but the Court intimated an opinion that the statute of Anne was passed for the advancement of British learning. The question was first pointedly raised in *Chappel v. Purday*, where the Court of Exchequer held, under circumstances like the present, that a foreigner resident abroad had no copyright, for that the Act 8 Anne, c. 19, was confined to British authors. The Court of Common Pleas took a different view in *Cocks v. Purday*; and that view was followed by the Court of Queen's Bench in *Boosey v. Davidson*, in which last case *Cocks v. Purday* was fully considered, as shown by the judgment of Lord *Campbell*. In the latest case on the subject, *Boosey v. Purday*, the Court of Exchequer adhered to their decision in *Chappel v. Purday*. The learned Judge who tried this cause took the view of the Court of Exchequer.



the Legislature had it in contemplation to vest the right in any but its subjects and those claiming through them; the object of the Act 8 Anne, c. 19, was the encouragement of learning by encouraging learned men to write useful books—an encouragement given at the expense of British subjects, to whom the monopoly raised the price of books; it was also a legal presumption that a Legislature confined its enactments to its own subjects, over whom it had authority, and to whom it owed a duty in return for their obedience. When the Act 8 Anne, c. 19, was passed, the principles of Parliament were very crude and narrow, for that Act absurdly attempted to keep down the price of books; it was therefore difficult to attribute to the framers of the same Act such large and enlightened views as they must have had if it encouraged foreigners (the case of foreigners was not a *casus omissus*, see the Act 8 Anne, c. 19, s. 7) at the temporary and immediate cost, at all events, of British subjects, for the sake of multiplying generally the number of useful works, and so benefiting those subjects on the whole (but see 1 Rich. 3, c. 9). The objection 'that the consequence of confining the statute to one territory would be to make a foreign author come over to Dover, in order to have the exclusive privilege, for if he stopped at Calais he would not have it,' was more showy than solid; it was only one of the consequences of a law bounded in its operation by territory. *Cocks v. Purday* was apparently decided, not so much upon the consideration of the Copyright Acts, as upon the erroneous assumption that the Court of Exchequer had in *Chappel v. Purday* questioned the personal right of an alien in England. The Milanese copyright had no existence beyond Milan,

and though property by the Milanese law, it was not recognised as property here: the foreign right in a slave was an analogous right—it was not recognised as property here which the law would protect.

Lord *St. Leonards* expressed his agreement with the Lord Chancellor and Lord *Brougham*, and said that he had long since arrived at the conclusion that no common law right existed after publication of a literary work. He thought that the Patent Law was also in favour of that view, but whether that view was right or wrong, a common law right could never be held to extend to a foreigner abroad. The question then came upon the Copyright Acts. It was clear, as an abstract proposition, that an Act of Parliament of this country having within its view a municipal operation, having as in the case before the House territorial operation, and being therefore limited to this kingdom, could not be considered to provide for foreigners, except as both statute and common law provided for foreigners when they became resident here and owed a temporary allegiance to the Sovereign, and thereby acquired rights just as other persons did; not because they were foreigners, but because being here they were entitled (in so far as they did not break in upon certain rules) to the general benefit of the law for the protection of their property in the same way as if they were natural-born subjects. The Act 7 Anne, for generally encouraging the settlement here of foreign Protestants, showed that just before the Copyright Act 8 Anne, c. 19, Parliament, under the idea that population was wealth, wished to attract foreigners to this country, and further, in two different Acts of 8 Anne, whereby it was intended to provide expressly for foreigners, the words

‘natives and foreigners’ were inserted. The Act 8 Anne, c. 19, was by no means scientifically framed: its heading was singular; the word ‘copies’ in the heading was used to represent ‘the exclusive right to the copies;’ the necessity of printing here, and of first publication here, clearly appeared from the intent of the Act, which was to benefit authors and not importers, particularly from section 7, but only by implication; and the Act 12 Geo. 2, c. 36, prohibiting generally the importation of books reprinted abroad, which had been first composed or written and published here, forced this conclusion, ‘that the Legislature then assumed that the books within the protection of the Act 8 Anne, c. 19, were books printed in this country.’ If a book composed abroad by a foreigner must be first published here, it necessarily and naturally followed that the foreigner should himself be here, to superintend that publication. Unless that construction was put upon the Act 8 Anne, c. 19, a foreigner might after that Act have imported books printed abroad, and have had copyright therein in evasion of that Act. The case put, ‘that a man might pass over from Calais and obtain the copyright here, whereas by remaining at Calais he could not acquire it,’ had no bearing on the question before the House. The real distinction was between a foreigner in temporary allegiance to this country, and claiming the right of a subject, and a foreigner owing no such allegiance, yet claiming that right. The question must be decided without reference to the relation in which this country stood to the United States, and without reference to the law of any other country; but it might be re-

marked that the United States did not give copyright to a foreigner not resident in the States, so reciprocity did not call for a strained construction of the Act in their favour. *Page v. Townsend*, 5 Sim. 395, bore on the subject: it was there held that prints engraved and struck off abroad, but published here, were not protected from piracy under the Act; if books could be printed abroad, and could then, being imported, obtain copyright here, a right would subsist in books which did not subsist in prints and engravings. The foreign composer, in the case before the House, was not in this country when his work was published here; he therefore never had the copyright in England, so could not assign it to the plaintiff. A fatal objection to the plaintiff's case also arose from the language of the bill of exceptions assuming that the plaintiff's assignor had a general copyright in the British dominions; the assignment to the plaintiff was by the bill stated to be confined to the United Kingdom: it was consequently an assignment of part only of the copyright, but copyright was indivisible: the assignment was therefore void, the assignment was also void on the authority of *Davidson v. Bohn*, 6 C. B. 456, because it was not attested by two witnesses.

In an action relating to the assignment of a copyright, (a) Sir *John Jervis*, C.J. incidentally remarked that the Court did not think it necessary on that occasion to express any opinion, 'whether under any circumstances the copyright in a literary work could become vested ab initio in an employer other than the composer.'

In a recent case, wherein it appeared that Mr.

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

Charles Kean, the well-known actor and dramatist, had designed the adaptation of one of Shakespeare's plays to the stage with the aid of scenery, dresses, and music, and had paid a person to compose the music, the Court of Common Bench held that the music, being only accessory to the principal design, the copyright in the music did not belong to the paid composer. (a)

A person who composed words to a well-known air, and added a prelude and an accompaniment of his own, has also been held to have acquired a copyright in the combination. (b)

No private arrangement can interfere with the author's statutory right; (c) and, in view to that protection, it is not necessary that he should affix his name to the production of his pen. (d)

13. What amounts to an infringement of the right.

13. Whilst all men are entitled 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; when those are the subject of copyright, they are entitled to legal protection. (e) Said a Scotch judge: 'A person might as well steal books, as appropriate their contents and transcribe them into his own publication.' (f)

It now, therefore, becomes necessary to consider what amounts to an infringement of the right by piracy of its subject. The case and dicta on this point seem to warrant the conclusion that any unauthorised use of a copy-

(a) *Hatton v. Kean*, 8 W. R. 7.

(b) *Lover v. Davidson*, 1 C. B. n. s. 182; and see *Leader v. Purday*, 7 C. B. 4.

(c) *Storace v. Longman*, 2 Campb. 27, n.; but see also *Shepherd v. Conquest*, 17 C. B. 427.

(d) See *Beckford v. Hood*, 7

T. R. 620.

(e) See Lord Langdale in *Lewis v. Fullarton*, 2 Beav. 8.

(f) Lord M'Kenzie in *Walford v. Johnstone*, 20 Dec. in Court of Sess. 2d series, 1161.

right book in a later publication is an infringement of the earlier, unless that use involves a fair amount of thought and judgment.

In allusion to a literary copyright work (then before him), giving an account of natural curiosities and such articles, Lord *Eldon* said that it was equally competent to any other person to set about a similar work bonâ fide his own, but that it must be in substance a new and original work, and must be handed out to the world as such. (a)

The same learned Judge observed in a subsequent case, (b) 'all human events are equally open to all who wish to add to or improve the materials already collected by others, making an original work.'

Again, in *Longman v. Winchester*, (c) upon a similar application, Lord *Eldon* states the question before him to be, 'whether it is not perfectly clear that in a vast proportion of the work of these defendants no other labour has been applied than copying the plaintiff's work.' He added: 'from the identity of the inaccuracies, it is impossible to deny that the one was copied from the other verbatim and literatim. To the extent, therefore, in which the defendant's publication has been supplied from the other work, the injunction must go; but I have said nothing that has a tendency to prevent any person from giving to the public a work of this

(a) In *Hogg v. Kirby*, 8 Ves. 222. This case was not decided on the ground of copyright, but of fraud; the Chancellor concluded that the defendant falsely represented to the public that his work was a continuation of the plaintiff's, and therefore restrained him. See also *Webb v. Powers*, 2 Woodb. & Min. 46.

(b) *Matthewson v. Stockdale*, 12 Ves. 275, reported by Mr. Vesey upon a motion to dissolve an injunction which stayed the publication of an Indian Directory. The Lord Chancellor restrained the later work, because it was in his opinion a fac-simile copy of the original.

(c) 16 Ves. 272.

kind, if it is the fair fruit of original labour; but if it is a mere copy of an original work, this Court will interpose against that invasion of copyright.' The motion was accordingly refused.

In a recent case, it was also clearly laid down by Sir *W. P. Wood*, V.C. that a man is fully at liberty to avail himself of matters patent to all the world, as a skeleton or starting-point, when he employed his own labour upon the subject-matter. (a)

Whenever infringement of copyright is the subject of complaint, Lord *Eldon* said the question is, 'whether it is a legitimate use by the defendant of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work.' (b) This last dictum Lord *Cottenham* declared put the question upon a proper footing. (c)

'A copy is one thing,' remarked *Story*, J. in *Emerson v. Davies*, 'an imitation or resemblance another. There are many imitations of Homer in the *Æneid*, but no one would say that the one was a copy from the other. There may be a strong likeness without an identity; and, as was aptly said by the learned counsel for the plaintiff—

Facies non omnibus una,  
Nec diversa tamen, qualem decet esse sororum.'

Upon piracy, and especially upon piracy of such books as are incapable of much originality in matter, the opinion of the talented Lord *Jeffreys* has fortunately been recorded on an application made to him in the Court of Session, in the year 1847, for an interdict against the

(a) *Cornish v. Upton*, 4 Law T. 422.  
n. s. 863. (c) In *Bramwell v. Halcomb*, 3  
(b) *Wilkins v. Aikin*, 17 Ves. M. & Cr. 738.

violation of copyright. In a collection of statutory precedents he appears to have thus expressed his views: (a) 'This is a case in which it is evident, from what has fallen, that there are involved principles of some delicacy. In a great number of preceding cases which have been tried, this sort of delicacy has arisen from the necessity of maintaining the policy of the Copyright Acts, and of affording the protection contemplated to parties who fall within the principle of those Acts on the one hand, and on the other, of avoiding the inexpediency of stretching that principle to cases where absolute originality cannot be pretended, and where the pretensions of the claimant of such copyright may tend to prevent all other parties from having recourse to the common and public materials from which his work has been taken or compiled. At the same time I must confess that I do not think any very clear general rules exist on this subject. . . . First, then, I hold clearly that, notwithstanding the difficulties I referred to as arising out of the policy of the Copyright Acts, we are bound to give the protection necessary to prevent literary men, the result of whose intellectual labour is embodied in certain useful works, from losing the fair reward of their industry by the misapplication of its products by others. This I hold to be clearly settled, that even though the materials from which such a work is taken be "in medio," as it is called, yet if those materials be arranged in a new form, the effect of that will be to afford the author the protection of copyright in that form. In all cases, in short (although the materials are expressly "in medio," and open to everybody), when a particular degree of judg-

(a) *Alexander v. McKenzie*, Dec. in Court of Session, vol. ix., n. s. 748.



ment in the selection of those materials has been used, and when the subject "in medio," so open to the world at large, has been to a certain extent snatched at and appropriated, such selection is in itself recognised as a certain degree of mental effort, which is entitled to the benefit of copyright. Again, while there is no doubt that it would be dangerous to encroach on the liberty of all who are disposed to make a selection from materials "in medio," with a view similar to that of any person who has previously made a selection from those materials, still the question comes to be "whether any second party, making such selection, has gone into the matter 'in medio,' for himself, and has not merely followed in his predecessor's traces?" But while the second party is not bound to shut his eyes to the advantages presented by the exertions of his predecessors, or of others who have been labouring in the same field, the question still comes to be, "Is there reasonable evidence that the two works produced are identical, and that the last author did not mount upon the back, and walk on the crutches of his predecessor, but actually used his own muscular exertions in traversing the field in which he made his observations? Did he, on the whole, do so fairly and honestly for himself, although he may occasionally have followed in the vestigia left by his precursor? Or is there evidence that the second writer's not going over the ground for himself is not the very cause why he arrived at almost identical conclusions with his predecessor?" I think that is the case here; but the point is perhaps of such a kind that piracy is not to be presumed from the mere coincidence in the substance of the works. It may often be a matter of great delicacy to substantiate such a charge. Perhaps, from the subject to

which both works relate being "in medio," the second party may be entitled to a favourable interpretation, and the mere fact of great similarity between the second and first work may not of itself warrant the inference that the second work is a mere copy. Thus piracy is not to be easily presumed from a similarity in matter in the case of spelling-books, or such elementary works; but if a second party issues a spelling-book which is nothing but a reprint of a spelling-book by another, with a new title page substituted for the old one, that is clearly piracy. If it is quite plain that the similarity of the substance of a second work and of a first is not a mere coincidence, which is the result of similar observation; but if the second work is substantially a transcript of the first, with merely colourable alterations, then there is an undoubted infringement of the copyright in the first work, and the alterations only make the case worse, as they indicate that the party has resorted to a device like that used in regard to stolen goods, of altering the marks on them to prevent identification.'

The really difficult question in cases where it must be admitted that the matter is not original is, said Sir *W. P. Wood*, V.C. in *Jarrold v. Houlston*, (a) 'how far the author of the work in question can be said to have made an unfair or undue use of previous works protected by copyright. As regards all common sources, he is entitled to make what use of them he pleases; but, as Lord *Langdale* said, in *Lewis v. Fullarton* (2 Beav. 6), he is not entitled to make any use of a work protected by copyright which is not what can be called a fair use.' The Vice-Chancellor then gave several instances of unfair or undue use, and the contrary, and remarked,

(a) 3 Ka. & Jo. 708.

‘that in writing for publication a work in the form of question and answer on a variety of scientific subjects, the author had a right to look to all those books which were unprotected by copyright, and to make such use of them as he thought fit, by turning them into questions and answers; he had also a right, if in reading a similar scientific work he observed that the writer had been led up to particular questions and answers by the perusal of some other work, to have recourse himself to that work; and so it would be a legitimate use of a scientific work if the author of a subsequent work, after getting his own work, with great pains and labour, into a shape approximating to what he considered a perfect shape, should look through the earlier work to see whether it contained any heads which he had forgotten.’ And then the Vice-Chancellor added, ‘now for trying that question (the question of fair use) several tests have been laid down; one, which was originally expressed, I think, by a common law judge, and was adopted by Lord *Langdale*, in *Lewis v. Fularton*, is, whether you find, on the part of the defendant, an animus furandi, (a) an intention to take, for the purpose of saving himself labour. I take the illegitimate use as opposed to the legitimate use of another man’s work on subject matters of this description to be this, that if knowing that a person, whose work is protected by copyright, has, with considerable labour, compiled from various sources a work in itself not original, but which he has digested and arranged, you being minded

(a) The animus furandi is only a proper test of piracy in cases where the materials are necessarily common to all mankind, and where the amount of independent labour

bestowed by a man upon such materials to make them his own is in question. (*Reade v. Lacy*, 1 J. & H. 521.)

to compile a work of a like description, instead of taking the pains of searching into all the common sources, and obtaining your subject matter from them, avail yourself of the labour of your predecessor, adopt his arrangements, (a) adopt, moreover, the very questions he has asked, or adopt them with but a slight degree of colourable variation, and thus save yourself pains and labour by availing yourself of the pains and labour which he has employed, that I take to be an illegitimate use.'

Perhaps, however, the best judicial answer given to the question, 'What is an infringement of copyright?' appears in the report of the judgment of Sir W. P. Wood, V.C. in *Spiers v. Brown*. (b) That judgment is mainly directed to the somewhat peculiar case of a dictionary, but it has a bearing on the infringement of other literary works, and for that reason the judgment should be attentively read. In this little book the following extracts may be considered sufficient. He says: 'All cases of copyright were very simple when a work of an entirely original character was concerned, being a work of imagination or invention on the part of the author, or original in respect of its being a work treating of a subject common to mankind, such as history or other branches of knowledge, varying much in their mode of treatment, and in which the hand of the artist could readily be discerned. But the difficulty that arose in this class of cases was that they not only

(a) Where the scheme of two guide books was quite different, the plan of the latter being more limited than that of the earlier work, and the scheme of the routes therein set forth different, and the latter book mentioned some places

on the routes, which places were not mentioned in the earlier book, Sir R. Kindersley, V.C. very properly refused to restrain the publication of the latter. (*Murray v. Boag*, 1 Drew, 353.)

(b) 6 W. R. 352.

related to a subject common to all mankind, but that the mode of expression and language was necessarily so common that two persons must to a very great extent express themselves in identical terms, in conveying the information or instruction to society which they were anxious to communicate. The most obvious case was that of figures, such as the table of logarithms (the case before Sir *John Leach*), where it would be impossible to deviate in the calculations or to vary the order, and the result must be identical. The same might be said of directories, calendars, Court guides, and works of that description. Those were cases in which the only mode of arriving at the amount of labour bestowed was by the common test resorted to of discovering the copy of errors and misprints, indicating a servile copying. . . . As to dictionaries, the matter stood in a somewhat different position. . . . Of course there could be no copyright in much of the information contained in the numerous dictionaries published, each necessarily having a large number of words identically similar. In a large part of his work Dr. Spiers could have no copyright as to words and expressions, though he might have it as to new words introduced, or new acceptations, or as to the order and arrangement by which he improved the particular work he had in hand. There were only one or two cases which seemed to lay down the principles applicable to this subject with sufficient clearness. In the case of *Cary v. Keursley*, 4 Esp. 168, Lord *Ellenborough* laid down the law in a manner which had not been questioned. He said: "That part of the work of an author 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 also 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? (a) Look through the book, and find any part that is a transcript of the other; if there is none such, if the subject of the book is that which is subject to every man's observation, such as the names of places and their distances from each other, the places being the same, the distances being the same; if they are correct, one book must be a transcript of the other; but when in the defendant's book there are additional observations, and in some parts of the book I find corrections of misprinting, while I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles on science." Then there was the case of *Longman v. Winchester*, 16 Ves. 269, in which Lord *Eldon* said: "Take the instance of a map describing a particular county, and a map of the same county afterwards published; if the description is accurate in both they must be pretty much the same: but it is clear that the latter publisher cannot on that account be justified in sparing himself the labour and expense of actual survey in copying the map previously published by another. So as to Paterson's 'Road Book:' it is certainly competent to any other man to publish a book of roads, and if the same skill, intelligence, and diligence are applied in the

(a) Animus furandi arises properly, in cases upon dictionaries, directories, and the like, where the materials are common, and the test is the amount of independent

labour bestowed by a man upon such materials to make them his own. (Sir *W. P. Wood*, V.C. in *Reade v. Lucy*, 9 W. R. 532.)

second instance, the public would receive nearly the same information from both works; but there is no doubt that this Court would interpose to prevent a mere re-publication of a work which the labour and skill of another person had supplied to the world. So in the instance mentioned by Sir *Samuel Romilly*, a work consisting of a selection from various authors, two men perhaps might make the same selection, but that must be by resorting to the original authors, not by taking advantage of the selection already made by another." Again, "The question before me is, whether it is not perfectly clear that in a vast proportion of the work of these defendants no other labour has been applied than copying the plaintiff's work. From the identity of the inaccuracies it is impossible to deny that the one was copied from the other verbatim et literatim. To the extent, therefore, in which the defendant's publication has been supplied from the other work the injunction must go; but I have said nothing that has a tendency to prevent any person from giving to the public a work of this kind if it is the fair fruit of original labour, the subject being open to all the world." Another case, which seemed to condense into one point the view taken by the Courts in cases where actual use is avowed (and the only question is, whether it is a fair use) is *Wilkins v. Aikin*, 17 Ves. 422, where Lord *Eldon* says this: "Upon inspection of the different works, I observe a considerable proportion taken from the plaintiff's that is acknowledged, but also much that is not; and in determining whether the former is within the doctrine upon this subject, the case must be considered as also presenting the latter circumstance." The question upon the whole is, "whether there is a legitimate

use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work." Those were the words which had been relied on by Lord *Cottenham* in *Bramwell v. Halcomb*, 3 M. & Cr. 737; and it was with the view thus taken by those learned judges that I have gone through a very laborious investigation of the works now in question.'

'The true test of piracy or not,' said an American Court, (a) 'is to ascertain whether the defendant has in fact used the plan, arrangements, and illustrations of the plaintiff as the model of his own book, with colourable alterations and variations only to disguise the use thereof, or whether his book is the result of his own labour, skill, and use of common materials and common sources of knowledge open to all men, and the resemblances are either accidental or arising from the nature of the subject.'

In *Webb v. Powers* (b) (a suit to restrain the invasion of copyright in a floral dictionary) an American judge (*Woodbury*) observed: 'Again, there is much discrimination to be used in enquiries of this character between different kinds of books, some of which from their nature cannot be expected to be entirely new. Thus, dictionaries of all descriptions, when on like subjects, philological, lexicographical, professional, or scientific, must contain many descriptions and definitions almost identical, as must gazetteers, grammars, maps, arithmetics, almanacks, concordances, cyclopædias, itineraries, guide books, and similar publications. In these, if great errors have not previously existed or unusual ignorance to be corrected, no great novelty is practicable or useful unless

(a) *Emerson v. Davis*, 3 Story, 768. (b) 2 Woodb. & Min. 512.



it be to add new discoveries or inventions, new names, or words, or decisions, so as to post up the subject to more recent periods; or unless it be to abridge and omit details, and condense a more voluminous work into a smaller and cheaper form, so as to bring its purchase within the reach of new and less wealthy classes in society. Some similarities, and some use of prior works, even to copying of small parts, are in such cases tolerated, if the main design and execution are in reality novel or improved, and not a mere cover for important piracies from others. . . . While, on the one hand, a prior compiler is not permitted to monopolise what was not original in himself, and what must be nearly identical in all such works on a like subject, yet he who uses it subsequently to another must not employ so much of the prior arrangement and materials as to show that the last work is a substantial invasion on the other, and is not characterised by enough new or improved to indicate new toil and talent, and new property and rights, in the last compiler. That is the cardinal distinction.'

The question of infringement of copyright is indeed a question 'not so much of kind as of degree,' (a) and doubtless it is difficult to draw the line where the use that is made of a work is fair and reasonable, or is substantially what is unlawful and forbidden, and only colourable and evasively different from it. (b)

Sir *R. Kindersley*, V.C. has defined unfair use of an original work to be the extraction of its vital part. (c)

(a) *Maule*, J. in *Sweet v. Benning*,  
16 C. B. 485; and see Lord  
*Jeffreys* in *Alexander v. M'Kenzie*,  
9 Dec. of Court of Session, 751.

(b) *Ibid.*

(c) *Murray v. Bogue*, 1 Drew,  
369.

It is clearly not necessary that a piracy should be so far a copy as to be a substitute for the original work. (a)

Where a work, entitled 'A Practical Treatise of the Law Relative to the Sale and Conveyance of Real Property, with an Appendix of Precedents, comprising Contracts, Conditions of Sale, Purchase, and Disentailing Deeds, &c.' contained extracts from an earlier standard work, which was entitled 'A Practical Treatise of the Law of Vendors and Purchasers of Estates,' Sir *L. Shadwell*, V.C.E. remarked: 'In cases of this nature, if the pirated matter is not considerable, that is, where passages which are neither numerous nor long have been taken from different parts of the original work, this Court will not interfere to restrain the publication of the work complained of, but will leave the plaintiff to seek his remedy at law. But in this case it is plain that the passages which have been pointed out have been taken from the plaintiff's book, and they are so considerable, both in number and length, as to make it right that this Court should interfere.' (b)

The dicta of the Vice-Chancellor, in the case last cited, must not, however, be relied on as an argument that piracy is to be judged solely by the quantity taken from the copyright work. Lord *Cottenham* has said, in reply to an argument of that description: 'When it comes to a question of quantity it must be very vague; one writer may take all the vital part of another's book, though it might be a small proportion of the book in quantity: it is not only quantity but value that

(a) *Bohn v. Bogue*, 10 Jur. 420. *Morison*, 8316; and *Murray v.*

(b) *Sweet v. Cator*, 11 Sim. 580; *Farquhar*, *Morison*, 8309: both instances of too copious extracts.

is always looked to. It is useless to refer to any particular case as to quantity.' (a)

Where the matter pirated formed an exceedingly small part of the plaintiff's work, but constituted the bulk of the defendant's work, Sir *L. Shadwell*, V.C.E. granted an injunction, but ordered the plaintiff forthwith to bring such an action as he might be advised. (b)

Mr. Turner, in his valuable little treatise on 'Copyright in Design,' pertinently observes: 'As to the estimating the injury by quantity (as when in Roworth's case (c) the pages were counted), we may remember Lieber's observation, that the thief only takes the wheat, not the straw, which is the bulk of the crop.' (d) And said *Story*, J. in *Gray v. Russell*, (e) 'Extracts non numerantur sed ponderantur. The quintessence of a work may be piratically extracted so as to leave a mere *capiat mortuum*, by a selection of all the important passages in a comparatively moderate space.'

14. As to piracy by quotation.

14. Quotation for the purpose of reviewing is not to have the appellation of piracy affixed to it; but quotation may be carried to the extent of manifesting piratical intention. This dictum is ascribed to Lord *Eldon* in *Mawman v. Tegg*. (f) 'There is no doubt,'

(a) In *Bramwell v. Hulcomb*, 3 M. & Cr. 738; and see Sir *W. P. Wood*, V.C. in *Tinsley v. Lacy*, 11 W. R. 877.

(b) *Kelly v. Hooper*, 4 Jur. 21.

(c) *Roworth v. Wilkes* was a case in which 75 pages of a treatise consisting of 118 pages were taken and inserted in a very voluminous work—the *Encyclopædia Londinensis*; and although the matter taken formed but a very small proportion of the work into

which it was introduced, the jury found for the plaintiff, who was the author of the treatise.—1 Campb. 94.

(d) P. 38.

(e) 1 Story, R. 11.

(f) 2 Russ. 393. See also Lord *Eldon*, C. in *Wilkins v. Aikin*, 17 Ves. 424; *Bohn v. Bogue*, 10 Jur. 420; *Whittingham v. Wooler*, 2 Swanst. 428; *Bell v. Whitehead*, 3 Jur. 68.

said Lord *Eldon* on another occasion, ‘that a man cannot under the pretence of quotation publish either the whole or part of another’s works, though he may use what it is in all cases very difficult to define, fair quotation.’

Admitted quotation may amount to piracy. This was ruled in *Bohn v. Bogue*. (a) The learned Judge there observed: ‘Confession may at the time that it is made be so far a proof of honesty, but a confession from the very nature of it does not diminish the previous theft; if a theft has been committed, it may save trouble in conviction, but it neither excuses nor justifies.’

To hold that extracts from a work for the sole purpose of criticism are piratical would, it has been truly observed, fetter public discussion, and such discussion is in this country considered beneficial to the public; further, a common result of extracts by way of criticism is far from injurious to the author or proprietor of the work criticised: they frequently extend its sale.

In *Carey v. Kearsley* (b) a test of fair quotation is given. Lord *Erskine* there remarked: ‘Suppose a man took “Paley’s Philosophy” and copied a whole essay with observations and notes or additions at the end of it, would that be piracy? That would depend upon the fact whether the publication of that essay was to convey to the public the notes and observations fairly, or only to colour the publication of the original essay, and make that a pretext for pirating it; if the latter, it could not be sustained.’

‘In short,’ to borrow the language of *J. Story*, ‘we must, in deciding questions of this sort, look to the

(a) 10 Jur. 420.

(b) 4 Esp. 168.

nature and objects 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. Many mixed ingredients enter into the discussion of such questions. In some cases a considerable portion of the materials of the original work may be fused, if we may use such an expression, into another work so as to be undistinguishable in the mass of the latter, which has often professed and obvious objects, and cannot fairly be treated as piracy, or they may be inserted as a sort of distinct and mosaic work unto the general texture of the second work, and constitute the peculiar excellence thereof, and it may be a clear piracy. If a person should, under colour of publishing elegant extracts of poetry, include all the best pieces at large of a favourite poet, whose volume was secured by a copyright, it would be difficult to say why it was not an invasion of that right, since it might constitute the entire value of the volume.' (a)

The law laid down by Lord *Erskine* in *Carey v. Keursley* was followed in *Campbell v. Scott*, (b) where the Vice-Chancellor of England granted an injunction against the publication by the defendant of certain of Campbell's poems, in a collection of poetry entitled 'The Book of Poets,' and 'The Modern Poets of the Nineteenth Century.' He on that occasion observed: 'Then, is the work complained of anything like an abridgement of the plaintiff's work, or a critique upon it? Some of the poems are given entire, and large extracts are given from other poems; and I cannot

(a) *Story, J. in Folsom v. Marsh*, 2 *Story*, 116. (b) 11 *Sim.* 31.

think that it can be considered as a book of criticism when you observe the way in which it is composed. It contains 790 pages, thirty-four of which are taken up by a general disquisition upon the nature of the poetry of the nineteenth century; then, without any particular observation being appended to the particular poems and extracts from poems which follow, there are 758 pages of selections from the works of other authors; and therefore I cannot think that the work complained of can in any sense be said to be a book of criticism. If there were critical notes appended to each separate passage, or to several of the passages in succession, which might illustrate them, and show from whence Mr. Campbell had borrowed an idea, or what idea he had communicated to others, I could understand that to be a fair criticism. But there is first of all a general essay, then there follows a mass of pirated matter, which, in fact, constitutes the value of the volume.'

In *Whittingham v. Wooler* (a) the publication of extracts (occupying six or seven pages) from different parts of Poole's farce of 'Who's Who, or the Double Imposture' (occupying forty pages), in a critical work called 'The Stage,' was not considered piracy clear enough for the interference of a court of equity. (b)

15. The publication of an unauthorised but bonâ fide abridgement or digest of a published literary copyright work is, it seems, no piracy of the original.

15. Piracy by abridgement or digest.

First, as to an abridgement; that conclusion was reached many years ago in *Newbery's* case, by Lord *Apsley*, C. and *Blackstone*. (c) Later, but as far back as the year 1740, a bill (a) was brought

(a) 2 Swanst. 428.

*quhar*, Mor. Dict. of Dec. 19, 20, p. 8309.

(b) For a case of too copious extracts, see *Murray v. M'Far-*

(c) Lloft, R. 775.

by Fletcher Gyles, a bookseller, for an injunction to stay the printing of a book entitled 'Modern Crown Law,' it being suggested by the bill to be colourable, and, in fact, borrowed verbatim from Sir Matthew Hale's 'Pleas of the Crown,' only some repealed statutes having been left out, and the Latin and French quotations translated into English. Upon the hearing, Lord *Hardwicke*, L.C. said: 'The question is whether this book of the new Crown law which the defendant has published is the same with Sir Matthew Hale's "Historia Placit. Coronæ," the copy of which is now the property of the plaintiff. (b) Where books are colourably shortened only, they are undoubtedly within the meaning of the Act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgement. But this must not be carried so far as to restrain persons from making a real and fair abridgement, for abridgement may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shown in them, and in many instances are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of an author. If I should extend the rule so far as to restrain all abridgements, it would be of mischievous consequence, for the books of the learned "Les Journals des Savans," and several others that might be mentioned, would be brought within the meaning of this Act of Parliament. In the present

(a) *Gyles v. Wilcox*, 2 Atk. 141.

(b) The 'Pleas of the Crown' were left in manuscript by Sir Matthew Hale at his death. He died in 1676, and in 1680 the House of Commons desired his

executors to print and publish the MS. Various accidents, however, prevented the publication till 1736, when the copyright was assigned to Gyles. See *Mor. Diet.* of Dec. app. pt. 1. p. 5.

case it is merely colourable; some words out of the "Historia Placitorum Coronæ" are left out only, and translations given instead of the Latin and French quotations that are dispersed through Sir Matthew Hale's works.' (a)

Again, in 1753, Lord *Eldon* said in *Tonson v. Walker*: 'A fair abridgement would be entitled to protection, but this is a mere evasion.' (b) *Tonson v. Walker* did not itself raise a question of piracy by simple abridgement. In that case the plaintiff's edition of 'Milton,' with Dr. Newton's 1,500 compiled notes, had been copied by the defendant's edition which merely added twenty-eight more notes.

The same doctrine was held by Sir *T. Sewell*, M.R. sitting for the Lord-Chancellor, about the year 1785, to hear a suit for piracy of the 'Memoirs of the Life of Mrs. Bellamy.' (c)

*Dodsley v. Kinnersley* has been sometimes quoted as an authority upon piracy by abridgement, but it was, as Sir *T. Plumer*, M.R. said in *Whittingham v. Wooler*, 'a case of extracts merely;' the sole subject of complaint there was a reprint, in the defendant's magazine, of an extract from the narrative of Dr. Johnson's 'Prince of Abyssinia.' Another extract the plaintiffs had themselves published in the London 'Chronicle' newspaper. Lord *Eldon* refused an injunction and clearly stated why he did so. He said: 'What I materially rely upon is that it could not tend to prejudice the plaintiffs when they had before published an abstract of the work in the London 'Chronicle.'

(a) See also Lord *Lyndhurst*, C.B. in *D'Almaine v. Boosey*, post, p. 141.

(b) 3 Swanst. 681.

(c) *Bell v. Walker*, 1 Bro. C. C. 451.



‘What constitutes a fair and bonâ fide abridgement in the sense of the law’ was said by the American judge *Story* to be one of the most difficult points under particular circumstances which could well arise for judicial discussion. And in *Folsom v. Marsh* (a) he observed: ‘It is clear that a mere selection or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be a fair and bonâ fide abridgement.’ He then added: ‘There must be real substantial condensation of the material and intellectual labour and judgment bestowed thereon, and not merely the facile use of the scissors or extracts of the essential parts constituting the chief value of the work.’ In *Folsom v. Marsh* the compositions alleged to be pirated were the writings of Washington, and an injunction issued, because the defendant had selected and imported into his publication (consisting of 866 pages) 353 pages from the plaintiff’s; the defendant’s work was mainly founded on those selections, which constituted more than one-third of its bulk and imparted to it its essential value; the publication was not therefore an abbreviation or abridgement in the strict sense of that word.

Again, ‘To constitute a true and proper abridgement,’ said Lord *Apsley*, C. in *Newbery’s* case, (b) ‘the whole must be preserved in its sense, and then the act of abridgement is an act of understanding employed in carrying a large work into a smaller compass and rendering it less expensive and more convenient, both to the time and ease of the reader, which made an

(a) 2 *Story*, 112; and see 4 *Eq. Jur.* 322.

*Bouverie’s ‘Institutes,’* p. 132; 2 (b) *Loffts. R.* 775.

*Story, Eq. Jur.* s. 940, 942; *Jer.*

abridgement in the nature of a new and meritorious work.' In reference to the case before him and his colleague (*Blackstone, J.*) he observed, 'that this had been done by Mr. Newbery.' On that occasion he and Mr. Justice *Blackstone* had spent some hours together, and were agreed that an abridgement, where the understanding is employed in retrenching unnecessary and uninteresting circumstances which rather deaden the narration, (a) is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work.

In a recent suit, (b) Sir *W. P. Wood*, V.C. did not agree that an abridger was a benefactor; he regarded him rather as a sort of jackall to the public, to point out the beauties of authors.

Next as to a digest. Upon a special case one question for the opinion of the Court of Common Bench was, whether the publication in the form of an analytical digest of certain head-notes copied by the defendant from a periodical law report, composed by the plaintiff, was a piracy. Judgment was there given for the plaintiff, though the Bench was not unanimous. (c) Sir *John Jervis*, L.C.J. held that the defendant had been guilty of infringement; he admitted that a digest might be made from published reports without necessarily subjecting the compiler to a charge of piracy, but considered that in the case before him no thought or skill had been brought to bear upon the defendant's work, and that the work in question was a mere mechanical stringing

(a) Newbery's publication was an abridgement of Dr. Hawkesworth's 'Voyages.'

(b) *Tinsley v. Lacy*, 11 W. R. 877.

(c) *Sweet v. Benning*, 16 C. B. 485.

together of the notes which the labour and intelligence of the authors had fashioned ready to the compiler's hand; he also thought *Butterworth v. Robinson*, 5 Ves. 709, (a) to be precisely in point. *Maule, J.* did not concur in the opinion of the Chief Justice as to the infringement in question; the grounds of his conclusion appear in the following extract from his judgment: 'In the present case the inclination of my opinion is that the work of the defendant is a different work, having a different object in view, and being totally different in its result from the work published by the plaintiffs; it may be that some persons may dispense with the plaintiff's work and take the defendant's, though a very imperfect substitute for it, though I should very much doubt whether it would enable any person, who really wanted it, to dispense with the plaintiff's publication. The object of a digest is to afford facilities for finding out cases that are inserted in the reports, without buying the reports themselves in extenso. The effect may be to induce many persons to abstain from purchasing the reports, relying upon the means of access to public libraries and other institutions for the fuller and more perfect information when they have occasion for it. But that, I think, is no argument in favour of this being a piracy; rather the contrary, because it shows that the defendant's work is useful only for a different purpose from that of the plaintiff's, and is not, and never was,

(a) *Butterworth v. Robinson* was an ex parte application for an injunction to restrain the sale of 'An Abridgement of Cases Argued and Determined in the Courts of Law,' &c. The application was supported by evidence that the

abridgement was not a fair abridgement, but, under colour of a new work, a verbatim copy of reports of which the plaintiff was proprietor. An interim injunction was granted. The case is very shortly reported.

intended as a substitute for it.' Sir *C. Cresswell* concurred with the Chief Justice in his conclusion upon the facts before them; so did Sir *R. Crowder, J.*: but the latter concurred reluctantly. Sir *R. Crowder* said: 'Looking at the language of the statute, I feel very reluctantly bound to express my opinion that it may and does amount to piracy. It falls exactly within the 15th section, taken in connection with the interpretation clause, s. 2. The result of these two sections is this, that a person is guilty of piracy who prints or causes to be printed for sale any book or part of a book in which there is subsisting copyright, without the consent in writing of the author or proprietor; that which the defendants have printed and published without the sanction of the plaintiffs is undoubtedly a part, and a very considerable and important part, of the work.'

16. An unauthorised copy of a translation of a foreign work, though the foreign work be not entitled to copyright here, is a piracy.

16. Piracy by translation.

This was decided by Lord *Eldon* in *Wyatt v. Barnard*, in the year 1814: (a) there the plaintiff was the proprietor of a periodical called 'The Repertory of Arts, Manufacture, and Agriculture,' and the defendants were the publishers of another periodical which contained various articles copied, contracted, or taken from the plaintiff's work without his consent, being translations from the French and German languages, and specifications of patents. Sir Samuel Romilly moved on behalf of the plaintiffs for an injunction against such publication by the defendants. Sir John Leach, on the other side, argued that it had never been decided that a translator

(a) 3 V. & B. 78.

had a copyright in his translation. Sir Samuel Romilly in reply insisted that translation was as much the subject of copyright as original composition. Upon an affidavit that the translations were made by a person employed and paid by the plaintiff at considerable expense, Lord *Eldon* pronounced an order for an injunction as to the translations. In delivering judgment, the Chancellor said: 'With respect to the translations of original works, whether made by the plaintiff or given to him, they could not be distinguished from other works. The injunction, therefore, must go restraining the defendants from publishing the translations first published by the plaintiffs.'

There is no doubt that the defendant in the case last cited might have himself translated the foreign work, although he was not allowed to copy the plaintiff's translation.

The foreign work in *Wyatt v. Barnard*, it may be observed, was not entitled to English copyright.

It seems that Lord *Eldon* decided *Wyatt v. Barnard* upon a conclusion that every translation was an original composition. If that decision be law the translation of an English copyright work can scarcely be a piracy. That has not, however, been directly decided, although *Yates, J.* in *Miller v. Taylor* was clearly of opinion that the purchaser of a published work entitled to statutory copyright might with impunity translate it. (a)

Lord *Macclesfield* also seems to support that view of copyright law in *Burnett v. Chetwood*. (b) And Sir *J. L. K. Bruce, V.C.* said in *Prince Albert v. Strange*: 'A work lawfully published in the popular sense of the

(a) 1 Burr. 2318.

(b) 2 Meriv. 141.

term stands in this respect, I conceive, differently from a work which has never been in that situation. The former may be liable to be translated, abridged, analysed, exhibited, complimented, (a) and otherwise treated in a manner that the latter is not.' (b) The learned American Judge *Story* is in favour of copyright in a translation. (c)

As the opinion of a great author on the subject of translation, and the talent necessary in a translator, may not be inappropriately quoted here, attention is called to the following words put by the witty Cervantes into the mouth of his hero, when conversing at Barcelona with an author. Don Quixote is made to say: 'Nevertheless, I cannot but think that translation from one language into another, unless it be from the noblest of all languages, Greek and Latin, is like presenting the back of a piece of tapestry where, though the figures are seen, they are obscured by various knots and threads, very different from the smooth and agreeable texture of the proper face of the work, and to translate easy languages of a similar construction requires no more talent than transcribing one paper from another. But I would not hence infer that translating is not a laudable exercise, for a man may be worse and more unprofitably employed. Nor can my observation apply to the two celebrated translations of Doctor Christopher de Figueroa in his 'Pastor Fido' and Don John de Xaurigui in his 'Aminta,' who with singular felicity have made it difficult to decide which is the translation and which the original.'

The International Copyright Act hereafter referred to

(a) Qy. complemented?

(b) 5 De G. & Sm.

(c) See *Emerson v. Davies*, 3 Story, 780.

extends to prevent translations of foreign works which have become by treaty entitled to protection in this country. (a)

Further, it seems that a re-translation without the consent of the author of the original work is open to a charge of piracy whenever that original work is entitled to copyright, for in *Murray v. Bogue* (b) Sir R. Kindersley, V.C. expressly laid it down that if A had translated B's English book into German, and then C had translated A's book into English, even if C did not know that A's book was a translation of B's, he (the Vice-Chancellor) would not allow B's book to be thus indirectly pirated.

17. No piracy save by multiplication of copies.

17. The intention of the Literary Copyright Act is to secure to an author the benefit of his labours, but his rights are limited to what is given by the Legislature. The privilege of a literary author is confined by the Act 5 & 6 Vict. c. 45, to multiplying copies of his work; any other person may, therefore, make what use he pleases of the work, save that of multiplication of copies. (c)

The public performance on the stage of a play representing the incidents of a published novel is, therefore, no infringement within the meaning of the Act 5 & 6 Vict. c. 45, of any copyright in the novel. This was determined in *Reade v. Conquest*. (d) Mr. Reade, the novelist, brought an action against Conquest for dramatising and causing to be acted, at the Grecian Theatre, a novel written by him, the plaintiff; the defendant demurred to the declaration, and the Court of Common Pleas allowed the demurrer. In delivering

(a) 15 & 16 Vict. c. 12.

(b) 1 Drew, 353.

(c) See Sir W. P. Wood, in

*Tinsley v. Lacy*, 11 W. R. 877.

(d) 9 C. B. n. s. 755.

judgment, *Williams*, J. observed: 'It was held in the case of *Coleman v. Wathen*, 5 T. R. 245, (a) that representing a published dramatic piece of the plaintiff's upon the stage was not a publication within the meaning of the Act 8 Anne, c. 19, so as to subject the defendant to the penalty imposed by that statute; and the 2nd section 5 & 6 Vict. c. 45, defining copyright to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is therein applied, seems to furnish a complete answer to the plaintiff's claim under that statute.' The Court also considered that *Murray v. Elliston* (b) was in the defendant's favour.

Neither is the public recitation of a published copyright work a piracy. It was not so when the Act of Queen Anne was in operation, (c) and the decision in *Reule v. Conquest* leads to a similar conclusion at the

(a) *Coleman v. Wathen*, being a statutory action for a penalty, of course depended on the statute 1 Anne, c. 19, upon which it was founded. That statute was repealed by 5 & 6 Vict. c. 45. A verdict was taken in *Coleman v. Wathen* for the plaintiff, with nominal damages, in order to raise the question, whether the public representation of a piece called 'The Agreeable Surprise,' upon a stage at Richmond, was a mode of publication which came within the meaning of the Act 8 Anne, c. 19. A rule to set aside the verdict was made absolute by the Court of King's Bench, Lord Chief Justice *Kenyon* observing: 'There is no evidence to support the action in this case. The statute for the

protection of copyright only extends to prohibit the publication of the book itself by any other than the author or his lawful assignees. It was so held in the great copyright case (*Millar v. Taylor*) by the House of Lords. But here was no publication.' *Buller*, J. added: 'Reporting anything from memory can never be a publication within the statute. Some instances of strength of memory are very surprising, but the mere act of repeating such a performance cannot be left as evidence to the jury that the defendant had pirated the work itself.'

(b) See *post*, p. 182.

(c) See *Buller*, J. in *Coleman v. Wathen*, 5 T. R. 245.



present day in respect to any work, not being a dramatic piece, within the protection of the statute 3 & 4 Will. 4, c. 15, hereafter referred to.

In the recent case of *Tinsley v. Lacy*, Sir W. P. Wood, V.C. expressly declared that any person might lawfully read out the whole of any copyright novel to a public meeting without any infringement of the right; such person cannot, however, for the purpose of assisting the audience to follow his lecture, distribute copies of the book among them. This multiplication of the work would be a clear violation of literary copyright. (a)

The multiplication of copies of a work in which there is copyright, though not for sale or hire, is an infringement of the right. It was argued for the defendant, in *Novello v. Sudlow*, (b) that the Legislature did not intend by the Act 5 & 6 Vict. c. 45, to interfere with persons who were not moved with a desire of profit, but the judgment of the Court, delivered by Sir T. N. Talfourd, J. was, that by such multiplication the copyright of the plaintiff was violated, and, therefore, the remedy for the plaintiff by action on the case attached.

The facts of that case were these: there was a Philharmonic Society, established for giving concerts to gratify the members of the Society and to promote music, not for giving concerts which should be a source of profit; the concerts were performed gratuitously by the members; to all these concerts were admitted, besides the members, many other persons at a fixed price; the defendant, a member and manager of the Society, being desirous of performing at one of the

(a) *Tinsley v. Lacy*, 11 W. R. (b) 12 C. B. 177.

concerts music from the plaintiff's work, had caused portions of the work to be lithographed for the use of the performers; and these he had then supplied to them without the plaintiff's consent.

The Scotch Court of Session had previously held, that to circulate gratuitously, without the consent of the author or his assigns, among the members of the Society of Writers to the Signet, a copy of a collection of legal precedents wherein copyright subsisted, was piracy. (a)

18. As to the simple embellishment of letter-press by the addition of plates, that would not excuse publication of the text. Sir *L. Kenyon*, M.R. (b) observed: 'Suppose it was only adding plates to an edition of "Don Quixote," the mere act of embellishing could not divest the right of the owner in the text.'

18. Embellishment by plates excuses not piracy of letter-press.

19. A plaintiff may with propriety claim copyright in a book, and sue in respect of its infringement, although it be only a musical composition, consisting of words and accompaniment, and he be the composer of the words only, the accompaniment having been written for him gratuitously. (c)

19. As to piracy of musical compositions.

In any case of alleged piracy of a musical composition the language of Lord *Lyndhurst*, L. C. B. in *D'Almaine v. Boosey*, (d) may, perhaps, be usefully referred to. There a foreigner composed the music of an opera and duly assigned the right of publishing it in England to the plaintiffs, who were Englishmen; the assignees entered at Stationers' Hall the opera, its overture and airs, and first published here the overture, the airs, and two sets of quadrilles arranged from the opera.

(a) *Alexander v. McKenzie*, Dec. in Ct. of Sess. vol. ix. n. s. 748.

(b) 2 Bro. C. C. 85.

(c) *Leader v. Purday*, 7 C. B. 14.

(d) 1 Y. & Coll. 301.

The defendant afterwards published in this country several of the airs, with some alterations, in the shape of quadrilles and waltzes, which were all described on the title page as taken from the opera, though arranged by another person. The Lord Chief Baron, in granting an injunction, thus expressed himself: "The other point raised by the defendant is this, "whether his work, from its particular nature, is to be deemed a piracy?" With reference to this question, the facts of the case are as follow: The plaintiffs published first the overture and then a number of airs and all the melodies. It is admitted that the defendant has published portions of the opera containing the melodious parts of it, that he has also published entire airs, and that in one of his waltzes he has introduced seventeen bars in succession, containing the whole of the original air, although he adds fifteen other bars which are not to be found in it. Now it is said that this is not a piracy, first, because the whole of each air has not been taken, and secondly, because what the plaintiffs purchased was the entire opera, and the opera consists not merely of certain airs and melodies, but of the whole score. But in the first place, piracy may be of part of an air as well as of the whole; and in the second place, admitting that the opera consists of the whole score, yet, if the plaintiffs were entitled to the whole, *à fortiori* they were entitled to publish the melodies which form a part. Again, it is said that the present publication is adapted for dancing only, and that some degree of art is needed for the purpose of so adapting it, and that but a small part of the merit belongs to the original composer. That is a nice question. 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 abridgement or a digest: such publications are in their nature original. Their compiler intends to make of them a new use; not that which the author proposed to make. Digests are of great use to practical men, though not so comparatively to students. The same may be said of an abridgement of any study, but it must be a *bonâ fide* abridgement; because, if it contains many chapters of the original work, or such as made that work most saleable, the maker of the abridgement commits a piracy. Now it will be said that one author may treat the same subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite distinct from that of others who preceded him; but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the author, and which may in such case be the subject of piracy; and you commit a piracy if, by taking not a single bar but several, you incorporate in the new work that in which the whole meritorious part of the invention consists. I remember, in a case of copyright at nisi prius, a question arising as to how many bars were necessary for the constitution of a subject or phrase. Sir George Smart, who was a witness in the case, said that a mere bar did not constitute a phrase, though three or four bars might do so. Now 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 intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now the most unlettered in music can distinguish one song from another; and the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not even to common apprehensions alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognised by the ear. 'The adding variations makes no difference in the principle.' (a)

20. Intention not necessary to piracy.

20. Doubtless an infringement of statutory copyright may be unintentional, nevertheless it is an unlawful invasion of property. (b)

After the expiry of the statutory term of protection in a work, copies lawfully multiplied may be sold. (c)

21. Remedy at law for infringement of the right.

21. Legal reparation for an infringement of the copyright is provided by ss. 15 & 16 of the Act 5 & 6 Vict. c. 45. They enact that if any person shall, in any part of the British dominions, after the passing of that Act, print, or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor

(a) See also *Russell v. Smith*, 15 Sim. 182. Sir W. P. Wood, V.C. in *Reade v. Lucy*, 1 Jo. & H. 524; and *Story*,

(b) Lord *Ellenborough*, C.J. in *Roworth v. Wilkes*, 1 Camp. 98. 115. J. in *Folsom v. Marsh*, 2 Story,

See also Sir R. T. *Kindersley*, V.C. in *Murray v. Bogue*, 1 Drew, 353; (c) See *Howitt v. Hall*, *antè* p. 65.

thereof; or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession for sale or hire any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case, at the suit of the proprietor of such copyright, to be brought in any Court of Record in that part of the British dominions in which the offence shall be committed: provided always that in Scotland such offender shall be liable to an action in the Court of Session in Scotland, which shall and may be brought and prosecuted in the same manner in which any other action of damages to the like amount may be brought and prosecuted there. Further, that after the passing of that Act, in any action brought within the British dominions against any person for printing such book for sale or exportation, or for importing, selling, publishing, or exposing for sale or hire, or causing to be imported, sold, published, or exposed to sale or hire any such book, the defendant, on pleading thereto, shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of such action; and if the nature of his defence be that the plaintiff in such action was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author, or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person whom he alleges to

have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when, and the place where, such book was first published; otherwise the defendant in such action shall not at the trial or hearing of such action be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein; and at such trial or hearing no other objection shall be allowed to be made on behalf of such defendant than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person so specified in such notice, or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication with the title, time, and place specified in such notice.

In *Leader v. Purday* it was accordingly ruled that points not raised in the notice of objections could not be raised upon the plaintiff's evidence on the trial. (a)

A general objection will not do. The Act throws on a defendant, if he seek to defend an infringement on the ground that the plaintiff is not the proprietor, the onus of specifying the person whom he alleges to be the proprietor, in order that the plaintiff may not be taken by surprise; at the trial the defendant must also give the title of the book, and the time when (the year is sufficient) and the place where published. (b)

(a) 7 C. B. 14.

1038; and see *Neilson v. Harford*,

(b) *Boosey v. Davidson*, 4 D. & S M. & W. 806.

L. 147; *Boosey v. Purday*, 10 Jur.

In the action the defendant may plead the general issue, and give the special matter in evidence; and if a verdict shall be given for the defendant, or the plaintiff shall become non-suited, or discontinue his action, then the defendant can recover his full costs, and for them he has the same remedy as a defendant in any case by law has. (a)

All actions, suits, bills, indictments, or informations for any offence committed against and under the Act 5 & 6 Vict. c. 45, except in respect of copies of books to be delivered to the British Museum, &c., must be commenced within twelve calendar months next after the commission of the offence. (b)

Besides the remedy under 5 & 6 Vict. c. 45, s. 15, an infringement is actionable at law. (c) As to books published before that Act an action for damages will lie in respect of a violation of copyright after the expiry of the twelve calendar months: contrary doctrine was urged and repelled in an action brought at the instance of Colonel *Matthew Stewart* (son of Dugald Stewart), against Messrs. *Black*, the Edinburgh booksellers. The action was in respect of an alleged piracy of the Professor's 'Dissertations on the Progress of Philosophy since the Revival of Letters in Europe.' (d)

In an action in England for piracy, the consideration of the two works has been referred to an arbitrator, who would have leisure to compare them. (e) In Scotland, the enquiry has been likewise referred by the Court to an arbitrator; (f) a jury generally, however, determines the question of piracy.

(a) 5 & 6 Vict. c. 45, s. 26.

Court of Sess. 2d series, p. 1026.

(b) *Ibid.*

(e) *Trusler v. Murray*, 11 East,

(c) In *Novello v. Sudlow*, 12 C. B. 177; and see *Boozey v. Tolkien*, 5 C. B. 476.

363, n. See present practice in Chancery, *post*, p. 164.

(f) *Alexander v. M'Kenzie*, 9

(d) *Stewart v. Black*, 9 Dec. of Dec. of Court of Sess. n. s. 751.



To make the publisher of a piratical work which another has printed liable at law for the infringement, guilty knowledge must be brought home to him. Although the 15th section of the Act of Victoria presumes guilty knowledge in some cases, it does not presume it from the mere fact of selling piratical works in print. This was ruled by Chief Justice *Wilde*, in the Court of Common Pleas. (*a*)

If several plaintiffs join in an action for piracy, it may of course be defeated by showing that one of them has deprived himself of all right of complaint. In *Sweet v. Archbold* it was held that the publication complained of being pursuant to the conditions of a cognovit given by the defendant to one of the plaintiffs was a complete answer to the action. (*b*)

The report of a select committee of the House of Commons, in the year 1836, recommended a cheap accessible tribunal for the protection of copyright; but their recommendation has not yet been followed. The necessity for such a tribunal has been insisted upon by many writers. (*c*)

22. Relief in equity against infringement of the right.

22. A person aggrieved by a threatened infringement of his copyright under the Act 5 & 6 Vict. c. 45, may also get relief in a court of equity, (*d*) which, on a proper application, will restrain a violation of the right. The principle of granting the injunction is that damages may not give adequate relief, and that the sale of copies by the defendant is in each instance not only taking away the profit upon the individual book,

(*a*) *Leader v. Strange*, 2 C. & K. 1010. right,' p. 5.

(*b*) 10 Bingham. 133.

(*c*) See Blaine on 'Artistic Copy-

(*d*) See *Sherriff v. Coates*, 1 R. & M. 159.

which the plaintiff probably would have sold, but may injure him to an extent which no enquiry for the purpose of damages can ascertain. (a)

Upon a motion to dissolve an injunction against the infringement of a copyright, Lord *Eldon*, C. remarked that jurisdiction upon subjects of this nature is assumed merely for the purpose of making effectual the legal right, which cannot be made effectual by any action for damages, as if the work is pirated it is impossible to lay before a jury the whole evidence as to all the publications which go out to the world to the plaintiff's prejudice; a court of equity therefore acts with a view to making the legal right effectual by preventing the publication altogether. (b) Accordingly, in the exercise of this jurisdiction, where a fair doubt appeared as to the plaintiff's legal right, the Court, before the passing of Rolt's Act, (c) always directed it to be tried, making some provision in the interim, the best that could be for the benefit of both parties. The particular provision was dictated by the circumstances of each case. (d)

In another suit Lord *Eldon* said: 'The owner of the copyright has a right to bring an action for invading it, and upon that this Court has founded the right to have

(a) See *Hogg v. Kirby*, 8 Ves. 224; and *Geary v. Norton*, 1 De G. & Sm. 9.

(b) In *Wilkins v. Aikin*, 17 Ves. 424.

(c) 25 & 26 Vict. c. 42.

(d) See Lord *Eldon*, C. in *Walcott v. Walker*, 7 Ves. 14; and *Lawrence v. Smith*, Jac. 472. See also Lord *Cottenham*, C. in *Saunders v. Smith*, 3 M. & Cr. 728; and

Sir *J. L. K. Bruce*, V.C. in *McNeill v. Williams*, 11 Jur. 344; *Chappell v. Davidson*, 2 Ka. & Jo. 123; Sir *J. Wigram*, V.C. in *Cory v. Yarmouth Railway Company*, 3 Hare, 600; *Spottiswoode v. Clarke*, 2 Phill. 155; *Jarrold v. Houston*, 3 Ka. & Jo. 724; Lord *Langdale*, in *Dalglish v. Jarvie*, 2 M. & Gor. 242.

an injunction on the ground that if it were necessary to bring action after action the expense of asserting the title might exceed the advantages to be derived from it.' (a)

A court of equity has no jurisdiction to give to a plaintiff a remedy for an alleged piracy, unless he can make out that he is entitled to the equitable interposition by injunction, and in such case the Court will also give him an account that his remedy in equity may be effectual. If the court of equity do not interfere by injunction, then his remedy, as in the case of any other injury to his property, is at law. (b) Unless that primary right to an injunction exist, a court of equity has no jurisdiction with reference to a mere question of damages. (c)

It has very recently been ruled by the Lords Justices in the Court of Chancery that it is now the duty of that Court to decide all questions of law or fact upon the determination of which relief in equity depends. (d) This ruling will probably tend very much to alter the practice of the Court of Chancery in withholding injunctions pending proceedings at law to establish the fact of piracy.

Distinct invasions of copyright by several persons cannot be restrained in one suit. (e)

The minuteness of the injury inflicted by a piracy has weighed with a court of equity in its refusal of an injunction. (f)

(a) In *Rundell v. Murray*, Jac. R. 852.  
314.

(b) Sir J. Leach, M.R. in *Bailey v. Taylor*, 1 R. & M. 75.

(c) Sir W. P. Wood, V.C. in *London and South-Western Railway Company v. Smith*, 1 Kay, 412; and see *Johnson v. Wyatt*. 11 W.

(d) *Re Hooper*, 11 W. R. 130.

(e) *Dilly v. Doig*, 2 Ves. 486; and see *Hudson v. Maddison*, 12 Sim. 416.

(f) *Bell v. Whitehead*, 3 Jurist, 68; and see Sir L. Shadwell, V.C.E. in *Saunders v. Smith*,

Prior to the passing of the statute 25 & 26 Vict. c. 42, an author might have so conducted himself in reference to his copyright as to have lost all title to relief in a court of equity until his title at law had been established. (a)

Where a mode of dealing had been commonly admitted and adopted by writers as no violation of copyright, and plaintiff had himself acquiesced therein, a court of equity would not, it seems, prior to that Act, restrain without a previous trial at law. In *Saunders v. Smith*, (b) which was a suit to restrain the publication of the second volume of 'Smith's Leading Cases,' and in which Lord Cottenham refused the injunction, he is reported as saying: 'In this case I find the publication complained of to be of a character (c) which, whether it be or be not an infringement of the copyright of the plaintiffs, is a course of proceeding which has been pretty largely admitted, and pretty generally adopted. Several cases occurred to me, and several were mentioned to me at the bar, in which a gentleman at the bar desirous of publishing a work upon a particular subject has collected the cases upon that subject, and has taken those cases, generally speaking, verbatim from reports which are covered by copyright. No instance has been represented to me in which those entitled to the copyright have interfered; no judgment, therefore, has been pronounced upon that subject. I am not stating whether the owner of the copyright is entitled to interfere in such a case, or whether that use of published reports is or is not to be permitted. That

(a) *Smalley v. Sherwood*, ante, Cr. 711.  
p. 19.

(c) As to the character of the publication, see *post*, p. 151.

(b) *Saunders v. Smith*, 3 M. &

is a question of legal right upon which I find, at present, no reason for coming to an adjudication. But in considering whether I am to exercise an equitable jurisdiction in such case, before the legal right has been established, it is very important to observe that, for many years, such a course as I have stated has been pretty generally adopted, 'more particularly when I find that these plaintiffs have themselves acquiesced in a similar course of proceeding.' In *Platt v. Button*, (a) too, Lord *Eldon* directed the plaintiff to bring his action, and then to apply for an injunction: he observed that the plaintiff had permitted several persons to publish the dances alleged to have been pirated by the defendant, some of them for fifteen years, and that the plaintiff had thus encouraged others to do so. 'That, it is true,' said the learned Judge, 'is no justification; but, under these circumstances, a court of equity will not interfere in the first instance.'

Further, a person cannot call for the interposition of a court of equity to protect copyright from infringement if—aware of the labours of another on the work complained of, of the character of the new work and of the intention to publish it—he makes no remonstrance whatever prior to its publication. *Rundell v. Murray* (b) is an authority on this point: there the plaintiff had written a book on domestic cookery, which she had given to the plaintiff for publication at his risk; the book also contained a statement by the plaintiff, that she gave it to the public without prospect of emolument; the defendant published it at his own cost,

(a) 19 Ves. 418; Coop. 303. *Chapman*, 3 Beav. 135.

(b) Jac. 511. See also *Lewis v.*

and when it had obtained a large sale he sent 150*l.* to the writer, which sum she acknowledged as a free gift; at the end of the first statutory term of copyright in the work under the statute of Queen Anne the plaintiff obtained an injunction to restrain the defendant against further publication; but, on argument, Lord *Eldon* declining to state in whom the copyright was vested, dissolved the injunction: he did so on the ground of the plaintiff's acquiescence in the defendant's outlay.

The principle of the last decision was followed in *Saunders v. Smith.* (a) The defendant in that suit had published without interference by the plaintiffs the first volume of his work, and an injunction was asked at the eleventh hour to restrain his publication of the second volume. Lord *Cottenham*, C. refused the writ, saying: 'When I look at this book, I see that it is a work of very great labour, and I find the principle is to take, first, the marginal note, sometimes with some alteration, and then to take the leading case, as a principle, and then, by very voluminous and obviously laborious notes, to work out the principle. It is clear, therefore, that the work is one of great labour, and that this was evident from the first volume; and I find that the plaintiffs were informed in March 1837 of an intention to deal with the existing reports in the manner now complained of. I find the first volume published, announcing the intention of going on with the same plan, which necessarily would run over the period to which the copyrights of the plaintiffs relate, and that no remonstrance is made to Mr. Smith upon

(a) 3 M. & Cr. 711.

the nature of the work, but he is permitted to go on with this laborious undertaking until the period at which the first part of the second volume is published. In the meantime there was a communication between the plaintiffs and Mr. Maxwell, who was interested in the publication of the work, and who has as much right to the protection of the Court as Mr. Smith; and in the proposal which he makes to the plaintiffs, he deals with the work as property he is entitled to deal with, wishing to make it the subject of arrangement between himself and the plaintiffs, and I do not find that this leads to any caution or interference on the part of the plaintiffs as to that course which Mr. Smith had pursued in part, and which the plaintiffs must have been fully aware he intended to pursue further. I do not give any opinion upon the legal question. I am only to decide that whatever legal right the plaintiffs may have, the circumstances are such as to make it the duty of a court of equity to withhold its hand and to abstain from exercising its equitable jurisdiction, at all events, until the plaintiffs shall come here with the legal title established. In doing this, I am only doing what Lord *Eldon* did in *Rundell v. Murray*, and what is very generally done upon questions of patent right. The Court always exercises its discretion as to whether it shall interfere by injunction before the establishment of the legal right.'

If an author or proprietor gave permission to several persons to publish his copyright work, such permission made it necessary for him to bring an action at law against others who publish a copy of it. Lord *Eldon*, C. was of this opinion in *Rundell v. Murray*, when he said: 'There has often been great difficulty about granting

injunctions where the plaintiff has previously by acquiescing permitted many others to publish the work; where ten have been allowed to publish the Court will not restrain the eleventh. (a)

It is very important for authors and proprietors to assert their rights at the earliest period of infringement. In *Tinsley v. Lacy*, (b) a case of an alleged infringement of copyright in the popular novels 'Aurora Floyd' and 'Lady Audley's Secret,' Sir *W. P. Wood*, V.C. remarked that if the plaintiff in that case had hesitated to apply to the Court in respect of what had been pirated, not amounting to more than one-fourth of the contents of the piracy, she would have been estopped from afterwards applying if a much larger proportion had been taken. The one-fourth, it should however be observed, there embraced the chief incidents of the plaintiff's work.

It is not absolutely necessary for the plaintiff in a suit seeking an injunction against the publication of a work partly pirated to state in his bill or in the affidavit in support of it the piratical portion. (c)

A court of equity will not restrain the infringement of a copyright, but will leave the plaintiff to his remedy at law if he be guilty of delay in his application.

When a defendant denies piracy he will do well to produce his MS. notes, or explain their non-production. (d)

An author's delay of several years has been held to

(a) Lord *Eldon*, C. in *Rundell v. Murray*, Jac. 511; also Lord *Brougham* in *Guichard v. Mori*, 9 L. J. ch. 227; and see *Platt v. Button*, Coop. Ch. Ca. 303.

(b) 11 W. R. 877.

(c) *Sweet v. Maugham*, 11 Sim 51.

(d) See *Murray v. Bogue*, 1 Drew 361.



be a sufficient reason for refusing him an injunction. (a) Five months' delay on the part of the plaintiff, in *Mawman v. Tegg*, (b) was accounted for to the satisfaction of Lord Eldon, C. by the necessity of comparing the whole of the two works (which were bulky) for the purpose of seeing how much of the earlier work had been in a substantial sense taken from it and infused into the later.

An unexplained delay of nine months would probably be fatal. (c) In a suit (d) where it appeared that the plaintiff and defendant were simultaneously preparing topographical dictionaries for publication; that the defendant's publication began first; that the plaintiff's attention was drawn to it at its commencement, and during its progress to complete publication, which occurred six and a half years before the filing of the plaintiff's bill; and when it also appeared that the plaintiff had possession for more than one year before the commencement of the suit of a complete copy of the defendant's work, with a view to its examination, Lord Langdale, M.R. refused an injunction solely on the ground of delay: he thought it his duty to impute to the plaintiff such a knowledge of the contents of the defendant's work as made it obligatory on the former to apply for injunction, if at all, at a much earlier period.

When a piracy was discovered in June, and the bill to restrain it was filed in the following month, Lord

(a) *Bailey v. Taylor*, 1 R. & M. 76; S. C. 1 Tamlyn, 303; and see *Bacon v. Jones*, 4 M. & Cr. 433; and see *Saunders v. Smith*, 3 M. & Cr. 711.

(b) 2 Russ. 393.

(c) *Smith v. London and S.-W. Railway Company*, 1 Kay, 412.

(d) *Lewis v. Chapman*, 3 Beav. 135; and see *Bridson v. Bencecke*, 12 Beav. 3.

*Langdale*, M.R. considered that there had been no improper or unnecessary delay. (a) In the year 1849 the state of the law rendered it doubtful whether a certain work was entitled to copyright. The work was copied, and the copies were sold without the consent of the proprietor of the original work: he did not apply immediately for an injunction, but gave notice of his ownership to the vendor, and threatened him with legal proceedings unless the sale was discontinued and the plates were broken up. No attention was paid to this notice. In March 1851, the proprietor issued a notice to the publishers, which notice contained a claim of his right to the work. On May 20, 1851 a decision at law established the claim of such a work to copyright. In August 1851, the proprietor again warned the vendor. In November 1851, he filed a bill to restrain the sale. Sir *James Parker*, V.C. held that the delay was fully explained, and granted the injunction. (b)

A court of equity was, prior to the Act 25 & 26 Vict. c. 42, less likely to issue or to continue an injunction against an alleged infringement of a literary work of a transitory nature than of a work permanent in its character. (c)

The language of the Court in *Spottiswoode v. Clarke* (d) (although not a copyright case) shows the difficulties which then beset a court of equity called upon to restrain the publication of an ephemeral work. Lord *Cottenham* there said: 'But the greatest of all objections is that the Court runs the risk of doing the greatest

(a) *Lewis v. Fullarton*, 2 Beav. 8. 275; see also *Gurney v. Longman*,

(b) *Buxton v. James*, 5 De G. 13 Ves. 505; and *Sheriff v. Coates*,  
& Sm. 84. 1 R. & M. 169.

(c) See Lord *Eldon*, C. in (d) 2 Phill. 154. It was a suit  
*Matthewson v. Stockdale*, 12 Ves. to restrain the sale of an almanack.

injustice in case its opinion upon the legal right should turn out to be erroneous. Here is a publication which if not issued this month (a) will lose a great part of its sale for the ensuing year. If you restrain the party from selling immediately, you probably make it impossible for him to sell at all. You take property out of his pocket and give it to nobody. In such a case, if the plaintiff is right, the Court has some means, at least, of indemnifying him, by making the defendant keep an account; whereas, if the defendant be right, and he be restrained, it is utterly impossible to give him compensation for the loss he will have sustained. And the effect of the order in that case will be to commit a great and irremediable injury. Unless, therefore, the Court is quite clear as to what are the legal rights of the parties it is much the safest course to abstain from exercising its jurisdiction till the legal right has been determined.'

A person having a complete equitable title to a copyright may institute a suit in respect thereof.

It was observed by Lord *Mansfield*, in the great case of *Millar v. Taylor*, that unless a court of equity saw a legal right in an author it would not interfere; but it by that, said Lord *Lyndhurst*, the Chief Justice meant to say that a court of equity would only interfere when the legal right to sue was in the applicant for interference, then he (Lord *Lyndhurst*) would not go so far, because he thought that a court of equity would assist any party having an equitable right when the legal right intervenes to prevent his obtaining justice, otherwise great fraud would ensue. (b)

(a) December.

C. 493.

(b) *Chappell v. Purday* 4 Y. &

Lord *Eldon*, too, sitting in the Court of Chancery, once (*a*) broadly intimated his opinion that a court of equity could not give equitable relief to any claimant of copyright by assignment not in writing. Afterwards, however, (*b*) in a case of *Mawman v. Tegg*, he at least qualified that statement. The work there alleged to be pirated had belonged one-third to Mr. Curtis, one-third to Miss Richardson, one-third to Mr. Fenner. Mr. Curtis had sold, but he had executed no assignment of his share to Mr. Fenner. Mr. Fenner had since become bankrupt. Miss Richardson had duly assigned her share to two of the plaintiffs (those two plaintiffs were the assignees in bankruptcy of Mr. Fenner), and a third person (not a party to the suit), in trust for her creditors. One objection relied on by the defendants was the absence of title in the plaintiffs to the work. To this Lord *Eldon* replied: 'Observations have been made upon the nature of the title of Mr. Mawman and his twenty associates in this work. Whether the title be a good legal title in them or be not is one question; but it appears to me that they have a complete equitable title.' On that title he gave relief.

Again, in allusion to an alleged piracy of Roscoe's 'Illustrations of the Life of Lorenzo de Medici,' Sir *L. Shadwell* declared that the Court of Chancery always took notice of the equitable interest, and if the equitable right to the copyright is complete, that Court would take care that the real question should be tried, notwithstanding there might be a defect in respect of the legal property. (*c*)

(*a*) In *Rundell v. Murray*, Jac. 315.

(*c*) In *Bohn v. Bogue*, 10 Jur. 420.

(*b*) 2 Russ. 385.

The person who has the legal title to a copyright invaded should, however, be a party to the suit for an injunction against such infringement.

This point was established by a decision in *Colburn v. Sims*. (a) That was a suit to restrain an alleged piracy of a diary illustrative of the times of George IV.: the plaintiff claimed under an agreement in writing for an assignment of the copyright in the work. The injunction was granted; but subsequently upon demurrer to the bill, the Vice-Chancellor of England, Sir *L. Shadwell*, considered the suit to be manifestly defective in not having the author of the work a party. Inasmuch, however, as the bill was sufficient in the opinion of the Court to show that the plaintiff had a good title in equity, that Judge gave leave to amend the bill without prejudice to the injunction.

Where it appeared in the Court of Chancery, upon an application to restrain the infringement of copyright in certain published law reports, for the preparation of which the plaintiffs, being law booksellers and publishers, had agreed in writing with several gentlemen at the bar, and the Court thought proper to direct an action to try the fact of piracy, it ordered that the defendants should at law admit the legal copyright in the plaintiffs. (b)

In a still later case, when an injunction had been granted upon the plaintiff's undertaking to try his right at law, and the legal proprietor of the right, a party to the suit, declined to lend his name in the action to the plaintiff, who was considered in equity his assign,

(a) 9 Sim. 154.

(b) *Sweet v. Shaw*, 3 Jur. 217.

Sir *L. Shadwell*, V.C.E. ordered the defendant to admit at the trial that the plaintiff was the legal proprietor. (a)

Any person associated by the proprietor of a copyright with himself in an entry in the book of registry at Stationers' Hall has *primâ facie* a title to sue jointly with him in a court of equity in respect of a violation of the right. (b)

By analogy to Patent Law, it seems that the proprietor of a copyright may, during its term of protection, apply for and obtain an injunction against the publication after the term of a piracy prepared during that term. (c)

If a person purchase a stereotype plate of a literary work, upon an undertaking with the vendor that the plate is to be used for the production of that work without any additions, he may, of course, be restrained at the suit of the vendor from publishing by means of the plate that work with additions; (d) because such a publication would be a breach of contract.

Where an injunction against the piratical part of a work would practically restrain the whole work, a court of equity will issue an injunction against the whole work. Where that result would not necessarily follow from an injunction limited to the piratical part, such

(a) *Sweet v. Cater*, 11 Sim. 581.

(b) *Stevens v. Wildy*, 19 Law J. ch. n. s. 190.

(c) *Crossley v. Beverley*, 1 R. & M. 166, n. The defendants there had been manufacturing the patented articles for some time, and keeping it secret from the plaintiff by excluding him from the premises. They had been doing

this fraudulently for the purpose of pouring into the market the articles so patented directly the patent should have expired; and see Sir *W. P. Wood*, V.C. in *Smith v. London and South-Western Railway Company*, 1 Kay, 412.

(d) *Napier v. Paterson*, 13 Dec. of Court of Session, n. s. 219.

limited injunction will issue. This appears to be settled by *Jarrold v. Houlston*: (a) there the learned Judge so ably reviewed the previous decisions on the point, that an extract from his judgment will perhaps best explain the practice. He is reported as having said in that case: "The next question is what course the Court should adopt where it appears that the piracy complained of extends to about half of the defendant's book. . . . In *Mawman v. Tegg* (b) Lord Eldon says: "The persons in the employment of the defendant can state exactly how much they copied, and what parts they copied, and can supply the Court with the knowledge of how the fact really stands, without leaving it to be collected from inferences more or less strong." I have already expressed my great regret that Mr. Philp has not taken that course. It is impossible for me now to ask him for an affidavit stating how much he has copied, when he has already filed an affidavit denying that he has taken a single idea from the plaintiff's book. Had he taken a different course in this respect it might possibly have put the case in a different position. The defendant in *Mawman v. Tegg* took a different course, and made an affidavit (c) stating that out of 227,000 lines, 2,160 lines, or somewhere about  $\frac{1}{100}$ th part of the whole had been copied. The Lord Chancellor felt so much difficulty on the case that he ultimately sent a reference to the Master to investigate the matter; but he makes these observations as to what ought to be done about the injunction. He says: "It

(a) 3 Ka. & Jo. 708.

(b) 2 Russ. 385. This was the case of an encyclopædia, part of which had been copied into another

encyclopædia; the suit ended in a compromise.

(c) 2 Russ. 395.

appears to have been Lord *Hardwicke's* opinion (a) that an injunction might be granted against the whole, although only part was pirated; and, in the instance of Milton's 'Paradise Lost,' with Newton's notes, although there was nothing new in that book except the notes, he was of opinion that he could grant, and he did grant, an injunction against the whole book. There is a case of an action tried before Lord *Kenyon*, (b) in which a motion was afterwards made for a new trial, and there Lord *Kenyon* states that the question whether you could grant an injunction against the whole of a book on account of the piratical quality of a part came before Lord *Bathurst*; and Lord *Bathurst* seems to have held that you could not do so unless the part pirated was such that granting an injunction against that part necessarily destroyed the whole. Lord *Kenyon*, who possessed great information on this subject, states himself to have been perfectly satisfied with the opinion of Lord *Bathurst*, as bearing upon the judgment of Lord *Hardwicke* and the other cases. In the case before Lord *Kenyon*, the declaration at law contained a count for publishing the whole work, and another for publishing a part; and Lord *Kenyon's* direction to the jury seems to have been to find damages for publishing the part only." Then Lord *Eldon* says: "The difficulty here is this, whether I have before me sufficient grounds to authorise me to say how far the matter which is proved (if I may use that word) to have been copied is sufficient to enable me to decide how much I may enjoin against. And if I can be thus authorised to say how much I can enjoin against, then the

(a) 4 Burr. 2326.

3 0; and *Truster v. Murray*, 1(b) *Cary v. Longman*, 1 East. E -t. 363.



question is, what will be the effect of that injunction applied to so much of the work in the state of uncertainty in which we now are? Or whether, on the other hand, as the matter cannot be tried by the eye of the judge, I must not pursue a course which has been adopted in cases of a similar nature, namely, refer it to the Master to report to what extent the one book is a copy of the other." In the previous part of the hearing he had said, "There is no doubt, if a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion." In *Lewis v. Fullarton* (a) Lord *Langdale* came to the conclusion that a considerable part of the plaintiff's work had been pirated, and, though he could not say how much had been so, yet he inferred, from what was already in evidence, that the result of further investigation applied to other parts of the work would be similar; he referred also to Lord *Eldon's* observations in *Mawman v. Tegg*, that it was the business of a defendant, when a considerable part of a work is shown to have been pirated, to separate and point out all that has been pirated, and he granted an injunction as to the entire work. It seems to me that the present case is one which differs to a considerable extent both from *Mawman v. Tegg* and *Lewis v. Fullarton*. Here it is as if the book in question had been published in parts. Had the last

(a) 2 Beav. 6. The order made in this case by Lord *Langdale* was: 'Let the defendant, his agents, servants, and workmen, be restrained from further printing, publishing, selling, or otherwise

disposing of any copy or copies of a book called, &c. containing any articles or article, passages or passage, copied, taken, or colourably altered from a book called, &c. published by the plaintiffs.'

part alone been published, there would have been no ground for interfering at all. In the first lecture, as it is called, in the defendant's book, there is nothing of which the plaintiffs complain. The fourth lecture, and all those subsequent to the twenty-fifth, I have carefully examined, and though here and there they contain passages of which the plaintiffs complain, I find nothing which can be reasonably objected to as showing that the writer has made an unfair use of the plaintiffs' book. The second lecture contains piratical matter, and as to the rest, between that and the twenty-fifth, some contain passages which appear to me, after carefully reading through them, to have been evidently taken from the plaintiffs' book, and the remainder contain passages which have a resemblance. Although I should not have been satisfied in dealing with the latter had they stood alone, it appears to me, therefore, that I shall be doing complete justice if I restrain the defendants, as I consider that I am bound to do, from publishing the second lecture, the third lecture, and the fifth and following lectures down to and including the twenty-fifth of the defendant's book. Adopting the words used by Lord *Langdale* in *Lewis v. Fullarton*, the injunction will restrain the defendant from publishing a book called "The Reason Why," containing the lectures I have mentioned, and then it will add, "or any passages or passage copied, taken, or colourably altered from the book called 'The Guide to Science' in the plaintiffs' bill mentioned." '(a)

In a plain case of infringement of copyright, Sir *L. Shadwell*, V.C.E. observed: 'I do not think that I

(a) See also *Motte v. Faulkner*, Ves. 2234, n.; *Reade v. Lacy*, 1 cited 1 Bl. 331; *King v. Reed*, 8 John & H. 428.

am bound to go through the whole book, but I apprehend that the law at present is in conformity with the old Roman law, which is, that if the defendant will take the plaintiff's corn and mix it with his own, the whole should be taken to be the plaintiff's, and after the defendants have taken so much as I see has been taken in this case, I think the injunction ought to be granted.'

Sir *W. Page Wood*, V.C. has lately said (a) that, if in a suit to restrain the violation of a copyright the judge arrives at a conclusion of piracy, he ought to grudge no labour that may be requisite to ascertain how far the injunction should extend. An opposite opinion has been attributed to Lord *Cottenham*, C. but on reference to the case before him (b) that conclusion seems to be erroneous.

The proprietor of an invaded copyright is entitled to the protection of an injunction, though the pirate promise to desist from his piracy and to pay the proprietor's costs; and if the pirate do not after the injunction offer to pay the proprietor's costs, the proprietor may

(a) In *Jarrold v. Houlston*, 3 Ka. & Jo. 708. In *Gyles v. Wilcox*, 2 Atk. 141, Lord *Hardwicke*, C. said that he should not be able to determine the question of piracy unless both books were read over; and at law the judge would be in his position in that respect, and he advised the parties to fix upon two persons of learning and ability to examine and compare the works, and report thereon to himself. This labour was delegated to a Master in Chancery in *Carnan v. Bowles*, 1 Cox. 283, s. c.; 2 Bro. C. C. 85. *Jeffrey v. Bowles*, 1 Dick. 429; *Nicol v. Stockdale*, 12 Ves. 277:

— v. *Leadbitter*, 4 Ves. 681. Lord *Eldon* himself compared the books: *Matthewson v. Stockdale*, 12 Ves. 277. Sir *Thomas Plumer*, M.R. in *Whittingham v. Wooller*, 2 Swanst. 460. Lord *Langdale*, M.R. in *Lewis v. Fullarton*, 2 Beav. 8. Sir *R. T. Kindersley*, V.C. in *Murray v. Bogue*, 1 Drew, 368; and Sir *W. P. Wood*, V.C. in *Spiers v. Brown*, 6 W. R. 352; and *Jarrold v. Houlston*, 3 Ka. & Jo. 708; and *Napier v. Routledge*, unreported (1859), followed his example.

(b) *Stevens v. Wildy*, 19 Law J. Ch. n. s. 190.

bring the suit to a hearing, and will be entitled to the costs of the suit. (a)

An allegation that 'matter contained in a particular edition of a copyright work is spurious' is irrelevant in a suit to restrain a violation of the right, though it may be the subject of an action, as being a libel on or disparagement of the edition. (b)

In stating in a bill for an injunction against infringement of copyright the title of the plaintiff, the assignee of the author, it seems insufficient to allege that he purchased the copyright without adding 'of the author.' (c)

Of course, piracy proved to be such will not itself be protected from invasion. In *Cary v. Faden*, (d) the plaintiff's itinerary was a piracy of Paterson's 'Road Book.' The defendants were alleged to have invaded the itinerary. Lord *Eldon*, C. refused to make any order for an injunction, saying:—'What right had the plaintiff to the original work? If I was to do strict justice, I should order the defendants to take out of their book all they have taken from the plaintiff, and reciprocally, the plaintiff to take out of his book all he has taken from Paterson. I think the plaintiff may be contented that a bill is not filed against him.'

When a perpetual injunction is granted, the Court of Chancery can and will now itself decide the amount of any damages sustained by the plaintiff by reason of the invasion of his right. (e) The value of a copyright is

(a) *Gary v. Norton*, 1 De G. & Sma. 9; but see *Millington v. Fox*, 3 M. & Cr. 338; and *Woodman v. Robinson*, 2 Sim. n. s. 211.

(b) *Soley v. Fisher*, 11 Sim. 583.

(c) *Gilliver v. Snaggs*, 4 Vin. Abr. 279; 2 Eq. Ca. Abr. 522.

(d) 5 Ves. 21.

(e) *Tinsley v. Lucy*, 11 W. R. 878.

per se immaterial in the view of a court of equity upon an application to it against an infringement. (a)

It must be borne in mind that no action, or suit, or summary proceeding in respect of any infringement of the copyright of a book published since July 1, 1842, is maintainable before the entry of the book in the registry at Stationers' Hall. (b)

23. Infringement of the right by importation.

23. Inasmuch as the copyright of a book may be injuriously affected by the introduction into this country of copies printed abroad, statutory provisions have been framed to counteract that mischief.

The evil was not met, however, in any way until the passing of an Act 12 Geo. 2, c. 36. That Act expired and similar provisions were then introduced into an Act 34 Geo. 3, c. 20. The 57th section of that Act provided that it should not be lawful for any person to import here any book first published in this country and reprinted abroad, and that if any person should so do, or should knowingly sell, publish, expose to sale, or have in his possession for sale any such book, the book might be seized by any customs or excise officer; the offender was also to forfeit 10*l.* and double the value of every copy imported. The enactment was, however, qualified with a proviso that it should not extend to any book that had not been printed or reprinted in this kingdom within twenty years before the importation, nor to any book reprinted abroad and inserted among other books or tracts to be sold therewith in any collection where the greatest part of such collection should have been first composed or written abroad.

(a) *Buxton v. James*, 5 De G. & R. Kindersley in *Murray v. Bogue*, 1 Drew, 364.  
Sm. 83.

(b) 5 & 6 Viet. c. 45, s. 24. Sir

The above enactment has never been repealed in toto, but the saving as to the importation of books not reprinted within twenty years is now abolished.

The 17th section of the Act 5 & 6 Vict. c. 45, has dealt with this subject of importation; it especially declares that no person not being the proprietor of the copyright, or some person authorised by him, may import into the British dominions, for sale or hire, any printed book first composed, or written, or printed, and published in the United Kingdom, wherein there shall be copyright, and reprinted out of the British dominions. And if any person not being such proprietor, or person authorised as aforesaid, shall so import, or shall knowingly sell, publish, or expose to sale, or let to hire, or have in his possession for sale or hire any such book, then every such book shall be forfeited, and seized, and destroyed by any officer of customs or excise, and every person so offending, being duly convicted thereof before the justices of the peace for the county or place in which such book shall be found, shall also, for every such offence, forfeit 10*l.* and double the value of every copy of such book so imported, &c., 5*l.* to the use of such officer, and the remainder of the penalty to the use of the proprietor of the copyright in such book. (*a*)

The 15th section of the Act of Victoria, already referred to, has provisions as to the importation of books piratically printed in this country.

By a later Act in the same session further provision was made to prevent the importation of piratical works. The Act 5 & 6 Vict. c. 47 [after reciting ‘that by a

(*a*) As to separate penalties upon each separate violation of the Act on the same day, see 12 George 2, c. 36; and *Brooks v. Middleton* 3 T. R. 509.

previous Act of Will. 4, books first composed, or written, or printed in the United Kingdom, and printed or reprinted in any other country, and imported for sale (except books not reprinted within the United Kingdom within twenty years, or being parts of collections, the greater parts of which had been composed or written abroad) were absolutely prohibited to be imported into the United Kingdom, and that great abuse had prevailed with respect to the introduction into this country for private use of such works so reprinted abroad, to the great injury of the authors thereof and of others'] enacted, that from and after the 1st day of April 1843, so much of the Act of William 4 as was therein recited should be repealed, and that from and after the 1st day of April 1843, all books wherein the copyright should be subsisting, first composed, or written, or printed in the United Kingdom, and printed, or reprinted, in any other country, should be, and the same were thereby, absolutely prohibited to be imported into the United Kingdom, provided that no such book should be prohibited to be imported unless the proprietor of such copyright, or his agent, should give notice in writing to the Commissioners of Customs that such copyright subsisted, and in such notice should state when such copyright should expire, and the said Commissioners should cause to be made and to be publicly exposed at the several ports of the United Kingdom from time to time printed lists of the works respecting which such notice should have been duly given, and of which such copyright should not have expired.

The Act 5 & 6 Vict. c. 47, has been repealed, but under

an Act 16 & 17 Vict. c. 107, the provision still subsists (a) and extends to importation into the British possessions abroad.

In regard to a British colony, however, if the Government of a colony provides, in a manner sufficient in the opinion of Her Majesty, for the protection within that colony of British authors, Her Majesty may, by Order in Council, declare that so long as such protection shall subsist any statutory prohibitions against the importing, selling, letting out to hire, exposing for sale or hire, or possessing foreign reprints of books first composed, written, printed, or published in the United Kingdom, and entitled to copyright therein, shall be suspended so far as regards such colony. (b)

The following colonies have placed themselves within the provisions of 10 & 11 Vict. c. 95, viz.: Canada, St. Vincent, Jamaica, Mauritius, Nevis, Grenada, Newfoundland, New Brunswick, St. Lucia, St. Kitts, British Guiana, Prince Edward's Island, Barbadoes, Bermuda, the Bahamas, Cape of Good Hope, Nova Scotia, Antigua, and Natal.

24. Forfeiture to the registered proprietor of a copyright book (duly entered) of all copies unlawfully printed or imported, without his consent in writing, is another check imposed by the Act 5 & 6 Vict. c. 45, s. 23; on piracy, and on the importation of foreign reprints, the proprietor may, after demand thereof in writing, sue for and recover the same, or damages for the detention thereof, in an action of detinue against

24. Forfeiture of piratical work to proprietor of copyright.

(a) See also 18 & 19 Vict. c. 96, s. 40. has not escaped strictures. See 6 Jurist, pt. II. p. 45.

(b) The Act 10 & 11 Vict. c. 95,



any party who shall detain the same; or he may sue for and recover damages for the conversion thereof in an action of trover. (a) The latter part of this provision is now in copyright legislation.

Sir *James Wigram*, V.C. in the year 1843, considered that at all events since the decision in *Donaldson v. Beckett* there has been no common law right in the author or proprietor of a pirated work to the possession of the piratical copies. He thought that there would be great difficulty in applying to the subject the principles of the common law; which in certain cases gives to the owners of an original material the right of seizing it in whatever shape it may be found, if he can prove it to be his own, or which relate to what is termed confusion of goods. 'It might be true,' he said, 'that if one writes or prints upon the paper of another, the writing or printing becomes his to whom the paper belongs; but it does not necessarily follow that the converse of that proposition would be true, that one who writes or prints upon his own paper the composition of another has thereby so mixed his property with the property of the author whose work he has copied, that he has lost his original title to the material which he has so employed. (b)

The 23rd section gives to a registered proprietor a right in a court of equity to an account only of the gains and profits made by an infringement of his copyright. (c)

As to the form of the order for the delivery up of pirated copies of a book, Sir *W. P. Wood*, V.C. observed in *Delfe v. Delamotte*, (d) that the old form ran thus:

(a) 5 & 6 Vict. c. 45, s. 23.

(b) *Colburn v. Sims*, 2 Hare, 554.

(c) *Delfe v. Delamotte*, 3 Kn. &

Jo. 581.

(d) *Ibid.*

‘that the defendants deliver up such copies to be destroyed;’ but the order he then made was ‘order the defendants to deliver to the plaintiff all copies of, &c.’ omitting ‘to be destroyed.’ (a)

The Act 54 Geo. 3, c. 156, which was repealed by the Act 5 & 6 Vict. c. 45, contained a provision somewhat similar to the 23rd section of the latter Act. The 4th section of the Act of Geo. 3 ran thus: ‘If any bookseller or printer, or other person whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the Isle of Man, Jersey or Guernsey, or in any other part of the British dominions shall, from and after the passing of this Act, within the terms and times granted and limited by this Act as aforesaid, print, reprint, or import, or shall cause to be printed, reprinted, or imported, any such book or books, without the consent of the author or authors, or other proprietor or proprietors of the copyright of and in such book or books, first had and obtained in writing, or knowing the same to be so printed, reprinted, or imported, without the consent of the author or authors, or other proprietor or proprietors, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, or shall have in his or their possession for sale any such book or books, without such consent first had and obtained as aforesaid, then such offender shall be liable to a special action on the case, at the suit of the author or authors, or other proprietor or proprietors of the copyright of such book or books so unlawfully printed, reprinted, or imported, or published, or exposed to sale,

(a) See *Mayall v. Higby*, 1 H. & C. 148, which, however, involved no question of copyright law, but was simply an action for the wrongful use of a published photograph lent for engraving only.

or being in the possession of such offender or offenders as aforesaid, for sale as aforesaid, contrary to the true intent and meaning of this Act. . . . And all and every such offender and offenders shall also forfeit such book or books, and all and every sheet being part of such book or books, and shall deliver the same to the author or authors, or other proprietor or proprietors of the copyright of such book or books, upon order of any Court of Record, in which any action or suit in law or equity shall be commenced or prosecuted by such author or authors, or other proprietor or proprietors, to be made on motion or petition to the said Court, and the said author or authors, or other proprietor or proprietors shall forthwith damask or make waste paper of the said book or books, and sheet or sheets, &c.' Under this section it was held in *Colburn v. Sims* (a) that where A having agreed with B to write a book, to assign the copyright to B, and not to write and publish any similar book, writes and employs C to publish a similar book, and C publishes it, C is not liable to forfeit the copies in his possession of the later book, unless the earlier was duly entered when he published.

Further, Sir *J. Wigram*, V.C. observed in that case: 'The claim which I have been called upon to consider is the right of the plaintiff to enforce the extreme penalty which the law imposes in the most aggravated case—a right which the absence of precedent shows to have been scarcely ever resorted to, and therefore not to be practically necessary for the protection of literary property.' (b)

(a) 2 Hare, 543; a suit concerning an invasion of Dr. Granville's 'Southern Spas of England.'

(b) See the reasons for the en-

actment of the penalty clauses in the Act 8 Anne, c. 19, *Aston, J.* in *Millar v. Taylor*, 4 Burr. 2350.

25. It was remarked in *Donaldson v. Beckett* by Lord Northington, (a) 'that it may be dangerous to vest an exclusive property in authors, for, as that would give them the sole right to publish, it would also give them a right to suppress, and then booksellers possessed of the works of the best of our authors might totally suppress.' This remark appears to have been thought worthy of attention by the framers of the Act 5 & 6 Vict. c. 45: reciting 'that it is expedient to provide against the suppression of books of importance to the public,' it enacts 'that 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 its author, has refused to republish, or to allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, to grant a license 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 license.' (b)

25. Abuse of the right.

26. Nothing in the Act 5 & 6 Vict. c. 45 contained affects any right subsisting at the time of the passing of that Act, except as therein expressly contained, or any previous contracts or remedies relating thereto. This is an express provision in the Act. (c)

26. Operation of Talfourd's Act as to copyrights then existing.

27. Thus far the law concerning copyright-after-publication in books generally has been considered, but the copyright in encyclopædias, periodicals, serials, reviews, and magazines has not yet been stated: that right stands in some respects on a peculiar footing.

27. The right in encyclopædias, periodicals, serials, reviews, and magazines.

(a) 2 Eden. 328.

(c) Sec. 28.

(b) Sec. 5.

The Act 5 & 6 Vict. c. 45, has specially provided, (a) that when any publisher or other person should before or on the 1st day of July 1842, have projected, conducted, and carried on, or shall after that date project, conduct, and carry on, or be the proprietor of any encyclopædia, review, periodical, magazine, or work published in a series of books or parts, or any book whatsoever, and should have employed or should employ any persons to compose the same, or any volume, parts, essays, articles, or portions thereof for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions should have been, or should thereafter be, composed under such employment, on the terms that the copyright therein should belong to such proprietor, projector, publisher, or conductor, and be paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, should be the property of such proprietor, projector, publisher, or other conductor, who should enjoy the same rights as if he were the actual author thereof, and should have the same term of copyright therein as was given to the authors of books by that Act, except only, that in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of 28 years, from the first publication thereof respectively, the right of publishing the same in a separate form should revert to the

(a) Sec. 18.

author for the remainder of the term given by that Act: provided always, that during the term of 28 years the said proprietor, projector, publisher, or conductor, should not publish any such essay, article, or portion separately or singly without the consent previously obtained of the author thereof or his assigns: provided also that nothing in that Act contained should alter or affect the right of any person who should have been or who should be so implied as aforesaid to publish any such his composition in a separate form, who by any contract express or implied might have reserved, or might thereafter reserve to himself such right; but every author reserving, retaining, or having such right, should be entitled to the copyright in such composition, when published in a separate form, according to that Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid.

Long prior to this enactment an injunction was obtained by the proprietor of a periodical to restrain the publication of articles extracted from it, and sworn to have been written by a person employed and paid by the plaintiff. As far back as the year 1814 Sir *Samuel Romilly* obtained from Lord *Eldon* an injunction to restrain the publication of translations (taken from a copyright periodical called the 'Repertory of Arts, Manufacture, and Agriculture') upon an affidavit that the originals were made by a person employed and paid by the plaintiff, and from foreign books imported by the plaintiff at considerable expense. (a)

When the owner of a weekly gazette sought to restrain the publication of an alleged piracy of his work,

(a) *Wyatt v. Barnard*, 3 V. & in *Barfield v. Nicholson*, 2 S. & S. 1. B. 77; and see Sir *J. Leach*, V.C.

Sir *L. Shadwell*, V.C.E. (a) refused to interfere, and to a certain extent based his judgment on this fact, viz. that the plaintiff had failed to show that the defendants, who were the original composers of the articles in the gazette, had been actually paid by him.

Lord *Cranworth*, V.C. also considered in *Richardson v. Gilbert* (b) that the Act of Her present Majesty makes actual payment for an article in a review a condition precedent to the vesting of the copyright therein in the proprietors of the work, though he thought that the title of the plaintiffs, the proprietors in that case, did sufficiently appear upon the bill, inasmuch as it was alleged therein, first, that the article was composed for the plaintiffs by a person employed by them to compose the same on the terms that the copyright therein should belong to the plaintiffs, and should be paid for by them (which was an advance towards a good title), and afterwards that the plaintiffs were then entitled to the exclusive property and copyright in the article, which, regard being had to the first averment, implied that the plaintiffs had paid the composer for the article.

If such actual payment be a condition precedent to the vesting of copyright in an article contributed to a daily paper, this construction of the Act may obviously lead to inconvenient results in the business of every-day literary life.

Within the meaning of the Act 5 & 6 Vict. c. 45, (c) a person may be the proprietor of the copyright in the separate publication of parts of a periodical simply by reason of his employment of the writers. This was

(a) *Brown v. Cooke*, 11 Jur. 77.      (c) Sec. 18.

(b) 1 Sim. n. s. 336.

decided in *Sweet v. Benning*. (a) There the plaintiffs, the registered proprietors of a periodical, had employed persons to report in their work certain legal decisions; the names of the persons so employed appeared in the periodical, and the arrangement between them and the plaintiffs was verbal; it was to the effect that they (the reporters) should furnish to the plaintiffs for publication in the periodical reports of such cases as they (the reporters) thought proper upon the terms of being paid so much per printed sheet; there was no reservation by the reporters of any personal right of publication or copyright, nor was it expressed between the parties that the copyright should belong to the plaintiffs; in fact, nothing passed between them on the subject. The circumstances of *Sweet v. Benning*, in the opinion of the judges who decided it, implied an understanding between the plaintiffs and the reporters that the former should acquire a copyright in the reports. Sir *John Jervis*, C.J. remarked: 'Where the proprietors of a periodical employ a gentleman to write a given article, or a series of articles or reports, expressly for the purpose of publication therein, of necessity it is implied that the copyright of the articles so expressly written for such periodical, and paid for by the proprietors and publishers thereof, shall be the property of such proprietors and publishers; otherwise it might be that the author might, the day after his article had been published by the persons for whom he contracted to write it, republish it in a separate form or in another serial, and there would be no correspondent benefit to the original publishers for the payment they had made.

(a) 16 C. B. 459; and see Sir *J.* 2 L. J. o. s. ch. 102; and *Wyatt Leach*, V.C. in *Barfield v. Nicholson*, v. *Barnard*, 3 V. & B. 77.



A Scotch suit bearing on this point may also be looked to. There a shipping list had been prepared and digested from custom-house statistics, to which the publishers of the list had sole access for publication. Lord *Deas* considered that the assistants whom they employed were not authors in the sense of 5 & 6 Vict. c. 45, s. 18, nor in any reasonable sense whatever. 'It might as well be said,' he remarked, 'that if the persons who plan and get up the Edinburgh almanack were to employ a man to make a good index to it, that person would be author of the index in the sense of the statute. There is less reason here for holding the assistants to be authors than in the case of the almanack, for there many of the assistants must often enquire after and procure information, whereas here they merely methodise and arrange matter previously the property of their employers, and which the assistants could in no event have had any right to use or appropriate.'

A publisher having acquired from an author a right to publish a treatise in a particular large and extended work, such as the 'Encyclopædia Britannica,' is not entitled to make the publication in another work not embraced in the contract, nor to publish generally beyond his license, while in truth and reality he is not publishing the treatise of that work, but is taking advantage of the license beyond its terms, and making a general publication of the treatise. (a)

In the case of the *Bishop of Hereford v. Griffin*, (b) the defendant was, on an ex-parte application of the

(a) *Stewart v. Black*, 9 Dec. in Court of Session, 2d series, p. 1026.

(b) 16 Sim. 190; and see *Mayhew*

*v. Maxwell*, 1 Jo. & H. 312; and *Murray v. Maxwell*, 3 L. T. n. s. 466 ch.

plaintiff, restrained by Sir *L. Shadwell*, V.C.E. from executing his threat to publish in a separate form an article written by the plaintiff at the request of the defendant for insertion in an encyclopædia. A motion to dissolve the injunction was refused on the ground of an uncontradicted affidavit by the plaintiff, that he had given to the defendant nothing beyond the right of publishing the article in the encyclopædia. *Napier v. Paterson*, (a) in the Scotch Court of Session, is another authority on this point. There the proprietor of a copyright in certain notes on the Bible sold the stereotype plates of a quarto edition of the notes, together with the privilege of printing from the plates; the purchaser sold the plates to another person at an auction, whereat a leaf of the book was exhibited by way of specimen; a catalogue referring to the specimen was also distributed. The Court granted an interdict against the buyer at the public sale when he proposed to publish a folio Bible with the notes and a commentary. The Lord Justice-Clerk said: 'Though I am unwilling to interfere with the publication of such a work, yet I think that we cannot do otherwise than grant this interdict. I cannot overlook the understanding conveyed by the entry in the catalogue of the sale, and the reference there made to a specimen page. From these it must have been clear to the purchaser that the thing to be produced from these plates was a quarto Bible with notes, but without a commentary. Now, the nature of stereotype plates is to multiply copies of the same work until the plates are worn out. Here the plates sold were those of a particular Bible, and to

(a) *Napier v. Paterson*, 13 Dec. of Court of Session, 2d series, p. 220 and see *post*.

show what it was that was to be thrown off from them as well as to show the state of the type, &c. a specimen leaf is shown at the sale. Stereotype plates are intended to throw off just exactly the work they were made for. Mr. Inglis asked, "May we not print the work on cheaper paper or with a larger margin?" to object to this would be a ruinous interference; but if commentaries be added to each page, thus making it a different work, and this to be sold as cheap as the original quarto, it is clear that the value of the latter will be diminished, and that not by multiplication of the same work, but by the production of a different work from these plates.'

The plaintiff's title in such cases to the protection of a court of equity is, it seems, wholly independent of copyright. (*a*)

For the breach of a contract by A to publish the literary work of B in a particular shape an action for damages will lie, as a different form of publication may be adverse to B's literary reputation. (*b*)

When a serial consists of criticisms, and extracts from copyright works to serve as a foundation for the criticisms, it might be fair enough to say that an insertion of the criticisms and extracts in separate numbers was a violation of the copyright. (*c*)

With regard to the registration of encyclopædias, reviews, magazines, periodicals, and serials, the Act 5 & 6 Vict. c. 45, s. 19, provides that the proprietor of the copyright in any encyclopædia, review, magazine, periodical work, or other work published in a series of

(*a*) *Mayhew v. Maxwell*, 1 Jo. & H. 312.

(*b*) *Planché v. Colburn*, 8 Bingh.

(*c*) *Sir T. Plumer in Whittingham v. Wooller*, 2 Swanst. 431.

books or parts, shall be entitled to all the benefits of the registration at Stationers' Hall under that Act, on entering in the book of registry the title of such encyclopædia, &c., the time of the publication of the first volume, number, or part thereof, or of the number or volume first published after the passing of that Act, in any such work which shall have been published theretofore, and the name and place of abode of the proprietor thereof, and of the publisher thereof, when such publisher shall not also be the proprietor thereof. (a)

(a) See *British Museum v. Payne*, 4 Bingham 540. The price and day of publication should be printed on periodical publications (60 Geo. 3 & 1 Geo. 4, c. 9, s. 5). As to the course to be adopted

upon the dissolution of a partnership, and the withdrawal of one partner from a periodical publication by the firm, see *Bradbury v. Dickens*, 27 Beav. 53.