THE

LAWS OF COPYRIGHT.

AN EXAMINATION OF THE PRINCIPLES WHICH SHOULD REGULATE LITERARY AND ARTISTIC PROPERTY IN ENGLAND AND OTHER COUNTRIES.

BEING THE YORKE PRIZE ESSAY OF THE UNIVERSITY OF CAMBRIDGE FOR THE YEAR 1882, REVISED AND ENLARGED.

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"O IMITATORES, SERVUM PECUS."

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TO

SIR ARCHIBALD LEVIN SMITH,

ONE OF THE JUDGES OF THE QUEEN'S BENCH DIVISION

OF

HER MAJESTY'S HIGH COURT OF JUSTICE,

This Work is Dedicated,

IN GRATITUDE FOR HIS TEACHING AND INFLUENCE,

BY HIS FORMER PUPIL,

THE AUTHOR.

PREFACE.

THE Yorke Prize of the University of Cambridge, to the establishment of which this little work owes its existence, was founded about ten years ago by Edmund Yorke, late Fellow of St. Catherine's College, Cambridge, and, under a scheme of the Court of Chancery, is given annually to that graduate of the University, of not more than seven years' standing from his first degree, who shall be the author of the best essay on some subject relating to the "Law of Property, its Principles and History in various Ages and Countries." The subject prescribed for the year 1882 by the Adjudicators (John Rigby, Esq., Q.C., and F. Vaughan Hawkins, Esq., Barristers-at-Law), was "The Law of Property in Literary Compositions, Published and Unpublished; the Principles that ought to regulate it, and how far such Principles have been acted upon in different countries." The successful essay, bearing the motto "*O imitatores, servum pecus*," forms the greater part of the following work. In preparing it for publication it was suggested to me that greater completeness would be obtained if Artistic and Musical Copyright were included in the scope of the work. To this addition the Adjudicators kindly gave their consent, and Chapters VI., VIII., IX. have accordingly been written. It is my duty to state that these parts of the work have not been seen by the Adjudicators.

Though excusing is proverbially accusing, I may be pardoned a few words on the purpose, it is hoped, that these pages may serve. They risk the danger of falling between two stools. There may be too many statutes and cases for the general reader, too much history and theory for the lawyer. I have tried to make the account of the English law an accurate, plain, and concise statement, in which authors and publishers may find the information they want as to their legal positions, while lawyers may use it both as a handbook and a guide to statutes and decisions. To the general reader, I can only offer a subject interesting both in history and in policy, and trust that the merits of the subject may pardon the faults of its treatment.

The present condition of the English Copyright Law calls loudly for codification to a Legislature unfortunately somewhat deaf to such unsensational appeals. A strong Commission presented an exhaustive report on the subject in 1878, but no Government action has yet been taken, and the bills prepared by the Law Amendment Society, and brought into the House by Mr. Hastings, have met the usual fate of the bills of private members. The appointment of the Grand Committee on Trade affords some hope that the subject may be dealt with shortly.

A commencement has indeed been made in the Codification and Revision of the Law of Copyright in Designs, by the Patents Act of 1883, which repeals six Copyright Statutes of more or less complexity. The Musical Copyright Act of 1882, however, can only be described as a legislative fiasco. The main work of legislation is yet to be done, and the diplomatic energies of the Foreign Office and the Board of Trade might well be employed in furthering the recognition of International Copyright, especially in the United States.

My original subject only required the use of foreign Codes as an illustration of the theoretical treatment of the subject, and in consequence I have not attempted any complete statement of any Copyright Codes other than those of England and the United States. A very full account of the copyright laws of foreign countries will be found in the work of Mr. Copinger, to which, together with the smaller work of Mr. Sidney Jerrold, I must express my indebtedness in connection with this branch of my subject. In dealing with the law of the United States, while I have endeavoured to refer on all points to the original sources, I must acknowledge my obligation for references to cases and many valuable discussions to the work of Mr. Drone, in my opinion by far the best book on Copyright in existence. I have also to thank the Adjudicators for their kind permission to make several alterations in the original essay, and for many valuable suggestions, which I have endeavoured to carry out. To G. W. Hastings, Esq., M.P., I am indebted for information as to the recent Copyright Bills before Parliament.

It is a commonplace of criticism that no good thing can come out of a prize essay, the 'Holy Roman Empire' of my friend Professor Bryce supplying the exception that proves the rule. I dare hardly hope that the following pages may escape this sweeping judgment.

T. E. S.

6, Pump Court, Temple,
November, 1883.

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THE LAWS OF COPYRIGHT.

CHAPTER I.

INTRODUCTION.

§ 1. Introduction.—§ 2. Method to be pursued.—§ 3. Necessity for preliminary investigation obviated.—§ 4. Absolute rights dismissed.—§ 5. Fundamental question of law of Copyright.—§ 6. What is meant by "Property in literary productions."—§ 7. Questions to be answered.

§ 1. Introduction.

"THE question of Copyright, like most questions of civil prudence, is neither black nor white, but grey" (*a*). So said Mr. Macaulay, the member for Edinburgh, in the course of the celebrated debates on the Copyright Bill brought in by Serjeant Talfourd at the beginning of the present reign, and in view of the controversial history of the subject it is a maxim specially to be remembered. For attempts to reduce to principle the laws dealing with Copyright, or the similar laws of Patents and Trade-marks, at once lead the student into what has been called "the realm of legal metaphysics," a realm as fruitful in controversy and as fruitless in proportionate results as that other realm where "ignorant armies clash by night" over the debateable fields of Phænomena and Noümena, Destiny and Free Will.

When we read of the "absolute right of the author

(*a*) Macaulay's Speeches, p. 110.

§ 1. Introduction.

to the fruit of his labour," or of that assumed "dedication to the public" which destroys the absolute right; whether by a "question-begging epithet" we find literary property condemned as a "monopoly," and hear Lord Camden exclaim "that it is unworthy great authors to traffic with a dirty bookseller for so much a sheet of letterpress" (*b*), or learn from Professor Huxley that "if there be any foundation for rights of property, the right of an author in a book is as complete and extends as far as the right of any person to any property whatever" (*c*); we have through all the storm to bear in mind that the truth is not the black or white broadly painted by these controversialists, but the humble grey which emerges as the result of long controversy.

And this "grey" on investigation will be found startling enough. We have a commission, appointed by a Conservative Government and presided over by a Conservative peer, recommending a form of legislation with regard to literary property which is denounced as the most pernicious communism when applied to land; and, while the measures of our earlier history, concerning "forestallers and regraters," and fixing the price of bread and other material necessaries, are considered as monuments of the obsolete errors of our less enlightened ancestors, we find the same commission in effect advising that the price of literary commodities should be fixed by the State. A subject which causes such divergence in controversy, and leads to such startling results, clearly deserves the most careful investigation, to be conducted on a method as purely scientific as possible.

(*b*) Parliamentary Register, Cobbett, 17, 1000.
(*c*) C. C. Ev. q. 5553.

§ 2. Method to be pursued.

Such a method would naturally commence with an investigation of the nature of property in order to ascertain whether it existed apart from protection afforded by the State, or whether protection from interference, promised and afforded by the State, constituted property. If the latter position was found correct we should further proceed to discuss the grounds on which such protection should be afforded, before applying the general principles thus obtained to the particular case of literary productions.

§ 3. Necessity for preliminary investigation obviated.

Fortunately, however, the necessity for this general preliminary investigation is obviated by the fact that practical agreement prevails amongst modern jurists as to the answer to be obtained. Though Utilitarianism is making its way rapidly in the science of Ethics, it is by no means recognised as yet by all thinking men as the true system of moral practice, still less as affording a scientific explanation of the foundations of morality. In politics, however, the Utilitarian formula is almost universally accepted, not only as the test of legislation, but also as affording a scientific foundation for the art of legislation. As Sir Henry Maine says the principle of utility may be only "a clear rule of reform" (*d*). As is contended by the Utilitarian school, it may be the ultimate reason and justification of all laws and all authority. We need not discuss whether *chronologically* it has been so; whether nations in their legislation have consciously aimed at the "greatest happiness of the greatest number," or whether their laws have unconsciously been made to express the prevalent ideas of the age as to utility. We may be content to assume, what is almost universally admitted,

(*d*) Ancient Law, p. 78.

§ 3. Necessity for preliminary investigation obviated.

that, *logically*, Utilitarianism is the groundwork of the science and art of legislation, and that therefore the justification of any particular law, the reason which justifies its enactment, is the ultimate benefit to result to the community from its conformity to such a law.

§ 4. Absolute rights dismissed.

We may further dismiss from consideration the much vexed question of "Absolute Rights" by taking for granted the position of the Austinian jurisprudence that all "rights," in the strict sense of the word, result from the command of the Sovereign, and have no existence prior to such command. As Professor Holland has well pointed out (*e*), the phrase "a right" is used in two senses: where *public opinion* would view with approval a man's carrying out his wishes either by his own acts or by influencing the acts of others, and with disapproval any attempt to interfere with his so doing, the man has been said to have a "*moral right*" to act in such a manner. Where the *power of the State* will protect him in thus carrying out his wishes, and will compel other people to so regulate their conduct that his wishes may be carried out, he has a "*legal right*" to act in accordance with his wishes. When, therefore, it is said that a man has "a right" to do any act independently of the action of the State, all that can be meant is that people generally view with approval his performing that act; and that therefore his proposed conduct is presumably in accord with the general standard of morality. It may, however, be inexpedient to confer on him definite legal protection in such action. The interference of the State in certain departments of social life may be productive of more evil than good, or the general standard of

(*e*) Jurisprudence, p. 58.

morality may differ from the standard set up by legislation. A moral right therefore does not necessarily imply a legal right, and the existence of the popular approval constituting the moral right is only of importance to the legislator because a conflict of law and popular opinion is *primâ facie* a thing to be avoided. § 4. Absolute rights dismissed.

In taking this view of the matter we naturally reject the opposite theory as to absolute rights, founded on the Law of Nature and on justice, and in no way determined by considerations of utility.

Since then no legal rights exist apart from the commands of the Sovereign, and the Sovereign in granting rights is guided by considerations as to the benefits resulting to the community from his proposed grant, the *Fundamental Question of the Copyright Laws* is :— § 5. Fundamental question of Law of Copyright.

Is it desirable in the interests of the community that the State should create and protect property in literary productions or the results of intellectual labour?

And before answering this we are led to consider the meaning of the phrase "Property in literary productions." "Property" is defined by Austin as "the right to use or deal with some given subject in a manner or to an extent which, though not unlimited, is indefinite" (*f*). Such property is created by the State when it orders all persons to abstain from so acting as to interfere with certain uses of the thing by the person invested with the right. § 6. What is meant by "Property in literary productions."

This right being indefinite, cannot be exactly defined. It may be said to be a right to do what one likes with a thing subject to restrictions imposed by the State,

(*f*) Austin, i. 382.

§ 6. What is meant by "Property in literary productions."

which have mainly reference to the prevention of harm to other people. It has been divided roughly into—

1. The right to use.
2. The right to prevent others from using.
3. The right to destroy.
4. The right to alienate during life.
5. The right to alienate at death.

The State however in conferring protection may not confer all of these.

The creation of literary property is asked in the following way. It is found that literary compositions have or may have an exchange-value. People are willing to give money to listen to a lecture, or to obtain a copy of a book. There is in short a demand for literary labour, and this pecuniary demand is one of the motives which lead to literary supply. When an author has written a work, unless the State intervenes, his manuscript may be stolen and copies sold to the public by the thief. The return for the author's intellectual labour thus is obtained by the thief and not by the author; or when the author has communicated his work to the public others may reproduce his work by mechanical means, and so may intercept part of the effective pecuniary demand which otherwise would have come to him to be satisfied.

An author therefore asks that the State should protect him by creating literary property. He asks that the State should prevent others from multiplying copies of his work and communicating them to the public without his permission. He asks that such unauthorized communication be restrained, whether it be the communication of the whole or of a part of his work; as either professedly his or under a disguise; in its

original form, or abridged, or translated into other languages, or made by other channels than those by which his communication has been made.

§ 6. What is meant by "Property in literary productions."

This being the nature of the literary property which the State is asked to create, the questions to be dealt with in the first part of this essay are:—

§ 7. Questions to be answered.

I. *Shall the results of literary labour be protected at all? Shall the ideal "Corpus Juris" contain a Law of Copyright?*

II. *If so, what shall be the nature and limits of this protection: what shall be the provisions of the ideal Copyright Law?*

To the discussion of the first of these questions we now proceed.

CHAPTER II.

THE FUNDAMENTAL QUESTION OF THE COPYRIGHT LAWS.

§ 8. Interests of the State in literary property.—§ 9. How they may be secured.—§ 10. Direct results of the absence of State protection.—§ 11. Indirect results of the absence of State protection.—§ 12. Evidence of Spencer and Huxley.—§ 13. Evidence from the United States.—§ 14. Will Copyright produce cheap books?—§ 15. The Royalty system.—§ 16. International Copyright.

§ 8. Interests of the State in literary property.

WITH respect to literary productions, the interests of the State are:—

1. To obtain *good* literary work.

2. To obtain it at as *small a cost* to the community as possible.

The interest of *authors* is to obtain as large a return for their work as possible, both in reputation and in money.

The interest of *publishers* is to obtain as much security as possible for the capital they invest in supplying the public demand for literary productions.

And generally it is to the interest of the community to secure these ends *without legislative interference.*

§ 9. How they may be secured.

The interests of the State have been said to be two:—I. *Good* books: II. *Cheap* books. The best books will be secured if the best men can be induced to write them. So long as there is an efficient demand for good books, there will be in the long run a sufficient supply of them; but the demand, to be efficient, must furnish authors with the rewards for writing which they desire. And these

rewards—setting apart the case of those authors of genius "who write because they must"—are fame and money.

§ 9. How they may be secured.

It is perhaps unnecessary to prove that the State cannot make legislative provision for securing fame to an author, except in the very indirect way of providing that inferior works shall not be sold under the false pretence that they are his. But can the State secure that an author or his assigns shall secure his due return in money? And clearly it cannot secure this, in the sense of a return proportionate to the merits of his work. It can, however, secure to the author or his assigns the return that the community feel disposed to give for the privilege of reading or obtaining copies of his work.

The community *can* do so; whether it *should* do so depends on the question whether without such security the best works will be produced, or whether the inducement offered, even if no such protection be afforded, will be a sufficient attraction to lead qualified men to become authors.

§ 10. Direct results of absence of State protection.

If no such security is afforded, the author of a literary work will be in this position. Suppose his work a success; it will be open to anyone to mechanically and literally reproduce it, and to sell the copies thus reproduced at a lower price than the original, inasmuch as the cost of production of the copy does not include remuneration to the author. That portion of the price, which on the sale of the original edition goes to the author, on sale of the copied edition will either remain in the pockets of the public, who thus directly benefit, or will go into the pockets of the copier, who reaps a larger profit than the ordinary one. Competition among rival copyists, however, must reduce this larger profit, and leave as the final direct result that, in the case of successful works, the

§ 10. Direct results of absence of State protection.

author will only obtain a part of the total public demand, while the community will secure successful works at a price which omits remuneration to the author.

§ 11. Indirect results of absence of State protection.

But the indirect results of this have also to be considered. Very few authors supply all the capital to publish their works; this is furnished by the publisher, whose business it is to estimate the chances of success of the works submitted to him, and to invest his capital accordingly. In this business there are great risks, and there must be corresponding remuneration. But the effect of the absence of State protection will be that, in the case of unsuccessful works, the publisher will bear the full loss, and in the case of successful ones, he will not receive the full profit by which he reckons his losing ventures are to be recouped. Having thus to compete with publishers who give no remuneration to the author, he cannot afford to offer so much remuneration to authors who bring their works to him.

Authors who publish at their own risk will not secure the full return for their labour; authors who publish at the risk of another must not expect to receive any return. And this must result in lessening the supply of authors; publishers will be less willing to print the works of unknown men, and, when they print, less able to give remuneration for such work. The work produced will be naturally work for which an immediate success may be expected, in order that capital may not be too long locked up, exposed to the risks of piracy, and such work must be of an ephemeral nature. The time and labour necessary to produce great works of thought could not be given, except by the favoured few, and their social surroundings are not favourable for profound labour. Man must eat to live, and most men must earn to eat. If eating will

not follow from writing, the writing must in many cases be left undone, or done as subsidiary to other employment, which drains energy and vigour from the writer, but which wins him bread.

§ 11. Indirect results of absence of State protection.

No doubt, in answer to all this, we hear that the thought of sordid gain does not influence a noble mind. Lord Camden reminds us that Milton did not refuse to publish 'Paradise Lost' because he was only offered five pounds for it. "He knew that the price of his work was immortality, and that posterity would pay it." But "where are the tablets of the lost?" Where are the great works that might have been produced if the great minds that could have written them had not been forced to spend precious hours in uncongenial tasks, in the drudgery of earning a livelihood? With some born authors, hope and the sacred fire may overcome the difficulties of the world, but with how many others is the ending in Chatterton's garret?

§ 12. Evidence of Spencer and Huxley.

Very few thoughtful men will deny that a great loss would have been suffered by English and European thought, had Mr. Herbert Spencer's philosophical works remained unwritten. Yet his evidence before the Copyright Commission (*a*), which gives a full financial history of their productions, shews that without State protection they could never have seen the light. And with regard to works on physical science, Mr. Huxley's evidence is to the same effect. He says: "My impression is that a considerable diminution in the term of copyright" (much more therefore its total abolition) "would be altogether fatal to the production of works requiring time and research, and perhaps costly illustrations." (*b*)

(*a*) C. C. Ev. pp. 257, 281.
(*b*) C. C. Ev. q. 5603.

§ 13. Evidence from the United States.

We should expect then, from theoretical considerations, that absence of State protection to authors would materially lessen the supply of the best books, by putting obstacles in the way of the production of the most permanent and valuable classes of literature. And experience points to the same result. It is true that there is no civilized country which does not recognise literary property, in which we can study the effects of entire absence of protection. On the contrary, it forms a strong argument for the necessity of protection, that all civilized countries, with the doubtful exception of some of the South American republics, have recognised literary property, and that the tendency of legislation in these countries during this century has been rather to extend than to diminish this protection.

But in the case of the *United States* we obtain an actual experience which serves the same purpose. While recognising National, the United States do not recognise International, Copyright. The works of English authors are reprinted by American publishers without the necessity of paying anything to their authors; and as a consequence they compete on the most favourable terms with native American works, with, according to the most competent observers, two-fold results. In the first place, this competition has the direct effect of cramping and depressing purely American literature. Publishers cannot afford to give large remuneration to authors, and need very great inducements to lead them to bring out works by unknown men; the supply of authors is therefore restricted, and many of the best men seek success in other professions. In the second place, the leading publishers have practically adopted a species of "social or moral copyright," as distinguished from strict copyright granted by the State. They abstain from printing English

works first reprinted by any other house, and thus have recognised the advantages to themselves, and ultimately to the public, of a system which recognises literary property. § 13. Evidence from the United States.

It is therefore to the interests of the community to protect literary property, that one of the public wants, a supply of the best literature, may be satisfied. Whether the other requisite, cheap literature, can be obtained by State regulation, is a matter of more difficulty. § 14. Will Copyright produce cheap books?

It may be accepted as a truism that where there is free competition, the price of the article supplied will in the long run be that at which it can be produced, together with the ordinary profit to the producer, and that State interference in fixing prices is, as a rule, worse than useless. Where there is not free competition or free bargaining, circumstances are altered, as in the case where from the nature of the article only one person can supply it, and he is therefore enabled to fix his price at the point where people say: "I will give so much for this, and no more." In the sale of books the author has such a "monopoly," and we have seen that the monopoly is desirable in the interests of the community. But it is also suggested that the community would defeat its own end, if after securing good literature by State protection, it allowed that literature to be rendered by high prices inaccessible to the people. This is a possible danger, indeed, but it does not seem in advanced communities a very practical one. For although there is no competition in the supply of any particular book, there is competition in the supply of works of a particular class; novels vie with novels; poetry competes with poetry for the favour of the public who read. There are very few books of sufficient importance to be bought at a high price, when

§ 14. Will Copyright produce cheap books?

other and similar works are offered for a much smaller sum. It is the interest of the author and publisher to publish their work at the price at which they can obtain the greatest return, and as a rule the lower the price is fixed the larger will be the sale. It follows from all this; that it is to the interest of the author and publisher to bring out editions at a price suitable to the mass of the reading community within a reasonable time of first publication; and so long as this is so, the State need not undertake the very difficult and unsatisfactory task of fixing the price at which tradesmen shall sell.

§ 15. Royalty system.

But besides direct regulation of prices by the State, a further suggestion has been made. It is proposed that, if after a reasonable time the author has not published a supply of his book at a reasonable price, it shall be open to any person to reprint the work on paying a *Royalty* to its author. By this plan it is contended that the public will obtain their books more cheaply, and the author will not be deprived of his fair remuneration. And this system in effect has been recommended for adoption in Colonial Copyright by the late Royal Commission. It is, of course, open to great objection on the ground of the difficulty of State decision as to what is a reasonable price, and as a general rule this is, I think, a sufficient argument against its adoption. But there are cases, notably the cases of International Copyright, and of Copyright in countries whose social organization is in its infancy, where its adoption with certain modifications seems desirable.

The consideration of these excepted cases will naturally come later, and we may content ourselves here with saying that the second end to be gained by the community, cheap books, should as a rule be attained by the

unfettered action of the author and publisher, their interest here being practically identical with that of the community; but that there are cases, depending on the varying circumstances of each community, where, if the author does not provide, within a reasonable time, a supply of his work at a reasonable price, other arrangements to procure that supply may fairly be sanctioned, provided that capital invested by the publisher is not unreasonably attacked, and that, except in special cases, due remuneration is secured to the author. § 15. Royalty system.

Before proceeding to the details of the ideal Law of Copyright, a few words may be said on the principle of *International Copyright*. The early history of Copyright law shews that it originally included the idea of protection of native industry. The doctrines of free trade, however, appear as applicable to intellectual as to physical commerce. It is to the interest of the community to secure the best foreign as well as the best native literature, and not only to secure it for themselves, but to encourage its further production by securing due remuneration for its authors. Foreign works reprinted without payment to their producers tend, by their competition, injuriously to affect the position of authors at home. § 16. International Copyright.

No reason therefore exists why the State should make a distinction between native and foreign literature, provided only that foreign authors make arrangements within a reasonable time of first publication for communicating their works to other countries. If they fail to do so, republication in those countries by others should clearly be allowed, the author under certain circumstances being secured his royalty. The community want good books as soon and as cheap as possible, and if no steps are

§ 16. International Copyright.

taken by the author to provide them with such a supply within a reasonable time, there is nothing unreasonable in allowing others to make provision for their wants.

For it is not here, as in the case of national or home Copyright, specially the interest of the author and publisher to supply the public of other countries at a price at which they will buy; an author may well be contented with the market of his own country without embarking on speculations in markets abroad, where he is probably ignorant both of the tastes of the reading public and of the best ways of creating demand. It is nevertheless desirable that he should be encouraged to himself republish abroad instead of simply waiting to receive a royalty on republication by others, and this end might be attained if the royalty were fixed at a lower figure than the author's ordinary profit on direct republication. For, in the first place, the author's quasi-parental fondness for his literary child is likely to secure that a work whose production he supervises will be produced in the most suitable way; and secondly, the increased remuneration for personal supply will tend to bring foreign works before the home public sooner than would otherwise be the case.

The foreign author, therefore, should be allowed a reasonable time during which to communicate his work to the home public in a suitable way, and during that time he should be protected from unauthorized reproduction in the country offering him protection. Should he make a suitable communication of his work, the protection should be continued; should he fail to do so, others should be allowed, on payment, as a rule, of a small royalty, to reproduce his work in that country, and, if they published a suitable reproduction, should be protected from competition therein.

§ 16. International Copyright.

The foreign author would thus obtain part of the benefit of a demand from other countries for his work, a privilege which could not but tend to encourage literary production and literary commerce all the world over.

The question of whether these privileges should be conferred on foreign literature absolutely, or as a return for reciprocal concessions made by foreign States, is one rather of policy than of principle. If, however, no concessions should be obtainable from foreign States, it seems that the ideal community should still grant copyright to the works of foreign authors. By doing so it will secure a better supply of foreign literature than if the reproduction of works produced abroad were open to everyone, without any regard to the claims of their authors, in which case only the more immediately popular and ephemeral works would be produced, as being works in which the capital invested was least exposed to the risks arising from unrestricted competition.

The question of *Colonial Copyright* is one raised by the peculiar circumstances of the British Empire, and does not demand separate treatment here.

We are thus brought to the consideration in detail of the principles on which the Law of Literary Copyright should be based.

CHAPTER III.

THE PRINCIPLES ON WHICH THE LAW OF COPYRIGHT SHOULD BE BASED.

SECTION I.

What should be protected?

§ 17. What should be protected by the State?

The results of a man's intellectual labour as put into form by him, whether communicated to the public, either by writing or orally, or not, unless either expressly or impliedly he waives protection.

"*As put into form by him*": the State cannot protect ideas unembodied in some set or permanent form. The impossibility of State interference in such details of life as conversations or discussions far outweighs any possible advantage of encouraging men to think over topics. Putting into form must be a condition precedent to protection.

"*Whether or not communicated to the public*": an author may so deal with his work that every member of the public may obtain a copy either gratuitously or by purchase. He may on the other hand only communicate it to a limited circle, or he may wish to make no communication at all to the public. One who has communicated his work to the public should clearly be

§ 17. What should be protected by the State?

protected, the sole object of State protection being to make it worth while for authors to make such a communication. If however he restricts or prohibits the circulation of his work the case is a little different.

§ 18. Unpublished works.

Is the State to prevent others who may obtain a copy of an unpublished work from publishing it contrary to the wish of the author?

Though it is the aim of the State to obtain good literature, the objections to compelling authors to publish are too manifold to need explanation. I say nothing of the evils attending unauthorized publication of private letters, diaries, and memoirs, which the author has not written with a view to publication. Even in the case of works the publication of which would be a public boon, the impossibility of drawing the line where unauthorized publication shall first be allowed, renders manifest the necessity of leaving the question of publication to the initiation of the author. He knows his work best, and, as a class, men who write do not suffer from such overbashfulness in communicating their works to the public, that a friendly theft should be needed to bring them to light.

Both published and unpublished literary works therefore should be protected by the State from unauthorized reproduction.

§ 19. Lectures. Plays.

"*Communicated either by writing or orally.*" The result of intellectual labour may reach the public through various channels; it may be printed for the eye, or spoken to the ear. And the question here is whether the protection granted to printed works should also be extended to spoken lectures and dramatic performances, or shall a hearer be allowed to go away and in his

turn communicate to the public either by printing or speaking what he has heard. § 19. Lectures. Plays.

For the answer to this question we must turn to the fundamental reasons for protection of literary work. Is it to the interest of the State to secure good lectures and good plays, and is the protection suggested necessary to obtain them? And first, without going into a long disquisition on the educational and other effects of the Stage, it may be said that the State is not so much interested in lectures and plays as in books. It has this interest however in the Stage, that the plays performed thereon shall be good, and, while this cannot be directly secured, yet, by affording protection to the labour of men who write for the Stage, the State may encourage a better class of authors to devote their time to the production of dramatic works. Oral communications made from the Stage should therefore be protected from unauthorized reproduction.

Similarly with regard to lectures, the personal element in a lecture is attractive enough to give a good lecturer considerable influence, and a better class of work is likely to be produced if the lecturer can look forward to further communication of his work to the public in printed or oral form, without being exposed to unauthorized competition. Mr. Huxley, and any community might wish to secure lectures from men of his stamp, says (*a*):—"If I announce myself as ready to give a lecture to-morrow to which persons may be admitted at a certain fee, I make a contract with the persons who come that in consideration of their paying so much they shall hear me speak for an hour, and that is all. I do not sell my right to print and sell the lecture." Without dwelling on the rather strained claim of right Lectures.

(*a*) C. C. Ev. q. 5571.

§ 19. Lectures. Plays.

made by the speaker, we may admit with him that a lecturer wishing for State protection should have it; while in view of the fact that many lecturers willingly waive protection, and indeed desire further publicity, it may well be provided that such oral communications shall be taken to be unconditional, unless the author expressly limits them by reserving his sole right to reproduce. In that case his reservation of rights should be protected.

§ 20. Waiver.

The further clause of the definition as to *express or implied waiver* will cover that class of intellectual productions where no protection is sought, conversations, political speeches, and the like. Here protection would have no end to serve, and could only work harm.

§ 21. Recapitulation.

Recapitulating; a man putting into a written or oral form results of intellectual labour should acquire protection. In the case of oral communications a reservation of his rights is to be implied in the case of the drama, but must be expressed in the case of lectures. The protection on principle should extend to all oral communications, but the doctrine of waiver of rights should be freely applied.

Section II.

Nature of the Protection to be afforded.

§ 22. Nature of protection to be afforded by the State.

We have now to consider in what way these results of intellectual labour should be protected.

The object of this protection is to secure the best class of literary works to the State. This may be indirectly attained by ensuring that the price which the public is willing to pay for a book should be paid to the author

or his representatives, and not to anyone who merely makes a mechanical and unauthorized copy of the work.

§ 22. Nature of protection to be afforded by the State.

Two ways have been suggested by which this result may be attained:—1. Protection by *Monopoly;* and 2. Protection by *Royalty.*

§ 23. Monopoly system.

I. *Protection by Monopoly.*—The author and his representatives may be protected from competition in the supply of the work, so that the public can only obtain it from them. They may be secured a "monopoly" of the book.

This system obviously secures the author the full return that the public is willing to pay, and, as it is to his interest to fix the price so as to obtain the greatest total return to himself, if he fixes the price too high, by checking the demand he will defeat his own ends. Some States which adopt the monopoly principle have also included in their code a proviso for regulating the price of books and ensuring a due supply of them. For the reasons stated above (*b*), these regulations are inadvisable; and the English proviso to that effect (*c*) is practically a dead letter.

This plan appears most suited to the public needs in countries where there is sufficient literary competition to prevent the literary monopoly of any particular class of works. The monopoly of a particular work in that class is then harmless. Under it the author and publisher have security that their capital invested will not have to compete with other capital embarked in the same venture, while the interest of the author is to find the price which will induce the largest number of the public to purchase, and also yield the largest return to himself.

(*b*) See p. 13.
(*c*) 5 & 6 Vict. c. 45, § 5.

§ 24. Royalty system.

II. *Protection by Royalty* is suggested as an alternative to the monopoly system. It is proposed that it should be open to any one to reprint the author's work on payment of a certain royalty or percentage to him; and the supporters of the system urge that it would provide due remuneration to the author, while securing to the public the advantages of competition in obtaining books at the lowest cost of production.

And in countries where there is a small demand for literature, or where a literary public is in the hands of a very few producers, this system may have its advantages. In countries where there is keen trade competition, its disadvantages are obvious.

Publishing is in such countries a very risky and speculative trade, and it is a difficult matter for unknown authors to obtain a publisher willing to invest his capital in the production of their works. The difficulty would be heightened, the risks increased, if, should the work prove a success, it were open to all publishers to compete in its supply on paying a royalty to the author. The original publisher would compete with such publications under the greatest disadvantages. He would have borne the additional expense of the corrections in printing from manuscript, and must allow in his price for the risk of original speculations. Other publishers could print direct from the corrected copy, and avoid all risk by waiting for the success of the work. No prudent man could undertake works involving much expenditure of capital with the prospect of such competition awaiting him.

To meet this objection it has been proposed to afford a certain limited period of protection to the original publisher before admitting publication by royalty as a competitor. This, however, would only be a protection in the case of light and ephemeral works, and would

afford no security in the case of scientific and philosophical publications of a more expensive character. In these much capital is invested, and the return is spread over a large number of years. It is not an uncommon thing to find £20,000 invested in a large literary venture, which cannot be repaid in less than twenty years. Protection is specially desirable to encourage the production of such works as these, and it must be a protection of some length. § 24. Royalty system.

Accordingly, the only circumstances in which the royalty system may be adopted, are—

(1.) In the case of communities of backward social organization.

(2.) As is argued elsewhere, in the case of International and Colonial Copyright, under due safeguards, where it is required to furnish a suitable supply of any book to the community in places where the author's interest does not immediately lead him to do so. In civilized communities like England and the United States, with large literary supply and demand, the author's interest may be relied on to furnish a supply of his work of a suitable character.

The more detailed consideration of the protection afforded will come most advantageously under the head of "Infringements" (*d*).

Section III.

Qualities to be required in a Protected Work.

§ 25. Qualities required in a protected work.

Although the object of State protection is to produce good literature, the State clearly cannot draw a line of literary quality, and only protect those works which attain to a certain standard of excellence. The enormous difficulty of such a task condemns it; and all

(*d*) See §§ 41–53.

§ 25. Qualities required in a protected work.

therefore that the State can do is to lay down certain conditions mainly negative.

The object of protection is certainly not to promote works of an injurious character. Most systems of law therefore contain a rule, that copyright cannot be obtained by a work of an immoral, seditious, libellous, or blasphemous character.

§ 26. Immoral books.

It is doubtful however whether this precaution does not defeat its own end; for the withdrawal of protection enables many people to commit the offence, but removes the power of checking its commission from the party most interested, the author of the pirated work. If protection is given to such works, only their author can publish them, and the State can deal with their circulation at once by prosecuting him, while both he and the State can prosecute unauthorized editions. If protection is withdrawn, the State will have far more difficulty in checking the circulation of an objectionable work, and will be deprived of the aid of a helper actuated by personal and pecuniary interest. The immoral character of a work should not therefore deprive it of copyright: its immorality can safely be left to the criminal law.

§ 27. Originality.

The object of the State is to promote intellectual labour, and thus to obtain works of some value. *Originality* is therefore a necessary quality for a copyright work. The English law however does not object to the presence of old matter, if enough labour in the way of arrangement recasting and addition has been bestowed on it to make it substantially a new work. And, while no definite rule can be laid down, we may say that so far as the work is new, so far as old materials

have been combined in new ways and with new labour, to that extent State protection may be afforded. It is to the interest of the State that light should be thrown upon old literary works by explanations, annotations, and additions; and these therefore may fairly claim protection. The fact however that old material is embodied in a work containing new matter, will not give any copyright in the old material. The State already has it and need not offer inducements to reproduce it; while still it protects new and valuable additional matter from unauthorized reproduction. § 27. Originality.

And from this follows the difficult question of *New Editions*, and the amount of protection to be afforded them. § 28. New editions.

It is to the interest of the community not only that an author should produce good books, but also that he should, even after first communication to the public, revise and improve them. He may therefore fairly claim copyright in his additions and alterations, provided they are of a substantial character. But this raises a further question. Under the system of copyright limited in duration from first publication, which has been adopted in various forms by many countries, the copyright of the first edition will expire before the copyright in the author's subsequent additions and alterations has lapsed (*e*). The first and crude edition may, therefore, compete with later and more mature ones, with the advantage on its side of not having to furnish any remuneration to the author. And this is an especially practical point in the case of scientific works and

(*e*) The evidence of Mr. Murray before the Copyright Commission, with reference to Hallam's History and Lyell's Geology, shews this to be a practical question. C. C. Ev. qq. 1242–1249, 1264–1271.

§ 28. New editions.

histories, which need frequent revision. The progress of discovery alters scientific conceptions, and the increased investigations of State papers and private manuscripts throw fresh light on history. The earlier editions of such works thus become obsolete or inaccurate, and it is clearly to the disadvantage of the community that, with the advantage of a smaller cost of production, they should compete with modern and revised editions. An author who has published a new edition of his work, in which substantial improvements have been made, should therefore be able to prevent the republication of earlier editions, which should be considered as cancelled.

The State however is not so much interested in the improvement, which would be only in diction, of works of poetry and fancy: "Belles Lettres" therefore might be fairly excepted from this proviso, which should apply only to works scientific or historical, or having as their object the communication of facts.

I do not pretend to overlook the fact that all these phrases:—"Substantial improvements," "original intellectual labour," and the like, only touch the difficulty of deciding what improvement is "substantial," and what is "originality." The question will however be dealt with more fully under the head of (*f*) "Infringements of Copyright," although any definite line of distinction appears impossible.

§ 29. Newspapers.

The question of originality also arises in a case where special provisions are necessary, the case of *Newspapers*. These contain statements of facts occurring at the time, and frequently articles of a literary character. So far as the latter are concerned, they are clearly entitled to protection; the State should encourage good newspapers

(*f*) See §§ 41–53.

§ 29. Newspapers.

as much as good books, and since the interest of this class of article is not ephemeral, but has a certain degree of permanency, it will be worth the while of competing papers, in the absence of protection, to copy such articles, even some time after their original publication.

In the case of mere announcements of fact the case is different; they are usually not repeated, because they are out of date the day after publication; competing papers must not be a day behind their rivals. Yet the enterprise of papers who provide early graphic and accurate news seems to need more encouragement than the appreciation of the buying public, and the barren flattery of rival journals who copy often without acknowledgment of the source. Telegrams from war correspondents, like those of Mr. Forbes in the *Daily News* and of the *Standard* correspondent during the late Egyptian war, surely deserve protection. At least acknowledgment of the source of copied matter should be compulsory, and it does not seem unfair to require some pecuniary return from papers reproducing. Undoubtedly, however, there is great difficulty in drawing the line between the facts and the literary articles, and no very precise principles can be laid down. With magazines, the matter is of more permanent interest, and the necessity for protection more obvious.

Law of England and other countries.

The law of *England* makes no special provisions as to the parts of newspapers which may not be reproduced, though the Copyright Commission recommend (*g*) that such a distinction be drawn.

Foreign countries (*h*) very commonly allow reproduction, if the source of the article is acknowledged. Thus *Belgium* allows such reproduction unless the right has

(*g*) C. C. Rep. § 88.
(*h*) Copinger on Copyright, pp. 500–600 *passim*.

§ 29. Newspapers.

been expressly reserved by the original author, and *Norway, Sweden,* and *Denmark* adopt similar provisions. *Austria* allows reproduction from an acknowledged source, if the extract is not more than a page in length.

France protects literary articles in newspapers, if registered, but not news, though it is not clear how the dividing line is drawn.

Section IV.

Quantity to be required in a Protected Work.

§ 30. Quantity required in a protected work.

We have seen that the State should not investigate the literary merit of works, if they are original and not obnoxious to the criminal law. Should it further require a certain size or length as a condition precedent to protection? And here again it seems that, if the work is separately communicated, no other criterion of size can be insisted on. A word or a sentence by itself cannot be protected, or rather there would be no gain to the State in doing so. And this consideration appears decisive of the claim of *Titles of works* to copyright.

Book-titles.

There is no gain to the State in the invention of a good title; the gain is to the author, whose work may be sold with more readiness if denoted by a taking or original sign. And as the justification of copyright is the resulting gain to the State, if there is no need to encourage the invention of good titles there should be no copyright in them. This will not hinder the State from interfering to prevent *fraudulent* use of a title invented by another, where the result is to induce the public to buy one work under the impression that they are buying another; and this appears to be the only true ground on which titles of works can claim protection.

Briefly we can only repeat ourselves, and say that any original work of appreciable or substantial size or quantity can claim protection.

§ 30. Quantity required in a protected work.

Section V.

To whom is Protection to be afforded?

§ 31. To whom is protection to be afforded?

As it is the author whom the State encourages to produce, the author in the first place should have the benefit of protection. It is however a matter of indifference to the State whether the author capitalizes his returns by selling his copyright once for all, or waits to receive them as the public by degrees pay them. If he capitalizes, the State should help him to obtain a fair price for what he has to sell by protecting his goods, that is, by affording protection from unauthorized reproductions to his assigns. Copyright therefore should be obtained by *the author, his representatives, or assigns.*

§ 32. Commissioned works.

A question of some difficulty arises in the case of works produced by *commission* (*i*). When the *entrepreneur* of an encyclopædia, magazine, or newspaper, composed of articles by a large number of authors, sets them to work for his undertaking, giving, as it were, an order for a given article at a given price, to whom should protection be afforded? The stimulus of production is furnished by the *entrepreneur*; his commission sets the author to produce, and the hope of further employment, among other things, presumably leads the author to turn out his best work. In this case the *entrepreneur* produces, and he can certainly claim protection for, the complete work. But frequently individual articles from

(*i*) This difficulty is more felt in the case of *Artistic* Copyright.

§ 32. Commissioned works.

his collection merit reproduction in a more accessible form, and since from motives of personal interest the author is more likely to effect this reproduction than the proprietor of the original work, he should be allowed to do so, if due care is taken not to interfere with the sale of the original work. To effect this it should be provided, in the absence of any special agreement between the parties, that until a certain time has expired the consent of both author and *entrepreneur* should be required to the reproduction in a separate form of the commissioned work; after that time the author should be allowed to reproduce at his will. The time of joint consent would depend on the more or less permanent character of the complete collection; it would, for instance, be much less in the case of newspapers than of encyclopædias, which would be deprived of much of their selling value by the republication of their most important articles in a separate form.

Section VI.

Duration of Protection.

§ 33. Duration of protection.

We now have to consider for what length of time in the interests of the State this protection should be continued. And, since the object of protection is to secure the best class of literature, the *primâ facie* answer will be—so long as is necessary to secure such literature, and no longer. Further protection will benefit only the author, and at any rate will injure the community to this extent, that it will pay for a certain period more for its books than it otherwise would, the cost of production being increased by further remuneration to the author. This reasoning however is subject to modification from other considerations.

§ 33. Duration of protection. Unpublished works.

And, in the first place, it does not apply to the case of *unpublished works*; the considerations which protect them at first from unauthorized publication are valid while the author has representatives living, though their force is lessened with time. There seems no reason, however, to limit the protection afforded to them, and so long as the author or his representatives survive and do not publish, so long unauthorized publication should be forbidden.

In the case of published works we have seen that in strictness enough protection should be given to secure publication of the best class of works, and no more. But, as Bentham has pointed out, the provisions of a law should not conflict unnecessarily with popular feeling, and popular feeling in many States undoubtedly condemns any arrangement whereby an author's works become common property during his lifetime. In some countries it goes further and disapproves of any proposal which does not secure to the children of an author the benefit of his works. It is very ready to listen to arguments that any proposed term of copyright will have that effect, and is therefore wrong. Such a deprivation can of course only occur where the author has not sold his copyright once and for all. If he has done so, no lengthening of the term of copyright (*k*) beyond about thirty years from first publication will make very much difference in the price that the publisher is prepared to give, and so neither the author nor his children have really suffered from the shortness of the term. But the feeling of injustice is present, and must be reckoned with by the Legislature. For any law which weakens the popular sense of security is objectionable, and a law which destroys property where public

(*k*) C. C. Ev. qq. 310, 312, 975, 2913.

§ 33. Duration of protection.

opinion would favour its continuance has such a weakening effect. And if the community are willing to confer on authors increased privileges without any corresponding gain to the public, the Legislature can of course only give effect to their wishes.

§ 34. Problem of duration of copyright.

The problem before us then is: *What period of protection from unauthorized reproductions is sufficient, on the one hand to secure the due production of the best literary work, and on the other by satisfying the popular sense of justice, not to endanger the popular sense of security?* That some limited period is sufficient is attested by the fact that no State with a copyright law now confers protection unlimited in duration. This term of limitation we now proceed to discuss, and the two questions before us are:—

Questions.

1. *On what principle shall the term of copyright be based?*
2. *What shall be the precise duration of such term?*

§ 35. Competing principles of duration.

The two chief principles in competition are:—

I. *That there should be an equal term of protection for each work*, as in a copyright of forty-two years from first publication.

II. *That all an author's works should cease to be protected at the same time*, as in a copyright term of the author's life and thirty years from his death.

These are combined in the present English system, which provides that copyright in all an author's works shall at any rate last forty-two years from their first publication, and shall at any rate last till seven years after his death, but leaves it doubtful whether his copyrights will all expire at the same or at different times. The late Royal Commission recommend (*l*) the adoption

(*l*) C. C. R. § 40.

§ 35. Competing principles of duration.

of the second system pure and simple—a term of the life of the author and thirty years from his death. This system has already been adopted for varying terms by France, Germany, Holland, Belgium, Norway, Sweden, Denmark, Russia, Spain and Portugal. The United States, Canada (*m*) and Switzerland adopt the English system; Turkey and Greece carry out the first principle pure and simple; Mexico has perpetual copyright, and Italy adopts a curious combination of both systems, with an admixture of the royalty principle (*n*).

The first, or *Fixed-term* system, has the apparent advantage of giving an equal term of protection to each work, an arrangement easily understood; whereas in the second, or *Fixed-end* system, the earlier works obtain more protection than the later ones, an advantage which appears arbitrary. It is, however, urged against the Fixed-term system—

1. That as the copyrights under it of an author's works will expire at different times, difficulties will be put in the way of complete and uniform editions of all his works. This objection however seems of very slight importance.
2. That as the copyright of early and imperfect editions will expire before that of later and more mature ones, the author's crude work will compete at a great advantage with his more finished productions. This point would be met by the provision as to new editions suggested above (*o*).
3. That the date of publication being often uncertain, the lapse of copyright would be also uncertain, and obedience to the law would be difficult. But the force of this objection is destroyed if, as

(*m*) The U.S. and Canada, the earlier English system.
(*n*) See Table, p. 41.
(*o*) See p. 27.

§ 35. Competing principles of duration.

suggested below (*p*), a system of compulsory registration is adopted.

On the other hand, objections which have weight with popular feeling are urged against the second, or *Fixed-end* system, which terminates the copyright of all works alike at the same time. With Carlyle and Darwin in our memory, it is not unreasonable to say that works may be published when their author is seventy-five years old; Swinburne and Rossetti have shewn us that twenty-five is not an unreasonable age to fix for a writer's first work. Taking, then, the German, or proposed English, term of life and thirty years after, we see that under it, while one work of an author may have eighty years' protection, another may have only thirty, the difference being quite irrespective of the merits of the works in question. For though the earlier works of some authors are more popular than their later ones, it cannot be laid down as a rule that the earlier works of all authors have sufficiently superior merits to entitle them on that account only to such advantages. On the contrary, especially in the case of more thoughtful books, whose immediate reward is less, while their ultimate worth is more, than works of fiction or *vers de société*, the later works of a man's life are the most valuable, while on the proposed plan they are the least highly rewarded.

There are two reasons suggested by the Royal Commission in favour of this *Fixed-end* system (*q*):—

1. That its adoption will assimilate the law of literary to that of artistic copyright; and
2. That as most continental nations adopt this system, its adoption by England would facilitate international conventions.

Both these arguments are of course only of force in con-

(*p*) See § 56.
(*q*) C. C. R. § 33.

nection with the present or proposed English system. Its true justification seems to be that the adoption of such a term, while satisfying popular justice by extending the copyright of all books alike to the term thought right by any community, yet protects the State by destroying all monopolies alike at the earliest period consistent with that popular feeling. On any other system the copyright in many of the works must either exist beyond this time, to the injury of the State; or expire before it, thus creating popular feeling against the law.

§ 35. Competing principles of duration.

For the considerations set out above come in here. The general principles which are to guide us are that:—

§ 36. Result.

1. A minimum term of protection should be ensured for each work sufficient to induce its author to publish, that is sufficient to enable him to reap a fair reward during the protected period, if there is a fair demand on the part of the public.
2. No work should cease to be protected at such a time as to create a popular sense of injustice.

But as this "minimum term" and "popular feeling" will vary with the different conditions of every community, having stated the general principles we can go no further, except in illustrating them by application to particular communities as, for instance, England.

§ 37. What should be the term of duration in England?

In England then we find, according to the evidence of Mr. Herbert Spencer and others before the Royal Commission, a term of about forty years' protection is necessary in order to make it possible to publish thoughtful and philosophical works, but that such a length of term is sufficient as an inducement to production (*r*). Indeed publishers will not give an appreciably higher price for a copyright for forty-two years than for one for twenty-eight years.

(*r*) C. C. Ev. qq. 310, 312, 975, 2913.

§ 37. What should be the term of duration in England?

On the second point we find that popular sentiment views with dislike the idea of an author's work becoming common property in his lifetime, and with some disfavour the idea of his children losing the benefit of it.

The term recommended by the Commission for adoption, the author's life and thirty years after, has the advantages of affording at least thirty years' protection to every work, and of continuing the protection for, roughly, a generation from the author's death. Its disadvantage is the arbitrary amounts of protection afforded to different works, ranging from thirty to eighty years, according as they are late or early works of their author.

On the other hand a term of protection, the same for each book, must either run contrary to popular opinion by making some books common property during the life of their author, or give to each work a term of protection far longer than is necessary to secure production. It would have the advantage, on account of its apparent fairness to each book, of being easily intelligible.

The system recommended by the Commission seems to attain the desired ends at the least cost to the State, and is therefore the system which should be adopted for England. Duration of copyright for other countries must depend on their varying national conditions and opinions; it must be such as to encourage solid and valuable works as well as popular and light literature; subject to these conditions it should be determined on the principles suggested above.

§ 38. Two-Term Copyright.

A further modification of the term of copyright deserves attention, as having been adopted in the United States and in the early English statutes, and discussed, though rejected, by the Copyright Commission. It is what may be called the *Two-term copyright*

§ 38. Two-Term Copyright.

system. In England under the Statute of Anne the term of copyright was fourteen years, with a further fourteen years if the author was still living; and in the United States the term is twenty-eight years, with an extension of fourteen years to the author and his family on re-registration of the work.

The alleged advantages of this system are as follows: It is found by experience (*s*) that a publisher will not give appreciably more for a copyright of forty-two than of twenty-eight years; the value of the book so far ahead does not enter into his calculations. If, then, the author can only sell a copyright of twenty-eight years he will suffer no immediate loss, while if his book becomes famous and popular, when the second term of copyright reverts to him he can reap further fruits of his labour by a fresh sale of his copyright in which the benefit of his popularity will be felt: otherwise, as at present, he obtains all his remuneration from a sale made when the success of the book is a speculation and the author often unknown.

There are however considerations which rob this suggestion of much of its force. And in the first place it is only applicable to the case of authors who sell their copyright once and for all (*t*); it will not affect those who make separate arrangements for each edition of their works. And as far as England is concerned the evidence of Mr. Longman, and the examination of Mr. (now Sir T. H.) Farrer before the Commission (*u*), shew that as regards authors who have made a name, the latter arrangement is the usual one. The suggested "double term" would therefore only apply in the case of poor and unknown authors, whose poverty prevented

(*s*) C. C. Ev. qq. 310, 312, 975, 2913.
(*t*) C. C. Rep. § 36; C. C. Ev. qq. 313–316.
(*u*) C. C. Ev. qq. 3056, 5218, 5555.

§ 38. Two-Term Copyright.

their publishing at their own risk, and whose want of reputation made undertaking their first work a commercial speculation of a very risky character. And it does not seem unfair that in such cases the publisher should have the chance of increased value to compensate him for the risks his capital runs. Publishers expend a great deal of capital in what must necessarily, with the curious fluctuations of popular taste, be speculative risks, and they are entitled to make and must make large profits on some works to compensate them for the inevitable number of failures.

And in the second place (*x*) the *Two-term* system will not be operative unless the author is forbidden to assign his second term of copyright before it vests in him. The evidence taken before the Committee of the House of Commons in 1774 on the working of the Statute of Anne, shews that this is necessary (*y*). One of the witnesses there said that he never saw or heard of any assignment of copyright in which the second term of fourteen years was reserved to the author.

In view of these considerations it does not seem desirable to introduce into the Law of Copyright the modification known as the *Two-term* system, except possibly in countries where the custom of making separate arrangements for each edition of a work does not prevail.

§ 39. Recapitulation.

In recapitulation, then, we have seen that the general principles on which the term of copyright should be fixed for any country are two; that it be at least so long as to induce the production of the best and most permanent class of literary work, and that it do not expire at such a time as to cause a popular sense of injustice to the author. The result of the application

(*x*) C. C. R. § 36.
(*y*) Cobbett, Parl. Reg. 17, 1086.

of these principles will vary in every country with different national conditions; and for convenience of reference a table of the actual terms adopted by various countries is subjoined. § 39. Recapitulation.

Terms of Copyright in Various Countries. § 40. Terms of Copyright in various countries.

System.	Country.	Term.
I. No limits . .	Mexico . . .	Perpetual.
	(formerly) England, France, Holland.	
II. *a. Fixed term* for each work.	Greece . . .	15 years from publication.
	Turkey . . .	40 „ „
b. Two-Term system.	United States .	28 years, second term of 14.
	Canada . . .	
	Japan . . .	30 „ „ „ 15.
	(formerly) England.	
III. *Fixed End*; all copyrights expire at same time.	Chili	Life of author + 5 years.
	Brazil . . .	„ „ +10 „
	Venezuela . .	„ „ +14 „
	Holland . . .	„ „ +20 „
	Germany . . .	„ „ +30 „
	Austria . . .	
	Portugal . . .	
	France . . .	„ „ +50 „
	Belgium . . .	
	Norway . . .	
	Sweden . . .	
	Denmark . . .	
	Russia . . .	
	Spain	Life of *owner* of copyright + 80 years.
IV. Combination .	England . . .	42 years, or life + 7 years, whichever is longer.
	Switzerland . .	30 years, or life of author, whichever is longer.
V. Peculiar . .	Italy . . .	1. A term of Monopoly Copyright for 40 years, or the life of the author, whichever is longer. 2. On its expiration, a further term of Royalty Copyright for 40 years.

Section VII.

§ 41. *Infringements of Copyright calling for Protection.*

Classes of infringements.

The general type of copyright law for advanced communities is, as we have seen, the Monopoly system, in which the author and his assigns, having the sole right of supplying the community with copies of the protected work, are protected by the State from all unauthorized reproductions thereof. We have now to consider what literary productions the State will hold to be reproductions of an author's work, and therefore infringements of his copyright.

They may be divided into four classes, (all of course only referring to reproductions during the term of protection):—

1. Open reproductions of the whole or a part of a work *simpliciter*, without extraneous matter.
2. Open reproductions of the whole or a part of a work together with other matter.
3. Disguised or altered reproductions of the whole or a part of the work, as abridgments, plagiarisms, and the like.
4. Reproductions of the whole or a part of the work through another channel than that chosen by the author, as dramatisations of novels.

§ 42. Class I. Open reproductions *simpliciter*.

1. Open reproductions of the whole or a part of the work *simpliciter*, and without extraneous matter.

Here no question can arise. Whether the reproduction is by native printing, or by the introduction of foreign reprints, it clearly tends to deprive the author of part of the return that would otherwise come to him, the ensuring of which to him is the object of State

protection. Even if the reproduction is only of a part, without additional matter, the object of the publisher or at any rate one effect of the publication must be the same. All such reproductions should therefore be treated as infringements of an actionable character.

§ 42. Class I. Open reproductions *simpliciter.*

2. Open reproductions of the whole or a part of the work in connexion with other matter.

§ 43. Class II. Open reproductions with other matter.

Here, even although a large quantity of other matter is added to the reprint, as in the case of encyclopædias or volumes of selections, the result is the same. The author is to some extent deprived of the return he might expect, and the reproduction is therefore an infringement.

The case is more difficult where only small parts of the work are reproduced, as in the case of illustrative quotations in a review or criticism, or in an argumentative refutation. The result of such reproductions frequently is to increase the sale of the author's work; they serve as advertisements and do no harm. On the other hand analysis and quotation may be carried to such a length as to supersede the original work, and this would clearly constitute an infringement. The dividing line, as in all this discussion, is difficult to draw; we can only say that any direct reproduction of the author's material which tends to supersede, or act as a substitute for, the original work is an infringement of his copyright, but that moderate quotation for the purpose of fair review or criticism is not such a reproduction.

3. Disguised or altered reproduction of a whole or part of the work.

§ 44. Class III. Disguised reproductions.

We now reach that class of infringements which presents the greatest difficulties in practice, and as each

§ 44. Class III. Disguised reproductions.

alleged infringement has usually to be dealt with by the consideration of a large number of details, it is clearly impossible to do more here than suggest the main points of importance in coming to a decision.

The immediate object of State protection is to secure that all who purchase an author's work shall during a certain period pay to that author or his assigns some remuneration. If, then, another work is published containing so much of the author's material that those who have purchased it have no necessity to purchase the original work; in other words if a work is published of such a character as to interfere with the sale of the original work, and directly indebted for that character to that work; in this case the end of State protection is defeated, and an infringement of copyright has taken place.

There are broadly two classes of works which may be plagiarised:—

1. Works, mainly of fact, compiled from sources open to all, such as directories, guide books, and works of scientific description.
2. Works of fiction and imagination where the material of the work is communicated to the public for the first time.

§ 45. Works of fact.

In the case of the first class of works, two compilations, the plan of which, as in the case of a directory, is common property, if produced from the same sources by original labour, must be almost identical. The second work must interfere to a certain extent with the sale of the first, and yet it may have been composed without its author's having even heard of the work of his predecessor. The State cannot discourage original work by regarding the second book as an infringement of a work to which it is in no way indebted. The author of the

first work can only claim protection if it appears that the second compiler has come to him, instead of seeking the original sources, and has thus availed himself of the results of the labour of another. In this case the second compiler obtains reward for what is really the work of the first; and this clearly constitutes an infringement. § 45. Works of fact.

In the case therefore of works of fact compiled from original sources open to all, a second work is only an infringement of a former work if it appears that the second compiler, instead of himself doing the work of compilation from the original sources, has made use of the copyright labours of a former author, or has appropriated from him novel features of arrangement, or the like. The English law allows the second compiler to make use of the work of the first as a signpost to the original sources, but this seems a deviation from principle. For here the second compiler, although his work is much lightened by the labours of the first, yet makes no recompense for the labour saved. No author should be allowed to produce a work competing with previous books, by making unauthorized use of the copyright labours of their authors; and this principle seems to exclude the English position.

§ 46. Works of fiction.

With regard to original works of fiction and fancy, the guiding principle is simpler, though its application is more complex.

When an author resorts to a copyright work for aid in the production of another work, if the result is that the second work competes injuriously with the original one, such resort should constitute an infringement. For the original author is deprived of profit which the public were presumably willing to pay him, and that by the competition of a work deriving part of its value from unauthorized appropriation from his own work.

§ 46. Works of fiction.

The question therefore is: Has the second author taken so much of the first work as to tend to diminish its sale by supplying a substitute-work? No definite rule can be laid down as to the amount of taking necessary to constitute an infringement; it must certainly be substantial, or enough to constitute a material part of the work from which it is taken. Where however there are only small takings but a general similarity, small takings may shew the intention to injure by appropriation. Another test of the substantial character of the matter used will be whether its appropriation affects the commercial or pecuniary value of the work from which it is taken.

The English law seems rather to lean towards the position that the point to be considered in deciding whether any reproduction is applicable or not is, not so much the proportion of the matter taken to the work from which it is taken, as its proportion to the new work of which it is made to form a part. It is said that if the second work contains such a proportion of original to borrowed matter as to constitute it, as a whole, a new and original work, it is not an infringement of copyright. It is submitted that this is wrong on principle.

For the State protects original works in order to secure good literature. It protects compilations from non-copyright sources, on account of labour expended in the compilation, though the sources remain open to all. But where the labour has been bestowed on matter already copyright, to grant protection to the result in its entirety is to protect matter which is not original, and to take away protection from matter which is. Part of the value of the work of the new author is presumably derived from the labour of his predecessor. That fresh matter has been added to the part appropriated does not alter

the fact of its appropriation without payment; and appropriation without payment defeats the end of protection. The question should not be whether "work and labour" has been bestowed on the portion appropriated, but whether a substantial portion of original and protected work has been taken without payment and without authority. § 46. Works of fiction.

These considerations seem conclusive in the case of *Abridgments*, which have sometimes by English law been held not to be infringements of copyright, on the ground that sufficient labour has been bestowed on them to create a new and valuable work. But certainly the whole value to a purchaser of an abridgment lies in the matter compressed; if this matter may be directly taken from a copyright work, the object of the State in protecting the author is thereby defeated. Abridgments should therefore be considered actionable infringements. § 47. Abridgments.

The *English* (*z*) Courts, however, have not interfered with abridgments which shew some intellectual labour, and in the *United States* the Courts (*a*), though with reluctance, have followed the English decisions, and held that a fair abridgment is not piracy.

France (*b*) more justly prohibits abridgments if they interfere with the sale of the original work, and the Courts have applied this to the sale of a much abridged version of a novel, interspersed with critical remarks. So in the kindred laws of *Norway*, *Sweden*, and *Denmark*, abridgments are treated as piracy unless they change the character of the work.

Generally as to the third class of reproductions, where any book appears to derive a substantial part of its value § 48. Recapitulation.

(*z*) See § 160.
(*a*) See § 160.
(*b*) Copinger on Copyright, pp. 500–600 *passim*.

§ 48. Recapitulation.

from matter forming a substantial part of a copyright work, and reproduced without the authority of its author, such book should, so far as the part appropriated is concerned, be considered an infringement of copyright.

§ 49. Class IV. Reproduction through other channels.

4. Reproductions, total or partial, open or disguised, of a work *through another channel* than that chosen by the author for its communication to the public.

Such reproductions occur where A. recites a copyright work written by B.; where a printed play of B.'s is performed on the stage by A.; or where a lecture delivered orally by B. is reproduced in a printed form by A. In all these cases a work is communicated to the public through a different channel from that in which the author first published.

It has been urged that the public is not so much interested in obtaining lectures, recitations, or plays, as it is in obtaining books, and that therefore to give extended protection, with a view to obtaining the production of works that may be used in such a way, is not desirable. On the other hand, the recitation of a poem or the performance of a play may satisfy a demand which would otherwise have purchased the original work, and thus the author may be deprived of part of the reward which the State intended to secure to him. But again, some recitations and readings serve to advertise the works from which they are taken, and their authors are only too glad to attain such further publicity. On the whole, it seems desirable that the matter should be left in the hands of each individual author, and that, if he wishes to reserve the right of reproducing his work through other channels, he should be required to give notice to that effect in his work if printed, or in some other sufficient way in the case of oral communications.

§ 50. Translations.

Further, the reproduction through different channels may be made in an altered form, or in conjunction with other matter. Somewhat of this nature is the case of *Translations.* The original work is transposed into a form in which it addresses itself to an entirely different class of readers. Apart from International Copyright, this question also arises in countries like the United States, where there is a mixed population, and a demand exists for English and German versions of a work. The American Courts decided (*c*) that a German translation of an English work was not an infringement of its copyright. Fortunately the Revised Copyright Statutes (*d*) altered this state of the law, which indeed seems opposed to all correct principles. For the main value of a translation is derived from the matter translated; and to translate without the authority of the author is to deprive him of part of his legitimate return, and so to defeat the end of protection. Unauthorized translations should therefore be treated as infringements of copyright.

While the law of the *United States* (*e*) is in accordance with this conclusion, it is doubtful whether the law of *England* (*f*) considers translations as infringements of copyright. *France* (*g*), however, forbids translations during the period of copyright without the consent of the author.

Germany requires that an author, to preserve his right of translation—

(1.) Should on the title-page of his work expressly reserve his right.

(*c*) *Stowe* v. *Thomas*, 2 Am Law Register, 210.
(*d*) § 4952.
(*e*) See § 161.
(*f*) See § 161.
(*g*) *Et seq.*, Copinger on Copyright, pp. 500–600.

§ 50. Translations.

(2.) Should commence his translation before the end of the year following that in which the original work appears.

(3.) Should complete his translation within five years from publication of the original work.

(4.) Should register his proceedings as to translations in a Government register.

On fulfilling these conditions, the authorized translation is protected from competition for five years.

Austria reserves the right of translation to the author for a year only.

Norway, *Sweden*, and *Denmark* make it piracy to translate without authority any work from one dialect of their languages into another, or from a dead language into a living one.

Spain very liberally grants to the owner of a foreign work the property in translations of his work, so long as he has property in the original by the laws of his own country.

Italy gives the author the sole right of translation for ten years from first publication.

§ 51. Dramatisation of novels.

The question is more difficult when portions of a copyright work are taken, original matter and arrangement are added to them, and the result is communicated to the public through a different channel from that by which the original work was produced. For instance, from a novel written by A., B. takes a certain amount of the plot and dialogue, such as his stage experience tells him will work into a good play; puts it into acting form, supplies new dialogue, and sometimes new characters, and orally represents the result in public, without the author's consent. Should this be treated as an infringement of the copyright in the novel?

If it is considered an infringement, the result will be that either certain novels will not be dramatised at all, and the demand for plays will be supplied by original work, or they will be dramatised with the consent of the author, and on such terms as he may impose. Neither of these results seem undesirable; on the contrary, there will be a benefit in the author's receiving remuneration for the use made of his work. § 51. Dramatisation of novels.

If however the State allows such reproductions, the author will not receive remuneration for value supplied, and the public will obtain a certain number of plays which otherwise might not have been produced; but—and this is a point specially pressed by authors of novels—their works may be seriously misrepresented by the versions of them produced on the stage. It must be admitted that the obvious evils attending such unauthorized reproductions are not very great.

It seems at least desirable to insist that the original author shall receive some return for the appropriation from his work, an appropriation which gives its value to the play. In France and the United States indeed the author is entirely protected from unauthorized dramatisation; and in England, though at present such dramatisations are allowed, the Copyright Commission has recommended their prohibition.

It was suggested to the Commission that this prohibition should at first only extend for a limited time; that if, during that time, the author dramatised his work or caused it to be dramatised, the protection should continue; but that if he did not, it should be open to others to make such a dramatisation. The Commission (*h*) however rejected the suggestion on the grounds of the convenience in legal uniformity, and the

(*h*) C. C. Rep. § 81.

§ 51. Dramatisation of novels.

small benefit accruing to the public from the representation of a story on the stage. These reasons seem by no means conclusive. There *is* some benefit to the public in having good novels represented on the stage, and there is also an advantage in having a dramatisation executed by stage-experts who understand the class of work required. Moreover, this seems a case where the Royalty system may be adopted without any of its characteristic evils. I should therefore suggest that, if the author fails to provide a dramatisation of his work within say, five years of first publication, it should be open to any one to do so on paying him a royalty for value received. This permission should apply to oral representation, and not to publication of the play in print; for while its representation on the stage will interfere with the circulation of the novel very slightly, if at all, the publication of the play could not but injuriously affect the demand for the original work.

Novelisation of dramas.

The case of "novelising" dramas, or turning a play into a novel, is rather different; it rarely occurs, and should, I think, be considered under any circumstances an infringement.

The Royalty system might perhaps be applied with advantage to other cases of reproduction of a work through channels other than the original one, as readings and recitations; but this must depend on the circumstances of particular countries.

§ 52. Result.

We have thus gone through the classes of unauthorized reproductions of literary work, and find the principle regulating them to be this:—

Principle of infringement.

Whenever a substantial part of an author's copyright work is reproduced without his authority, whether alone or in conjunction with new matter, whether by the same or a

different channel to the original, so as to tend to damage the sale of such original work, and thus to lessen the original author's return for his work, such reproduction is an infringement of copyright.

§ 52. Result. Principle of infringement.

The questions of "substantiality," and "tendency to injure," can only be settled by considering the details of each case. And this principle is also subject to the exceptions mentioned above in connection with reproductions through another channel, where the adoption of the Royalty system is suggested. This discussion and principle will equally apply to a code framed on the royalty system, if the offence is made, not "reproduction without authority," but reproduction "without payment of the prescribed royalty."

"Unauthorized reproduction" must cover not only printing and publishing, but also, in the case of foreign reprints, importation; and in all cases, sale or exposing for sale to the public. For unless unauthorized distribution is treated as an infringement of copyright, it will be practically impossible for the author to protect himself; he naturally does not become aware of the infringement of his copyright until the distribution of the unauthorized reproduction has commenced. The penalties for infringement by exposing for sale, however, will not be so heavy as those on the author, publisher, and printer of the piracy, and will take the form of confiscation of copies rather than of direct fine.

§ 53. Laws of foreign countries.

The law of foreign States (*i*) on the more important points has already been stated; and the legislation of England and the United States will be dealt with hereafter in detail. Foreign codes do not diverge much from the principles suggested above:—

(*i*) See Copinger on Copyright, pp. 500–600.

§ 53. Laws of foreign countries.

France forbids unauthorized reproductions "*en entier ou en partie*," and considers a servile imitation, or "*une copie servile*," of more than a quarter of a work, as piracy. It is piracy to copy the plot of a novel or the arrangement of a book, or to give to a work of similar character to the complainant's, a similar title. And the piracy is the same whatever means of communication to the public are used: "*elle est independante des moyens à l'aide desquels elle est produite*," and thus a novel may not be dramatised for the stage.

In *Germany*, piracy is "every mechanical multiplication of all or part of a work without the consent of the author." It is not however piracy to quote small portions of works, or to incorporate small works into large ones of a different character, if the source is acknowledged, or to reprint single articles from periodicals or newspapers.

By the laws of *Norway*, *Sweden*, and *Denmark*, it is not piracy to quote passages from any acknowledged source, or, (an unusual provision,) to reprint a copyright work which has been out of print for five years, unless the author announces his intention of reprinting it. *Switzerland* allows reproductions requiring intellectual labour, and does not consider a volume of selections from copyright works an infringement of copyright.

Section VIII.

Investitive Facts of Protection.

§ 54. Investitive facts of protection.

With respect to an *unpublished work*, the taking of any permanent form from which reproduction is possible will be the investitive (*k*) fact of copyright.

(*k*) The terms *Investitive*, *Transvestitive*, and *Divestitive*, introduced by Bentham, are used to denote those facts or events which the law

§ 54. Investitive facts of protection.

In regard to works *published*, or communicated to the public, the moment of such first communication, whether by printing or orally, should be the time from which the limited period of copyright should run. The author is granted the monopoly of the market for a certain time, and that time should commence when the market commences, that is, when any member of the public can obtain a copy of the work. In literary productions, where there is a definite and universal method of publication, the question of whether a work has been published, so important in artistic copyright, can rarely arise. It does sometimes, however, become important in the case of plays, and it seems that any communication to the public, so made that any member of the public on paying a certain price, or coming to a certain place, can receive the communication, should be considered publication.

§ 55. Registration and deposit of copies: law of foreign countries.

Other conditions, however, are frequently imposed, such as registration of the work and presentation of a certain number of copies to the State.

Most States, indeed, require registration of the work as an investitive fact of copyright, either directly or by requiring deposit of copies, or in both ways together.

Thus *France* (*l*) requires the deposit of two copies of the work at the Ministry of the Interior, in exchange for which a receipt is furnished, which serves as evidence of the copyright.

England requires registration at an unofficial registry, as a condition precedent to suing for infringements of

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makes conditions precedent to the creation, transference, or destruction respectively of copyright. Thus publication is an investitive fact of statutory copyright; *i.e.* on publication the law gives certain rights to the person publishing, or *invests* him with certain rights.

(*l*) See Copinger on Copyright, pp. 500–600.

§ 55. Registration and deposit of copies: law of foreign countries.

copyright, and the presentation of five copies to various libraries.

The *United States* (*m*) require—(1.) Deposit before publication with a government official of a printed copy of the title of the work.

—(2.) Deposit within ten days from publication of two copies of the work, from which the government office can register.

Italy requires the deposit of three copies at a government office, together with a declaration that copyright is reserved.

Belgium, *Switzerland*, and *Portugal* all require deposit of copies. On the other hand, *Russia* requires registry, but no deposit of copies; and *Austria*, *Norway*, *Sweden*, and *Denmark* do not insist on any formalities of this sort.

§ 56. Registration.

The object of requiring *Registration* is to obtain evidence as to the existence and duration of copyright, the evidence as to duration being only necessary in those systems which have a fixed term of copyright for each work, commencing with first publication. Besides providing evidence for the Courts, it furnishes information as to copyright to the public at large. It may be made conclusive evidence of copyright, in which case the registration must be something more than formal, or it may be only treated as a *primâ facie* proof, throwing the burden of proving the absence of copyright on the other side.

The object of requiring a deposit of copies of a work, apart from facilitating registration, is to secure for the State or the National Library a complete collection of works published in the State.

(*m*) Revised Statutes, §§ 4956, 4957.

§ 56. Registration.

Though the State in creating property may fairly impose some condition on the author, these conditions should be framed so as to attain the ends sought with as much economy of burden as possible. A system is wanted which will provide evidence of copyright, and help to establish a National Library with as little trouble to the author as possible. This may be effected by requiring a deposit of *one* copy of a book with a government department which shall register it, give in exchange a certificate of registration to serve as *primâ facie* evidence of copyright, and forward the copy to the National Library.

The requirement of more than one copy from the author seems, especially in the case of expensive works, an unnecessary tax on him. For instance, some illustrated works are published at a cost of ten guineas or so, and only from 75 to 100 copies are produced. The English requirement of five copies to the libraries in these cases acts as a tax of from 5 to 8 per cent. on the undertaking. To avoid this, some great works are only published for private circulation.

Registration, being an important function of the State, should only be entrusted to a department under the direct control of the Government. The registration, however, cannot be made a complete investigation of the claims of each work to copyright without involving a great deal of unnecessary trouble and expense; and the certificate (*n*) therefore can only be taken as *primâ facie* evidence of copyright.

As the value of the register as a record, and of the library as a national one, lies in their completeness, registration should be made compulsory. Some nations, notably the United States, make failure to register de-

(*n*) C. C. Ev. qq. 489, 1043–1050.

§ 56. Registration.

structive of copyright; but this seems a penalty disproportioned to the offence. England does not allow the author to sue until his work has been registered, but after registration allows him to sue for infringements committed previous to his registering; this seems to err in the opposite direction, for there is then no inducement to register until copyright has been actually infringed. The mean suggested by the English Commission seems the right method; they propose that failure to register should not absolutely destroy copyright, but that the author should not be able to sue for infringements committed before registration. In the present and suggested English rules, the registration by deposit is in strictness an investitive fact of the remedy rather than of the right.

§ 57. Nationality of author and place of publication.

A third set of conditions of copyright found in the law of many States, relates to the *nationality* of the author or publisher, and the place of publication of the work. Thus, apart from International Copyright, in *England* (*o*), the work must be first published in the United Kingdom, but (probably) no restrictions are placed on the nationality of the author or publisher.

In the *United States* (*p*), the author or proprietor of the work must be a citizen of the States or resident therein, and the work must be first published in the United States.

France and *Belgium* grant copyright to works wherever published, and by authors of whatever nationality, on fulfilment of the conditions of deposit required in France and Belgium respectively.

Germany (*q*) protects all works of native authors,

(*o*) See § 165.

(*p*) Revised Statutes, § 4952.

(*q*) See Copinger on Copyright, pp. 500–600.

wherever published, and all works published by a German house. § 57. Nationality of author and place of publication.

Norway, *Sweden*, and *Denmark* grant copyright only to natives; but extend their copyright by reciprocity. *Spain* allows copyright to subjects of foreign States recognising literary property.

The conditions are thus exceedingly varied, ranging from the strict nationality of the United States, to the cosmopolitanism of France. As the object of the State is to attract good literature, it should encourage first publication within its territory by granting copyright to works so published, of whatever nationality their authors or publishers may be. The question of copyright in works first published abroad falls under the head of International Copyright; briefly, such publication should vest a limited copyright to be extended by further communication to the home-state.

§ 58. Summary of investitive facts.

Summarised, then, the *Investitive Facts* of Copyright should be—

I. *Publication within the State* of a work capable of copyright.

II. *Publication* of a similar work *abroad* (to a certain limited extent). In neither of these cases should the nationality of the author be a matter of importance.

III. *That at the time* of any *infringement*, the work infringed should have been *registered* by deposit of a copy at the proper government office; (which, however, is not strictly an investitive fact of copyright, but of the remedy against the infringement of the right.)

Section IX.

Transvestitive Facts of Protection.

Transvestitive facts.

§ 59. The question whether an author should be allowed to assign his copyright has been answered above (*r*) in the affirmative. Several States, and notably England, require that an assignment *inter vivos* should be in writing, and, in view of the importance of the property transferred, this does not seem unreasonable.

The assignment should be registered, the penalty being the inability of the assignee to sue for infringement before registration.

The death of the author will act as a transvestitive fact of his copyright to his legatees or representatives, and the change of proprietorship with the date of death should be registered under similar penalties. The register will thus afford a complete history of copyright works.

In those cases where the Royalty system is adopted, mainly in connection with International and Colonial Copyright, further modifications of the register are needed. Here omission to republish, or to provide a suitable supply of a work within a certain time, serves as a transvestitive fact of local copyright to a fresh *entrepreneur*. Permission to this latter to reproduce should be entered in the register, and must be obtained after an investigation of the case on evidence, with notice to the author, especially if the question is whether the supply provided is "suitable." It is clearly not fair to the author that his property should be transferred without his having an opportunity to object, and it is better for all parties that this opportunity should come before the reproduction has been issued, than when a certain amount of capital has been sunk by the reproducer.

(*r*) See p. 31.

Summarised, therefore, transvestitive facts are:— § 59.

Transvestitive facts.

1. Assignment in writing *inter vivos*, with entry on the register.
2. Bequest or devolution on death of the owner of copyright, with entry.
3. (In the Royalty system), a license from the proper Court to publish a copyright work on account of the proprietor's failure to provide a suitable supply. This however only changes the original author's monopoly to a copyright by royalty.

Section X.

Divestitive Facts of Protection.

§ 60.

Divestitive facts.

The transvestitive facts set out above are relatively divestitive facts; some person is divested of his right by them, though the right remains.

Absolute divestitive facts are:—

1. The expiration of the term of copyright.
2. Waiver of his rights by the owner of the copyright, which should be made by entry in the register, where the work is already registered.

These absolutely destroy the right.

Several countries adopt divestitive and transvestitive facts of greater strictness to the author, in order to secure an ample supply of literature to the State. Thus in *Norway, Sweden and Denmark*, if a work is out of print for five years, it is no piracy to reprint it unless the author supplies the want by bringing out a new edition, or announcing his intention of doing so. In *Italy*, after the death of an author the State may, on public grounds, and on making compensation to the parties interested, declare any of his works the property of the State, a power beneficial in theory, but likely to be very rarely

§ 60. Divestitive facts.

exercised. In *England*, the Judicial Committee of the Privy Council have power, (I believe never used,) to grant licenses to republish if a work is out of print after the death of its author, and the proprietor of the copyright refuses to republish.

In most civilized countries however the author's interest may be relied on to keep the public sufficiently supplied; and in countries which have not reached such a stage of literary development the application of the Royalty system will be sufficient.

Section XI.

§ 61. Remedies for infringement.

Remedies for Infringements.

1. *Of the Author.*—Some countries impose arbitrary fines; some attempt to ascertain the amount of damage done, and many confiscate pirated works for the benefit of the author.

Thus English Courts give actions for damages or for penalties, confiscate unauthorized reproductions either for destruction or for the benefit of the author, and also endeavour to restrain the commission of the offence by granting injunctions against unauthorized printing or publication.

The United States confiscate pirated copies and give an action for damages.

France (s) makes illegal reproduction, with intent to injure, a criminal offence; without such intent, only a civil one.

Belgium imposes a fine and confiscation; so also *Holland*, which divides the benefit of the fine between the proprietor of the copyright and the poor.

Germany gives an action for damages or imposes a

(s) Copinger on Copyright, pp. 500–600.

§ 61. Remedies for infringement.

fine, and where the reproduction was *malâ fide*, adds imprisonment to the penalty. *Norway*, *Sweden*, *Denmark* and *Italy* impose a fine or damages with confiscation of copies; Italy makes the maximum fine £200. *Russia* gives an action for damages and confiscation.

The object in committing the offence being presumably pecuniary gain, the most appropriate and exemplary punishment is a pecuniary fine. As the result of the offence is pecuniary loss to the author, he should certainly be recouped the damage he has suffered, but the amount of the fine should not be limited to the actual damage, as otherwise the infringer might calculate his fine as a purely commercial item of expenditure, and put the author to the trouble of proving the exact damage he has sustained. This would virtually establish the Royalty system in the most objectionable form as far as the author is concerned. The most advantageous arrangement seems to be—

Author's remedies.

(1.) The imposition of a heavy fine, half to go to the State and half to the author.

(2.) Confiscation of the unsold copies for the author's benefit.

(3.) Damages, if the author can prove he has sustained more than the amount he receives from the two foregoing sources.

Under the Royalty system, a fine per copy unsold considerably exceeding the royalty payable, and a similar fine for the copies sold will be the appropriate penalties. Imprisonment does not seem a suitable penalty, except as an alternative where the fine is not paid. Heavier fines will naturally be imposed on the reproducer or importer than on the seller of pirated copies, in which latter case the confiscation of unsold copies will probably be sufficient.

§ 62. Limitations of actions.

Most States fix a time within which the author must sue for infringements, and such a limitation seems fully justifiable.

In *England* the action must be brought within twelve months of the date of the offence. Some States add a further limitation from the date when the offence came to the knowledge of the author. Thus in *Germany*, the action must be brought within three months of knowledge of the infringement, and within three years of the actual infringement, which time, in cases of infringement by sale, is to be dated from the last infringement. In *Norway*, *Sweden* and *Denmark* the action must be brought within twelve months of knowledge of the infringement, and within two years of the infringement itself.

This proviso as to the author's knowledge seems a very judicious one. It may often be some time before a piracy comes to the knowledge of the author, and the English term of one year seems too short. The term will of course vary in different countries, but ordinarily the German term seems a very suitable one, viz., that the action must be commenced within three months from the author's knowledge of the infringement, and three years from the infringement itself.

§ 63. Remedies against the author.

2. *Remedies against the Author.*—The only duty specially imposed upon the author is to deliver a copy of his work to the National Library. The Copyright Commissioners seem to have overlooked the fact that if this deposit is enforced, and a proper receipt filled in, registration is at once effected; and that, therefore, the temporary loss of copyright which the author sustains by non-registration is strongly reinforced if not superseded by the actual fine inflicted for not providing the materials of registration. The two penalties should probably,

however, continue concurrent. The State will avail itself of the remedy for non-deposit of copies, but as works published may easily be overlooked, the proviso as to temporary loss of copyright will make it the author's interest to deposit a copy of his work. § 63. Remedies against the author.

Where, as in international and colonial copyright, the State interferes to secure a suitable supply of works, the author's penalty for not providing such a supply will be the loss of his monopoly, a licence to publish on payment of a royalty being granted to another. As has been said, this licence must be obtained from the proper government department on full investigation with notice to the author affected.

Section XII.

Codification.

§ 64. Codification.

Before proceeding to the discussion of the English law in detail, a cardinal principle in which it is sadly deficient, and on which any copyright law should be founded, may be briefly alluded to. The English law has varying statutes and varying rules for almost every mode of communication of intellectual and artistic work to the public—books, engravings and maps, music, dramatic compositions, oral communications such as lectures, paintings, photographs, sculptures and designs; all are regulated by different statutes, based on different principles. Fifteen English Acts of Parliament deal with questions of copyright; six more constitute the law of designs, which is rather akin to the law of patents, whilst all this legislation is of the most unsystematic and haphazard character. The character of the English Copyright Acts has been frequently censured by the judges who have to interpret them, the most recent instance being in the judgment of the present Master of the Rolls

§ 64. Codification.

in *Nottage* v. *Jackson* (*t*), where the question was as to the meaning of the term "author of a photograph," and the Master of the Rolls said that the draughtsman of the Act appeared to have used terms in the sense in which nobody else used them.

But the general principles which should be applied to all these classes of intellectual property are the same. The variations are only in details and arise from the slight differences in the modes of communication of these different works to the public, and there is no reason why the whole legislation relating to Intellectual Productions, both Literary and Artistic, should not, with great gain in simplicity and brevity, be embodied in one code.

That this is practicable is shewn by the fact that most countries who have lately revised and recast their Copyright Laws, and especially the United States, Germany, and the Scandinavian countries, have included in one code or statute all the different branches of intellectual productions; while others, as France, have for many years had but one set of legal provisions, based on principles universally applicable.

The new Copyright Law then should be simple and unified in principle; the old English statutes should be reduced to one code dealing with all the branches of the subject. The admirable digest of Sir J. F. Stephen (*u*) shews with what comparative brevity even the present law may be treated, although the different branches of communication of intellectual work to the public are treated separately. But much greater brevity and clearness may be obtained if the different classes of literary productions are all expressly brought under the general principles which should regulate them. To shew that this is possible has been one of the aims of the foregoing pages.

(*t*) W. N., Aug. 11, 1883; Law Times, Aug. 11, 1883, pp. 274, 279.
(*u*) C. C. R. pp. 65–89.

CHAPTER IV.

HISTORY OF THE ENGLISH LAW OF COPYRIGHT.

§ 65. Introduction.

WE have now reached the second part of our subject—the discussion of the English Law of Literary Property, published or unpublished. But before dealing with the law as it exists at the present day, the History of the English Law of Copyright claims our attention, not so much on account of its practical importance as of its interest as history, and by reason of the vigorous controversy which raged during the last century as to the legal interpretation to be placed on certain alleged facts which themselves were disputed. Pages of argument,

§ 65. Introduction.

metaphysical, historical and juridical, were devoted to "the common-law right" and the "Statute of Anne;" and though it is now settled that the Law of Copyright as to published literary productions rests entirely on statute, yet on account of the historical interest attaching to the growth of the law, especially on a question considered last century of the greatest importance, it is necessary for us to spend a little time in exploring this extinct volcano of controversy.

§ 66. Questions at issue.

The questions at issue were two:—

I. Was there, between the introduction of printing in 1471 and the passing of the Statute of Anne in 1710, either such a direct recognition of copyright by the judges, or such a state of things existing in the custom of authors and printers and recognised indirectly by statute, that the judges, if the question were brought before them, were bound to recognise copyright or literary property? In other words, did copyright at common law exist before the Statute of Anne?

II. If so, what was the effect on this common law right of the Statute of Anne?

§ 67. Copyright before Statute of Anne.

And with regard to the first question, we may say at once that there appears to be no direct creation of copyright by statute, or direct recognition of it by judicial decisions during the period named. This may be accounted for, and an attempt is made to explain it elsewhere, by the constitution and powers of the Stationers' Company, but the fact remains. When, however, a custom, having reached a certain degree of general acceptance and long duration, comes before the Courts, they are practically bound to recognise and give effect to it, unless it is clearly unreasonable. And it is con-

tended with great show of truth that such a general recognition of ownership in literary works had existed for a long period of time when the Statute of Anne was passed. § 67. Copyright before Statute of Anne.

The question is, however, complicated by the quasi-private position of the Stationers' Company and the doubtful character of its register. It is not clear whether it was compulsory on the company to register works published in England, or what means, if any, existed by which owners of copyright might ensure the accuracy of the entries in the register. Further, the king's "patents" for books which he claimed as his property by prerogative, and the numerous grants of "privileges" for different periods to private authors involve the discussion in some difficulty. That a certain amount of the custom of the time is founded upon decrees of the Star Chamber, and other part upon ordinances of the Long Parliament is used to create prejudice; while the whole matter is further complicated by the fact that the question of Literary Property is entirely subordinated in the history of the time to that of Licensing and the State Regulation of the Press. However to the discussion of the whole matter we now proceed.

Until means existed for rapid multiplication of copies of literary works the right of making copies was not of much pecuniary value. Such multiplication first became possible on the invention of printing, introduced into England by Caxton in 1474, or according to a very doubtful story (*a*), at the King's expense by Corsellis at Oxford in 1468. Some time naturally elapsed before the art took sufficient root in England for questions of piratical printing to arise. At first indeed the demand for the new printing outran the supply, § 68. Early days of printing.

(*a*) Lowndes on Copyright, p. 2.

§ 68. Early days of printing.

and an Act of 1485 (*b*) allowed the importation of printed books from abroad. This freedom of trade continued till 1534, when apparently the printers and binders were strong enough to obtain protection by an Act (*c*) prohibiting the importation of books, while protecting the interests of the public in the way then considered right by making provisions for fixing the price of books printed at home.

The position of authors in the first half of the sixteenth century is by no means clear. The Crown claimed prerogative rights (*d*) in certain classes of books, and granted the sole privilege of printing them by patent to its assigns. As head of the State, the King claimed the sole right of printing all Acts of State, Ordinances of the Council, and the like; as head of the Church, he alone could print the books of rites and ceremonies of the Church. The Bible had been translated in 1547 by Grafton at the King's expense; the Year-Books were reported at the expense of the Crown; and this labour expended was said to give the sole right of printing such works to the Sovereign. Further, almanacs (*e*) were claimed by the King as his prerogative, on the ground either that they were mechanical applications of the tables in the book of Common Prayer, which was his, or that being no man's property they were therefore the Crown's. The royal claims indeed went so far as to assert that all printing was the King's prerogative, on the ground that the first

(*b*) 1 Rich. III. c. 9, s. 12.
(*c*) 25 Hen. VIII. c. 15.
(*d*) *Basket* v. *Cambridge University*, 1 W. Blackstone, 105; Willes, J., in *Millar* v. *Taylor*, 4 Burrows, 2329; Mansfield C.J. (S.C.), 4 Burr. 2401.
(*e*) *Stationers' Co.* v. *Carnan*, 2 W. Bl. 1002, in which case the claim was rejected.

printer, Corsellis, had been brought to England at the King's expense. § 68. Early days of printing.

All, however, that these claims of prerogative right, together with the grants of "privileges" by the Crown to private persons, seem to shew is, that at a time when the Crown prerogative was very extensive and grasping the Sovereign attempted to secure the monopoly of what promised to be a new and valuable invention. But side by side with privileges of royal grant something very like a custom of property gradually grew up to form part of the common law. In its infancy it is not surprising that authors, and especially printers, should strengthen their position by the most obvious means in their power, a grant from a royal prerogative which had never been more powerful.

In 1504, a printer, William Faques by name (*f*), first describes himself on the title-page of his books as "*Regius Impressor*" (*g*); and in 1518, Richard Pynson,

(*f*) Herbert's Ames, Typ. Ant. i. 308.

(*g*) *Office of King's Printer.*—This continued to be held for many years, Richard Grafton (1553), Richard Jugge and John Cawood (1564), and Christopher Barker (1584), being among the occupants of the office. A full account of the holders of the office is given in the report of the case of *Basket* v. *Cambridge University*, 1 W. Bl. 105. Its tenure required the expenditure of considerable sums of money through various channels. In June, 1619 (S. P. Dom. 1619–1623, p. 55), John Bill presents a statement incidentally reciting that Bonham Norton and himself "had for many thousand pounds bought the office of King's Printer"; and in 1630, Bonham Norton is brought before the Star Chamber for alleging that the Lord Keeper had £600 out of this transaction (S. P. Dom. 1629–1631, p. 285). In July, 1630, the Council direct certain persons to aid the King's Printer in a search for "persons importing books of right belonging to him" (S. P. Dom. 1629-1631, p. 306). The position, however, had its disadvantages. In January, 1634, Barker and Lucas, the King's Printers, were fined £300 for "base and corrupt printing of the Bible," the fine being remitted at the instance of Laud, if they would provide Greek type and print a Greek work every year. The documents contain a recital that "the King's patentees for printing are great gainers by that patent" (S. P.

§ 68. Early days of printing.

who succeeds Faques as the King's printer, publishes the first book issued "*cum privilegio*" (*h*), bearing on the title-page the inscription, "cum privilegio impressa a rege indulto, ne quis hanc orationem intra biennium in regno Angliae imprimat aut alibi impressam et importatam in eodem regno Angliae vendat."

In 1519 a work of the same printer is printed "*cum privilegio*" without mentioning any restriction of time; and in 1520 (*i*) his books appear simply "*cum privilegio a rege indulto.*" In 1530 (*k*) a "privilege" for seven years is granted to an author in the consideration of the value of his works and the time spent on it, this being the first recognition of the nature of copyright as furnishing a reward to the author for his labour.

In 1537 (*l*) the author of an edition of the Bible petitions the Lord Cromwell that a privilege may be granted to his work till that edition be sold, which he suggests will not be for three years from that time, and his reasons might be used nowadays in favour of copyright; that he will be ruined by competition, that the competing works will be badly done, and "that it is a thing unreasonable to permit or suffer them" (the copyists) "to enter into the labours of them that had both sore trouble and unreasonable charges."

Meanwhile between 1523 and 1533 the first recorded dispute as to copyright had arisen (*m*): a work printed

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Dom. 1633–1634, pp. 412, 480). In 1630, indeed, the question of "the propriety of maintaining the office of King's Printer" had been considered, and a memorandum of the services of the late John Bill in printing books was prepared, on which the office was continued (S. P. Dom. 1629–31, p. 271).

(*h*) Herb. Ames, T. A. i. 264; iii. 1782.

(*i*) Herb. Ames, T. A., sub nomine "Pynson."

(*k*) Herb. Ames, T. A. i. 470.

(*l*) Lowndes, p. 7.

(*m*) Herb. Ames, T. A. i. 186; Lowndes, p. 6.

in the former year by Wynkyn de Worde was reprinted by a printer named Trevers, and Worde's second edition, published in 1533, and protected by the privilege of the King, contains a vigorous attack on the former piracy. § 68. Early days of printing.

Thenceforth for the next hundred years or more we find a large number of books protected by special privilege from the King, besides his grants by patent of books considered his own property, as to the University of Cambridge in 1534. And these "privileges" were co-existent with the keeping of the register of the Stationers' Company, entries in which conferred exclusive rights of printing on the persons in whose names the books were entered. § 69. Royal privileges.

It has been urged that the existence of these royal grants was conclusive against the existence of copyright, as shewing that without them there was no literary property. And it may be granted that at their first appearance there was no custom strong enough to found a common law right. In the infancy of printing and the zenith of sovereign power authors and printers naturally came to the royal favour for protection. Thus in the case of musical copyright, as to which no definite legal decision was given till 1777 (*n*), as late as 1763 a royal licence for the sole printing of certain musical works for fourteen years was granted by the Crown. And it is interesting to note that in Wurtemberg so late as 1815, literary property was still founded on sole privileges to print granted by the Sovereign (*o*). But meanwhile in England the fact that the King's patents as to his prerogative of property in books were justified as rights acquired by labour and occupancy, and that

(*n*) *Bach* v. *Longman*, 2 Cowper, 623.
(*o*) Lowndes, p. 126.

§ 69. Royal privileges.

his grants to private persons of privileges were usually granted in consideration of the labours of the author or the expense of the printer, both served to justify the reasonableness of a custom of literary property, and thus might have recommended it to the judges as the foundation for a common law right. The age was one of monopolies and royal grants, and it was not therefore surprising that the monopolies should have continued after the necessity for any such extraordinary invention had passed. Besides, in days when licensing and patronage were all important, the royal favour acted both as a shield and an advertisement. A list of the patents collected by Rymer in his Fœdera, together with some of those contained in the calendars of domestic State papers, which however are only a small number of the mass of privileges granted, is set out in an appendix, and from their nature it will be seen that nearly all of them involve something more than a simple recognition of literary property. Documents contained in the calendars of State papers suggest that these royal privileges were used both as a means of rewarding the persons whom the King delighted to honour, and also for the purpose of lining the pockets of the King's servants. An application for a "privilege" made by Thomas Wilson to Sir Thomas Lake, the Latin Secretary in 1607 (*p*), after specifying the service required, winds up with the frank remark: "The gratuity I shall entreat you to accept of a poor man shall be forty or fifty angels to buy my lady a velvet gown, and a most devoted and thankful heart." In 1597 (*q*) a privilege to print certain school books for fourteen

(*p*) S. P. Domestic, Addenda, 1580–1625, p. 495, on date April 12, 1607.

(*q*) S. P. Domestic, 1595–97, p. 352.

§ 69. Royal privileges.

years had been granted to Henry Stringer, the Queen's footman; and in 1631 (*r*) G. R. Wackerlin petitions for a renewal of the grant of the sole right of printing certain Latin books (Virgil, Terence, Cicero, and Ovid) made to the late King's footman, to the petitioner for thirty-one years, "whereby he may get some small recompense, as the footman did, by letting the same grant to the Stationers' Company." In 1630 (*s*) the Attorney-General brings Bonham Norton and others before the Star Chamber for spreading a rumour that the Lord Keeper had £600 for making a decree between Norton and Barker for the King's Printer's office. These documents throw a suggestive light on the nature of many of the privileges, and the method of obtaining them.

§ 70. History of the Stationers' Company.

However in the early days of printing the royal grants of patents and privileges went side by side with the growth of the Stationers' Company, till at last the register of the Company superseded the privilege of the King; and to the growth of the Company therefore we must now turn.

In 1556 the records of the Star Chamber contain the entry (*t*):—

"Thos. Marsh, stationer, for selling books without license of the patentee: Ordered that the persons detected for the printing and corrupting of the Bishop of London's book shall be bound to print no more"; and a decree of the same date, constituting the *charter of the Stationers' Company*, ranks as the first great landmark in the history of Copyright in England.

Charter of Stationers' Company.

(*r*) S. P. Dom. 1629–1631, pp. 514, 537, on dates Feb. 20, and Mar. 21, 1631.

(*s*) S. P. Dom. 1629–1631, p. 285, on date June 17, 1630.

(*t*) Burn on Star Chamber, p. 55.

§ 70. History of the Stationers' Company. Purpose of early legislation.

But, while it occupies this position in our history, its immediate cause was very far from being the interest of authors. The chief motive of all these early Ordinances and Acts is the same; *the order and regulation of printing and printing presses in the interests of Church and State.* The charter or decree of 1556 recites (*u*): "That certain seditious and heretical books both in rhymes and tracts are daily printed, renewing and spreading great and detestable heresies against the Catholic doctrine of the holy Mother Church," and ordains that for the suppression of this evil ninety-seven persons, who are named, shall be incorporated as a society of the art of a stationer. No person in England shall practise the art of printing unless he be one of this society, and the master and warden are authorized to search for, seize, and burn all prohibited books, and to imprison anyone that should exercise the art of printing contrary to their direction.

Printing was thus confined to members of the Company; they had power to make by-laws so long as they were not repugnant to the statutes of the kingdom, and their by-laws, thus tacitly approved by the Crown, must have been considered part of the law of the land. Further, their summary powers of seizure, search, and imprisonment rendered it unnecessary for them to bring disputes before the ordinary Courts, and this, it is suggested, affords the explanation of the lack of early judicial recognition of copyright (*x*).

(*u*) Herb. Ames, T. A. iii. 1590; it was ratified in 1559 by Elizabeth; Herb. Ames, T. A. iii. 1600; Maugham, Lit. Prop., p. 12.

(*x*) Thus the State Papers contain, in 1560, articles of the Stationers' Company against Wolfe, for unlawfully printing and infringing the patent of the Queen's Printer (S. P. Dom. 1547–1580, p. 167). In 1623 there appears a petition of William Stainsby, a printer, to Secretary Calvert, for pardon and restoration to his business, the Wardens of the Stationers' Company having, by warrant from the Council,

§ 70. History of the Stationers' Company.

In 1559 (*y*) the charter was confirmed by Elizabeth, and thus by patent a monopoly of printing was conferred on the society. In the same year an injunction (*z*) from the Queen enjoined that no book or paper should be printed unless *licensed* by the council or ordinary, and in 1566 a decree of the Star Chamber (*a*) forbade persons to print against the force and meaning

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nailed up his printing-house and broken down his presses, for unlawful printing (S. P. Dom. 1623–25, p. 141). A large number of cases, mainly of unlicensed printing, came before the High Commission Court. On July 11, 1624, Locke writes to Carleton, "A poor man is in trouble for printing a book called *Votiva Anglia*; the High Commission Court were about to liberate him, when the King ordered him to be remanded and pay £1000 fine, as he was said to have gained £1000 by the book" (S. P. Dom. 1623–25, p. 298). A certain Sparkes however stands out as the Hampden of printing. Brought up in 1629 on articles of the Ecclesiastical Commissioners, he denied the present binding authority of the decree (of 1585) in the Star Chamber, for regulation of printing, as directly intrenching on the hereditary liberty of the subject's person and goods, and being contrary to Magna Charta, the Petition of Right, and other statutes (S. P. Dom. 1625–29, pp. 538, 569). In 1631, Sparkes again appears to answer his contempt before the Star Chamber, because when Barker and Lucas, the King's Printers, had seized his Bibles as printed contrary to their patents, Sparkes had brought a suit at Common Law against them for such seizure (S. P. Dom. 1629–31, p. 510, date Feb. 6, 1631). In the same year, four stationers, of whom Sparkes was one, were brought before the Council for selling unlicensed books (S. P. Dom. 1629–31, pp. 159, 166, 202, 203): and shortly afterwards Sparkes and others were before the High Commission Court on a charge of unlicensed printing (S. P. Dom. 1631–33, pp. 3, 35, 39, 231). Many cases appear in the records of the High Commission Court during the years 1630–35, for printing or selling unlicensed books (*e.g.*, S. P. Dom. 1634–35, pp. 265, 532). And though it is not pretended that cases in the Star Chamber or High Commission Court are authorities for the common law right, the existence of such a summary mode of enforcing the powers of search and seizure the Stationers possessed explains the absence of any direct acknowledgment of their rights in the ordinary Courts.

(*y*) Herb. Ames, T. A. iii. 1600.

(*z*) Strype's Parker, p. 221; Herb. Ames, T. A. iii. 1601.

(*a*) Herb. Ames, T. A. iii. 1620.

§ 70. History of the Stationers' Company.

of any ordinance, in any of the statutes or laws of the realm.

§ 71. Registers of the Stationers' Company.

From their foundation the Stationers' Company kept books or registers, and, though no legislative enactment with reference to registration appears till 1637, from 1558 it became apparently the universal practice for authors, or the printers to whom they sold their books, to enter such books in the register of the Company. Such entries were probably required by by-laws of the Company, infringements of which by its members were punished with fines by the Master and court. As only members of the Company could, except by special privilege, print books at all, entry of a work in the Company's register by one of them confirmed the property in him; the Company protected him from piracies by his fellow members or outsiders, and allowed him to assign his rights by entry in the register. Accordingly from 1576 to 1595 (*b*) above 2000 "copies" of books were entered either entirely, or in shares, as the property of particular persons. The first of such entries is in 1558; from 1559 (*c*) we find members fined for printing other men's copies; entries of the sale of a copy and its price appear in and after 1573; and from 1582 copies are entered with an express proviso that "if it be found that anyone has right to any of the copies, then the license touching such of the copies so entered to another shall be void."

In the subsequent controversy as to the existence of the "common-law right," it was attempted to set aside all this evidence as merely entries of private transactions between members of the Stationers' Company, which

(*b*) Carte; Maugham, Lit. Prop. p. 17.
(*c*) Willes, J., in *Millar* v. *Taylor*, 4 Burr. 2313.

were no proof of the common law. But the common law right of an author to his unpublished work was universally admitted; and by the ordinances of the Star Chamber his work could only be printed and published by members of the Stationers' Company, so that regulations binding them bound all printing within the realm (*d*), and thus gave a practice sufficiently universal for the judges to found a common law right on. And when the ordinances of the Star Chamber were set on one side by means of the prejudice attaching to that ill-famed body, it should have been remembered that this was a matter not affecting the rights of the Crown in any way, but only dealing with the rights of private authors and printers; in it therefore there was no especial reason to distrust their decisions, which were held sufficient to found other branches of the common law, notably the law as to perjury.

§ 71. Registers of the Stationers' Company.

The effect however of the Company's restrictive by-laws was that a large number of "copies" (*e*) became vested in the wealthier printers, while the poorer ones found themselves shut out from employment, and in consequence endeavoured to break down the restrictions and resisted the governing body of the Company (*f*). The Company accordingly petitioned the Crown for protection and enforcement of their by-laws, urging that if the monopolies were not enforced "no books at all would be printed within a short time. For com-

§ 72. Resistance to the Company

(*d*) Such regulation was easy, as in 1583, a return shewed only fifty-three presses in London (S. P. Dom. 1581–90, p. 111); and in 1634 there appear to have been only twenty-three master printers in London (S. P. Dom. 1634–35, p. 231).

(*e*) "*Copy*," the technical term then used for the right to produce copies—the *copyright*.

(*f*) Strype; Lowndes, p. 12.

§ 72. Resistance to the Company.

monly the first printer was at charge for the author's pains—whereas any other came to the copy gratis, and so he might sell cheaper and better than the first printer. . . . . These inconveniences seen, every man would strain courtesy who should begin so far that in the end all printing would decay in the land to the utter undoing of the whole Company of Stationers." The result was the confirmation of the charters of the Stationers' Company by a decree (*g*) dated June 23, 1585, providing that every book shall be licensed, "nor shall any person print any book, etc., against the form or meaning of any restraint contained in any statute or law of the realm, or *contrary to any allowed ordinance set down for the good government of the Stationers' Company.*

But this was only obtained by concessions on the part of the wealthier printers, whose monopoly of "copies" had roused the resistance by the poorer members of the Company, and the decree of 1585 is followed by a recital that (*h*) "Many of the richer members who had some licenses from the Queen granting them a property in the printing of some copies, exclusively to all others, yielded divers of their copies to the Company *for the benefit and relief of the poorer members thereof,*" and then follows a list of some eighty or a hundred works of all classes of literature, Latin and English, prose and poetry, for which presumably the Queen's license or privilege had been granted. Mr. Barker, "Her Majesty's printer," yields certain testaments; Mr. Tottell, "the printer of the law books," who clearly did not confine his attention to law, surrenders, *inter alia,* "Romeo et Julietta," and "Songs and Sonnettes of the Earl of Surrey." Mr. Newberry, the warden, and Henry Denham

(*g*) Herb. Ames, T. A. iii. 1668.
(*h*) Herb. Ames, T. A. iii. 1672–1675.

yield, as "assigns to execute the privilege which belonged to Henry Bynneman deceased, as many of the following books as shall be found to have belonged to the said Henry Bynneman"; and Mr. Newberry himself yields certain books "when he hath sold these of the former impression which he hath on his hands."

§ 72. Resistance to the Company.

§ 73. Sources of sole right of printing in 1623.

The regulations were still evaded by printing beyond sea, and in 1623 a further decree (*i*) forbade the printing beyond sea of "such allowed books as have been imprinted within the realm by such *to whom the sole printing thereof by letters patent or lawful ordinances or authority doth appertain.*" Here the sources of the right of "sole printing" are recognised by statute as—

Sources of sole right of printing.

I. *Letters patent;* which are either *grants to Crown patentees* of Crown property, as in the case of Bibles and Law Books, or *special privileges* in books not specially the property of the Crown granted in exercise of an alleged prerogative to private persons. The peculiar position that these grants occupied is shewn by the fact that the celebrated *Statute of Monopolies* (*k*) excepts from its prohibition of monopolies other than patents to the authors of new inventions, *patents concerning printing*, saltpetre, gunpowder, great ordnance, and shot.

II. *Lawful Ordinances or authority*; that is, the rules and regulations of the Stationers' Company.

§ 74. History 1625–1643.

Proceeding in the history; in 1625 a Royal Proclamation (*l*), interesting in its anticipation of modern arguments, recites, "That divers books, written in Latin and

(*i*) Maugham, Lit. Prop. p. 13.
(*k*) 21 Jac. I. c. 3.
(*l*) Rymer, Fœdera, xviii. 8.

§ 74. History, 1625–1643.

well printed at Oxford and Cambridge, have afterwards in the parts beyond the seas been reprinted very erroneous, and sent back into our Kingdom and vended here as true copies at lower rates, in respect of the baseness of the paper and print, than the original here can be afforded, whereby the authors have been enforced to disclaim their own works, the first printers much impoverished, and our own people much abused in laying out their money upon falsified and erroneous copies; which hath discouraged our scholars from printing, and disabled printers from undertaking the charge of the presse for publishing;" wherefore such importation is again forbidden, and certain regulations in connection with the University presses are framed to check it.

Decree of 1637.

In 1637 came the great decree (*m*) of the Star Chamber, "touching the *Regulation* of Printers and founders of letters," still carrying out the original purpose of legislative interference. It recited that "divers decrees had been made for the better government and regulation of printing . . . and divers abuses had arisen . . . to the prejudice of the public, and divers libellous, seditious, and mutinous books had been unduly printed, and other books and papers without license, to the disturbance of the peace of the Church and State," and enacted, after dealing with "seditious, scismaticall and offensive books," that—

§ 2. Every book should be licensed *and entered into the Register's book of the Company of Stationers.*

§ 7. That no person within this kingdom or elsewhere shall imprint or import . . . any copy . . . which the said Company of Stationers, or any other person or persons, have or shall have, by *any letters patent, order, or entrance in their register book, or otherwise,* the right, privilege,

(*m*) Tracts, vol. xlviii., Middle Temple Library. Lowndes, p. 15; Maugham, p. 13.

authority or allowance solely to print, nor shall put to sale the same.

§ 74. History, 1625–1643.

Here again the sources of the "sole right to print" are set out as: 1. Letters patent and orders; 2. Entries in the register book; while the word "otherwise" was much relied on in *Millar* v. *Taylor* (*n*), as shewing a common-law right independent of entry in the register.

In 1640 the Court of Star Chamber fell a victim to the Long Parliament, and in 1641 the place of its Ordinances was temporarily taken by another (*o*), prohibiting printing without consent of the *owner*, or importing, upon pain of forfeiting the copies to the *owner or owners of the copies of the said books*. Here then is a clear statutory recognition of property in copy, which can only have been supported by a custom such that the common law should have recognised and incorporated it.

§ 75. Protest of authors, and Ordinance of 1643.

In the disturbed state of the country, and the embittered controversy between the Court and the Parliament, great licence was manifested in the Press—or, it would perhaps be more correct to say, was conceived by the party in power to exist in the works of their opponents—and much piratical printing occurred both inside and outside the Stationers' Company. It was even suggested that all "copies" should be laid open to any printer that pleased to publish them. This suggestion was opposed in a declaration (*p*), signed by several prominent divines, to the effect that "considerable sums of money had been paid by stationers and printers to many authors for the 'copies' of such useful books as

Protest of authors, 1643.

(*n*) 4 Burr. 2314.
(*o*) Maugham, Lit. Prop. p. 13.
(*p*) Carte's Letters, 1735; Maugham, Lit. Prop. p. 14; Lowndes, p. 16.

§ 75. Protest of authors, and Ordinance of 1643.

had been imprinted, in regard whereof we conceive it to be both just and necessary that they should enjoy a property for the sole imprinting of their copies; and we further declare that unless (*q*) they do so enjoy a property, all scholars will be utterly deprived of any recompense from the stationers and printers for their studies or labour in writing and preparing books for the press; and that if books were imported to the prejudice of those who bore the charge of impressions, the authors and buyers would be abused by vicious impressions, to the great discouragement of learned men, and extreme damage of all kinds of good learning."

Here the authors' view of restrictions on piracy, and their object as encouraging learning, is brought clearly before the Legislature. We need not infer that it was not recognised before; the petition to Lord Cromwell quoted above (*r*) takes the same ground; and Milton in his magnificent protest against the resultant Act of 1643, the Areopagitica, treats the matter as beyond question, when, alluding to the reasons urged for that enactment, he says, "one of the glosses used to colour that Ordinance, and make it pass, was the retaining of each man his several copy, *which God forbid should be gainsaid.*"

Ordinance of 1643.

However, on the 14th of June, 1643, the Long Parliament passed the celebrated "Act (*s*) for redressing Disorders in Printing." It recited "that the late orders had proved ineffectual for suppressing the great late abuses and frequent disorders in printing so many false and forged, scandalous, seditious, libelling and unlicensed papers . . . to the great defamation of religion and government . . . and notwithstanding the diligence of

(*q*) *i.e.*, they *do* enjoy, and it must not be taken away.
(*r*) See p. 72.
(*s*) Scobell, Acts and Ordinances, p. 44.

§ 75. Protest of authors, and Ordinance of 1643.

the Company of Stationers to put the orders in execution: . . . and further, that divers of the Stationers and others, contrary to former orders and *the constant custom used among the Stationers' Company*, have taken liberty to print, vend, and publish the most profitable and vendible copies of books *belonging to the Company and other Stationers*;" and enacted:—

1. "That no book shall be printed unless the same shall be licensed and entered in the register book of the Company of Stationers, *according to ancient custom*.

2. "And that no person shall hereafter print any book lawfully licensed and entered in the registers of the said Company for any particular members thereof, *without the license and consent of the owner or owners thereof*; nor yet import any such book formerly printed here from beyond the seas, upon pain of forfeiting the same to the owner or owners of the copies of the said books, and such further punishment as shall be thought fit;" and suitable penalties are provided.

Under this Act it will be seen that every book printed must have an owner, whose consent is necessary to its reprinting. A book printed without its owner's consent would not be licensed; a pirated book would be exposed both to the penalties for piracy and the penalties for unlicensed printing, and the distinction would not be too clearly marked in the minds of those owners of copy whose right was infringed.

§ 76. Ordinances of Long Parliament.

A further Act (*t*) against unlicensed pamphlets followed in 1647, and a second (*u*) in 1649. This latter starts with a lengthy preamble concerning "unlicensed and scandalous books and pamphlets;" the "ignorance and

(*t*) Scobell, p. 134.
(*u*) Scobell, ii. 88.

§ 76. Ordinances of Long Parliament.

assumed boldness of the weekly pamphleteer," and the "irregularity and licentiousness of printing, the art whereof in this Commonwealth and in all foreign parts hath been sought to be restrained from too arbitrary or general use or excuse." It then gives power to seize books being printed or reprinted *by such as have no lawful interest in them*; and enacts that no pamphlet shall be printed unless licensed and entered in the registrar's book of the said Company of Stationers. "For the encouragement of all regular printers and support of the said manufacture in the Commonwealth," it provides that printed books shall not be imported; and finally enacts that "No person shall print or reprint any book now entered in the register book of the said Company for any particular member thereof, *without the consent of the owner or owners thereof*; nor counterfeit the name, mark, or title of any *book or books belonging to the said Company* or particular members."

The Ordinance of 1649 having expired, is renewed by an Ordinance (*x*) in 1652, reciting "that it had appeared by experience to be a good and profitable law for the end therein expressed;" and providing regulations and licences for printers, "forasmuch as the life and growth of all arts and mysteries consisteth in a due regulation thereof."

§ 77. Licensing Act of 1662.

As the dissolution of the Star Chamber had led to the renewal of its licensing decrees by Ordinances of the Long Parliament, so the Restoration, and the dissolution of the Long Parliament were closely followed by the reconstruction of the Ordinance of 1643 and its followers in the Licensing Act (*y*) of 1662: "An Act for preventing

(*x*) Scobell, ii. 230. The Ordinances of 1647 and 1652 do *not* contain the "owner's clause," in that of 1649. Drone's statement (p. 59) is incorrect.

(*y*) 13 & 14 Car. II. c. 33.

the frequent abuses in printing seditious, treasonable, and unlicensed books and pamphlets, and for regulation of printing and printing-presses." The main purpose is still political; and the preamble recites that "the well-government of and regulating of printing is matter of public concern." Property in books is only recognised incidentally. § 77. Licensing Act of 1662.

§ 3. All books are "to be entered in the book of the register of the Company of Stationers in London." . . . The Universities are not "to meddle either with books of Common Law, or matters of State and Government" (which are the King's property), "*nor any book the right of printing whereof doth solely and properly belong to any particular person or persons*, without his or their consent."

§ 6. "No person shall print or import any book which any person by virtue of letters patent, or of entries duly made in the register book of the Company of Stationers or of either of the Universities, has or shall have the *right*, privilege, authority or allowance *solely to print* . . . *without the consent of* the *owner or owners*." The penalty for infringement of this clause is to go half to the King, and half to the *owner of such copy*.

§ 7. "The mark of the person who has the privilege, authority or allowance solely to print is not to be put on books without his consent, and the licenser is to return copies to the printer or owner": (thus contemplating that the owner may be other than the printer, and thus not necessarily a member of the Stationers' Company.)

The provisions of this statute have been set out at some length, and for this reason. When approaching the Copyright "Statute of Anne," which by its unfortunate wording roused one of the greatest controversies § 78. Position of literary property in 1660.

§ 78. Position of literary property in 1660.

in English legal history, it is important to notice how the whole of the Licensing Act, the main end of which is to regulate printing for political purposes, *is based on the supposition of existing literary property*. It does not create such property, but assumes it as existing and protects it: no previous statute can be shewn which does create it; the inference is therefore irresistible that such a universal custom of literary property existed prior to the Statute of Anne as to have ensured the recognition of such property as existing at common law.

But while the Act recognised the custom of literary property, the custom itself—or rather the way in which the custom worked—was strongly objected (*z*) to by authors and others. Though the author was obliged to register, there was no obligation on the Stationers' Company to make the entry; but, once an entry made, the person to whom it was entered became the owner. Complaint was heard that the Company asked large sums of money for making entries, and sometimes refused or neglected to make them; that they made erroneous entries, and erased or altered entries when made, and so injured the property of authors.

Indeed, a later protest of the Lords against the renewal of the Licensing Act gives as one of its reasons "that the Act destroys the property of authors in their copies." Similarly, in 1693, a Committee of the Commons gave as one of their reasons for not agreeing to the renewal of the Act, "that the said Company are empowered to hinder the printing of all innocent and useful books," (*i. e.*, by refusing an entry on the register), "and have an opportunity to enter a title to themselves and their friends for what belongs to and is the labour of others."

(*z*) Lowndes, pp. 25-27.

§ 78. Position of literary property in 1660.

Some petitioners so much objected to compulsory entry on the register, that they made statements which were directly reversed when the Licensing Acts were suffered to expire. They said (*a*): "The property of the author hath always been owned as sacred among the traders, and generally forborne to be invaded; but if any should invade such property *there is remedy* by laws already made, and no other were ever thought needful till 1662:" and again, "as for securing property, it's secured already as our own experience may show."

§ 79. Statutory protection ceases. By-law of 1681.

The Licensing Act after several renewals, and one lapse of six years (*b*), expired in 1694, and with it the statutory protection of literary property. Those in whom the "right, privilege, authority, or allowance of sole printing," was vested had now to be content with such remedies as the common law gave them. Instead of their statutory penalty per copy, they could only recover the actual damage proved to result from the piracy, a much less satisfactory mode of procedure. For copyright had been so long protected by Acts and Decrees, that any other mode of proceeding than the statutory one was almost unknown. The Stationers' Company had promptly endeavoured to meet the difficulty as far as its own members were concerned; the Licensing Act had temporarily expired in 1679, and in 1681, when we may suppose the disadvantages of rights only protected by the common law had begun to make themselves felt, they had passed the following by-law (*c*):—

By-law of Stationers' Company, 1681.

"Whereas several members of this Company have

(*a*) Lowndes, p. 30.
(*b*) 1679–1685.
(*c*) Quoted in *Millar* v. *Taylor*, 4 Burr. 2307.

§ 79. Statutory protection ceases. By-law of 1681.

great part of their estate in 'copies'; and by ancient usage of this Company when any book or copy is duly entered in the register book of this Company to any member thereof, such person to whom such entry is made is and always hath been reputed to be the proprietor of such copy, and ought to have the sole printing thereof, which privilege and interest is now of late often violated and abused, *it is therefore Ordained*, that where any entry is now, or hereafter shall be duly made of any book in the said register, by or for any member of this Company, that in such case, if any member shall thereafter without the license or consent of such member for whom such entry is duly made in the Register, or his assigns, print or import any such copy or sell the same, he shall forfeit to the Stationers' Company the sum of 12 pence per copy."

§ 80. Confirming Charter of 1684.

The members of the Company however possibly suffered from piratical competition on the part of outsiders, as well as within their own body, for in 1684, there being no Licensing Act in existence, a *new charter* (*d*) was granted them. After reciting "That divers members and brethren of the Company have great part of their estate in books and copies," (*i. e.*, stocks of printed books, and sole rights to print particular books), "and that for upwards of a century before they have had a public register kept in their common hall for the entry and description of books and copies," it confirmed former charters, and proceeded: "We, willing and desiring to confirm and establish every member in their (*sic*) *just rights and properties*, do well approve of the aforesaid register, and declare that every member of the Company who should be the *proprietor of any book*, should have

(*d*) Maugham, Lit. Prop. p. 17.

and enjoy the sole *right*, power, privilege, and authority of printing such book or copy *as in that case had been usual heretofore*" (*e*).

§ 80. Confirming Charter of 1684.

It will be seen that this charter does not profess to do more than "confirm just rights and properties," and declare "what had been usual heretofore." The Company seem to have so relied on the summary penalty per copy for piracies imposed by the Licensing Act, as hardly to have understood the strength of their position when that Act expired.

By-law of Stationers' Company, 1694.

The Act was renewed in 1685, only to expire in 1694; and its final lapse is immediately followed by the renewal of the by-law of 1681, with the additional recital that such copies were assigned, left by will, and used to make family provisions (*f*).

§ 81. Recapitulation of period previous to 1710.

We now reach the period immediately preceding the Statute of Anne, and in view of the momentous consequences to copyright resulting from that statute, it will be well to briefly sum up the existing state of things.

Since 1558, literary property "in books and copies" had been recognised by implication in nearly every statute dealing with printing. The precise relation of this property to the Stationers' Company and the entries in its register is not perfectly clear. It has been urged that such copyright as existed applied only to members of the Stationers' Company, and not to authors outside the Company. But the registers of the Company according to Carte (*g*), both in the 16th and 17th centuries,

(*e*) This Charter may possibly be only one of the set of charters resulting from the wholesale forfeitures by corporations, and their purchase of new charters in 1684. Its language however suggests that it is called forth by the five years lapse of the Licensing Act.

(*f*) Quoted in *Millar* v. *Taylor*, 4 Burr. 2308.

(*g*) Maugham, Lit. Prop. p. 17.

§ 81. Recapitulation of period previous to 1710.

contain entries in sufficient numbers to shew that up to 1695, and even later, "there was hardly a book in which property was not ascertained, and the sole right of printing secured by entries in the Stationers' Register." And the jury, in *Millar* v. *Taylor*, on the evidence before them, found, as part of their special verdict (*h*), "That before the reign of her late Majesty, Queen Anne, it was usual to purchase from authors the perpetual copyright of their books, and to assign them from hand to hand for valuable consideration, and to make the same the subjects of family settlements for the provision of wives and children."

It was clearly considered, therefore, that authors (*i*) had perpetual rights of property in their works, and that these rights could be assigned. No statute can be produced which creates these rights, though many allude to them as existing, and provide special means of protecting them. They constantly speak of the "owner of the copy," but no statute calls such owner into existence. If the right existed at all, it existed therefore by the Common Law, or was such a custom as should and would be recognised by the Common Law. Hardly any records however of protection to the right, afforded by the State, are in existence, and there seems to be no entry (*k*) of a prosecution in the ordinary Courts, for printing without licence. This may be explained by the fact that the Stationers' Company had, by their charter, summary rights of search, seizure, and imprisonment, and similar powers existed under the Licensing Acts. Here no recourse to the ordinary Courts was needed, and no entry of proceedings would exist.

(*h*) 4 Burr. 2307.
(*i*) Or more usually the printers, their assigns.
(*k*) 4 Burr. 2313.

§ 82. Cases prior to the Statute of Anne.

The cases which appear in the books are mainly where the alleged rights of the Stationers' Company, or of authors, clash with those of the King's patentees (*l*). Thus, in 1666 (*m*), Atkins, a patentee from the Crown of law books, sued the Stationers' Company for infringing his patent, and was successful. His counsel stated that the King had granted fifty-one patents. On appeal to the House of Lords, they seem to have held that a copyright was a thing acknowledged by the Common Law, that the King had this right, and had granted it to the patentees. One objection and answer during the hearing summarises a great deal of subsequent discussion. Counsel for the defence urged: "The price of books will be enhanced," to which the plaintiff's counsel replied: "As a matter of fact, no books are sold so cheap as are printed by the King's patentee, so my client informs me." Again, in *Roper* v. *Streater* (*n*), in 1670, the Lords protected the law patentee of the Crown against the assigns of the author. The right of copy *in some one* seems to have been almost taken for granted. In *Stationers' Co.* v. *Seymour*, in 1678 (*o*), where it was urged that prognostications added to the King's Almanac made a new property, the judges said that it no more did so than "if a man should claim a property in another man's copy, by reason of some inconsiderable additions of his own."

(*l*) These rights had clashed in cases which did not come before the ordinary Courts. A long struggle between the Stationers' Company and the University of Cambridge, lasting from 1583 to 1629, finally resulted in the triumph of the University. (See *inter alia* S. P. Dom. 1581–90, pp. 107, 111; Add. 1580–1625, p. 658; 1619–23; Nov. 25, 1621; 1625, p. 173; 1626, p. 343; 1627, p. 493; 1628, p. 546; 1629, pp. 496, 520.) The King's prerogative was stated, in an opinion given by Coventry, the Solicitor-General, in Nov. 1618, to override charters of previous sovereigns to the Stationers' Company. (S. P. Dom. 1623–25, p. 554.)

(*m*) Carter's Reports, pp. 89–92; 4 Burr. 2316.

(*n*) Skinner's Reports, 234; 4 Burr. 2317.

(*o*) 1 Mod. 256; 4 Burr. 2317.

§ 82. Cases prior to the Statute of Anne.

All these cases however only deal with a Crown right granted by express patent, and only by implication uphold a common law right. As has been pointed out, the summary proceedings and easily recoverable penalties under the charter of the Stationers' Company and the Licensing Act have left no trace on the law reports, though a few of them appear in the Calendars of Domestic State Papers and Records of the High Commission Court. Common law proceedings were far more cumbrous and less profitable, and the use of a bill in equity, subsequently so common, does not seem at this time to have been understood.

§ 83. Result.

There was then prior to the Statute of Anne no statute expressly creating, or judicial decision expressly recognising, copyright; there was such constant usage among authors and printers, recognised indirectly both by statutes and judicial decisions, that when the question arose for decision, a Court of Law might reasonably recognise literary property both before and after publication, as part of the Common Law; and such was the opinion of three judges against one in *Millar* v. *Taylor* (*p*), and of eight judges against four in *Donaldson* v. *Beckett* (*q*).

§ 84. Statute of Anne.

We now come to the celebrated *Statute of Anne*, which remains to all ages a warning of the care needed in parliamentary draftmanship, and of how great a fire little words may kindle.

After 1694, the lapse of the Licensing Act left authors and proprietors of copies without the protection summarily enforceable by penalties and seizure of copies, which they had previously enjoyed, and left them very

(*p*) 4 Burrows, 2303.
(*q*) 2 Bro. Cases in Parl. 129; 4 Burr. 2408.

discontented. As Lord Mansfield observed (*r*), they considered an action at law an inadequate penalty, and had no idea that a bill in equity could be maintained except on letters patent. Accordingly the booksellers and publishers, most of whose property consisted in valuable "copies," importuned Parliament for *further* protection. They petitioned in 1703, 1706, and 1709. They said that (*s*) "at common-law a bookseller can recover no more costs than he can prove damages; but it is impossible for him to prove the tenth or hundredth part of damage he suffers, because 1000 counterfeit copies may be dispersed into as many different hands, all over the kingdom, and he is not able to prove the sale of 10; the defendant is always a pauper;" and they therefore prayed "that the confiscation of counterfeit copies might be one of the penalties inflicted on offenders."

§ 24. Statute of Anne.

Amongst other heads of a bill suggested by some petitioners, were (*t*): (1.) That the proprietor of copy should be secured in his particular copies, by giving him a method of process, as treble costs and damages against the invader. (2.) That the register book of the Company of Stationers *should be duly rectified*, and all fraudulent and false entries, and entries of popish and other illegal and scandalous books therein entered, be expunged, and the true proprietor thus reinstated in his right.

This petitioning resulted in 1709 in the introduction of a bill which, with several material alterations, ultimately became law (*u*). The occasion of its introduction must be borne in mind; it originated with booksellers and publishers to further protect a property they already

(*r*) 4 Burr. 2406.
(*s*) Lowndes, p. 29-31.
(*t*) Lowndes, p. 29.
(*u*) 8 Anne, c. 19.

§ 84. Statute of Anne. Title.

conceived themselves to have. Its material parts, as finally settled, ran as follows:—

"An Act for the encouragement of learning by *vesting* the "copies" of printed books in the authors or purchasers of such copies during the times therein mentioned."

Note on Title.—(According to Willes, J., in *Millar* v. *Taylor* (*v*), the Bill went to Committee as "a Bill to *secure* the undoubted property of authors for ever." The Journals of the House for January 11, 1709, contain the entry that Mr. Wortley brought in a "bill for the encouragement of learning, and for *securing* the property of copies of books to the rightful owners thereof" (*x*).)

Preamble.

"Whereas printers &c. . . . have of late frequently (*a*) *taken the liberty* of printing, (*b*) *re*printing and republishing books without the consent of the authors or proprietors of such books . . . for preventing such practice and for the encouragement of learned men to compose and write useful books, be it enacted—

Notes on preamble (*a*): "*taken the liberty*," it was urged that this phrase was only applicable if a right existed previously, and the answer was made that the same phrase was used in the Hogarth Acts as to engravings, where no previous right existed. (*b*) "*re*printing": it was argued that *re*printing could only be objectionable if a sole right to print and reprint existed.

Clause 1.

§ 1. From the 10th of April, 1710, the author of any book already printed, who shall not have transferred the right, shall have the sole right and liberty of printing such book for the term of twenty-one years to commence from the said 10th day of April (*a*) AND NO LONGER, and that the author of any book not yet printed and his

(*v*) 4 Burr. 2333.

(*x*) Com. Journ. xvi. 260. Mr. Topham had, on Feb. 28, 1706, brought in a bill "For the better securing the rights of copies of printed books. —C. J. xv. 316.

assigns shall have a similar right for fourteen years from first publication (*a*), *and no longer*. § 84. Statute of Anne.

Note (*a*).—These three words were ultimately fatal to the Common Law right; whether it was intended that they should be so, or merely that they should decisively restrict the statutory term is doubtful; Clause 9 is quite inconsistent with them.

A penalty of a penny a sheet was imposed on piracy. *Clause* 2 enacted that no one should be subjected to penalties unless the title to the copy of books hereafter to be published should, *before such publication*, be entered in the register of the Stationers' Company, "*as hath been usual.*" *Clause* 4 contained a proviso for fixing the prices of books if they appear too high and unreasonable. *Clause* 5 requires nine copies of each work to be delivered to nine public libraries.

§ 9. "Provided that nothing in this Act contained shall extend or be construed to extend either to prejudice or confirm any right that . . . any person . . . claims to have to the printing or reprinting any book or copy of a book already printed or hereafter to be printed." Clause 9.

Note.—A large number of persons "claimed to have rights" at common law "to printing or reprinting books." This Act therefore by its ninth clause, should have left these rights as they were, without either "prejudicing or confirming them."

§ 11. Provided always, that after the expiration of the said term of fourteen years the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years. Clause 11.

Note.—This throws some light on the term "*and no longer*" in the first clause, and suggests that it should not be interpreted as overriding § 9.

§ 85. Result of Statute of Anne.

The phrases of this Act have been already sufficiently discussed by others. The result seems to be, that the bill as originally introduced provided perpetual statutory copyright; that, this being strongly opposed, a term of statutory protection was accepted, the words "and no longer" being added to exclude the possibility of a further statutory term, and that the 9th clause was intended to leave all rights existing or alleged to exist at the passing of the Act *in statu quo*. Though not the judicial interpretation of the Act, this seems on the whole to reconcile the phraseology of clause 9 and the preamble with that of clause 1.

The question as to the effect of this compromise, whether it gave a term of copyright protected both by statute and common law, and left the further common law right as before, or whether it abolished the common law right, replacing it by a limited statutory term, could not arise till 1731; for until that date, being twenty-one years from the date fixed in the statute, all books had statutory copyright. And after that date cases soon arose to test the effect of this legislation.

First, however, in 1735, an Act (*y*) was passed forbidding the importation of foreign reprints of English works, unless such works had not been printed or reprinted in England for twenty-one years previously, a restriction in the interests of the public recognising the rationale of literary property and the modifications it must submit to. The clause of the Act of Anne for fixing the price of books was also repealed, a recognition that "regulation" (*z*) is not always "consistent with the life and growth of all arts and mysteries."

The first cases to test the effect of the Act of Anne

(*y*) 12 Geo. II. c. 36.
(*z*) See Ordinance of 1652, p. 59.

arose in applications to the Court of Chancery for injunctions to prevent the printing of piratical books. It was subsequently urged against the importance of these precedents, that such injunctions were only granted till the final hearing, and were not final settlements of the question. In answer to this (*a*) it must be remembered that injunctions in the Court of Chancery were only granted in *questions of property*, and when the right was clear and unquestioned; and also that, though in form interlocutory, they were generally treated as a final settlement of the action, and when granted were made perpetual by consent of the defendants.

§ 85. Result of Statute of Anne.

The first case arose in 1735, when, in the case of *Eyre* v. *Walker* (*b*), Sir Joseph Jekyll restrained the defendant from publishing the 'Whole Duty of Man,' said to have been first assigned in 1657, and therefore outside the term of statutory copyright. This case however was rendered unsatisfactory by doubts as to the facts; the alleged assignment took place two years before the book was published, and the authorship is still an unsettled question.

§ 86. Cases under Statute of Anne.

In the same year, in the case of *Motte* v. *Faulkner* (*c*), the defendant was restrained from printing certain miscellanies of Pope's and Swift's, published in 1701, 1702, and 1708, and therefore outside the term of statutory copyright. After another case in 1736, Lord Hardwicke in 1739, in the case of *Tonson* v. *Walkner*, restrained the defendant from printing Milton's 'Paradise Lost,' the assignment of which was dated in 1667.

In 1760, in the similar case of *Tonson* v. *Collins* (*d*),

(*a*) 4 Burr. 2325.
(*b*) Id. 2325.
(*c*) Id. 2326.
(*d*) Id. 2326.

§ 86. Cases under Statute of Anne.

where the defence set up was that copyright only existed by statute, and that the statutory period had expired, the question was referred to a Court of common law, who ultimately refused to give a decision, on the suspicion of collusion, although it was understood that the judges were in favour of the plaintiff as far as the case had gone.

Up to this point, therefore, the Court of Chancery had recognised that a clear right of literary property existed in works not within the statutory protection. That this right was independent of the statute was further shewn by the fact (*e*) that though the statute required registration at Stationers' Hall as a condition precedent to protection, the Court gave relief in cases where the work pirated had not been so registered.

§ 87. *Millar* v. *Taylor.*

Under these circumstances the question was for the first time brought to a decision in the Courts of Common Law in the celebrated case of *Millar* v. *Taylor* (*f*). The poet Thomson had published a poem, 'The Seasons,' in the years 1726–1730; statutory copyright therefore expired in 1758. Thomson had sold the copyright to Millar; in 1763 Taylor pirated the work, and in 1766 Millar brought an action against him, which was heard before Lord Mansfield, C.J., Willes, Yates, and Aston, JJ., and decided in 1769.

The judges held by three against one that the copy of a book or literary composition belongs to the author by the common law, and that this common law right of authors to the copies of their own works is not taken away by the Statute of Anne.

Of the majority, Mr. Justice Willes delivered an

(*e*) 4 Burr. 2319.
(*f*) Id. 2303.

§ 87. *Millar* v. *Taylor.*

extremely (*g*) able historical survey of the question, to which all subsequent authors, not excluding the present essayist, are much indebted. Mr. Justice Aston agreed on general grounds, and Lord Mansfield, probably the greatest authority of the time on the Law of Copyright, or indeed on any other legal subject, contented himself with agreeing shortly with the judgments of his two puisnes (*h*). In opposition, Mr. Justice Yates delivered a lengthy and involved judgment against the common law right, based mainly on metaphysical considerations as to the nature of property. The effect of his arguments is much weakened by the fact that he admits an author to have *property at common law* in his unpublished works so as to prevent others from printing them. Thus the first discussion of the matter in Courts of Law resulted in the affirmation of a copyright at common law undisturbed by the statute.

§ 88. *Donaldson* v. *Beckett.*

In 1774, after a decision in the Scotch Courts denying the common law right, the question came up for decision on an appeal to the House of Lords in the case of *Donaldson* v. *Beckett* (*i*). The facts were the same as in *Millar* v. *Taylor*, except that Millar's executors had sold the "copy" to Beckett, who prosecuted Donaldson for piracy. The Lord Chancellor Bathurst granted a perpetual injunction against the defendant, from which he appealed. The House of Lords called in the judges to give their opinion on certain questions, which they did with the following

(*g*) It was subsequently said by Lord Abinger during the argument in *Chappell* v. *Purday*, that this judgment was really the work of Lord Mansfield.

(*h*) It was one of the *two* occasions on which Lord Mansfield's Court were not unanimous: 4 Burr. 2395.

(*i*) Brown, Cases in Parl. 129; 4 Burr. 2408; 17 Cobbett, Parl. Hist. 954, 1003.

§ 88. *Donaldson v. Beckett.*

results. (Lord Mansfield, as a peer of the realm, did not give his opinion with the judges, or take any part in the decision, a reticence much to be regretted.)

Answers of the judges.

The judges were asked:

I. 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?

Answer.—To this, ten judges (and Lord Mansfield) were of opinion that he had the sole right; one dissented. The judges were thus practically unanimous on the existence of the author's common law right before publication.

II. If the author had such a right originally, did the common law take it away upon his printing or publishing such book? And might any person afterwards reprint and sell for his own benefit such books against the will of the author?

Answer.—To this, eight judges (and Lord Mansfield) answered "No;" three judges "Yes;" a large majority thus holding that publication did not at common law divest copyright.

III. If such an action would have lain at common law, is it taken away by the Statute of 8th Anne; and is an author by the said statute precluded from every remedy, except on the foundation of the said statute, or on the terms and conditions prescribed therein?

Answer.—On this, the vital point, five judges (and Lord Mansfield) answered "No;" six judges answered "Yes."

IV. The fourth question was a combination of the first and second: Whether the author of any book, and his

assigns, had the sole right of printing and publishing the same in perpetuity by the common law?

§ 88. *Donaldson v. Beckett.* Answers of the Judges.

Answer.—To this, seven judges (and Lord Mansfield) answered "Yes;" four judges "No."

V. The fifth question practically repeated the third—Whether this common law right is in any way impeached, restrained, or taken away by the Statute of Anne?

Answer.—On this, after minute discussion of the wording and circumstances of the statute, six judges answered "Yes;" five (and Lord Mansfield) "No."

On these answers of the judges, Lord Camden moved the House to give judgment for the appellant and against the common law right.

He first dealt with the evidence of custom adduced to shew the existence of such a right, and summarily dismissed it as either illegal decrees of an unconstitutional tribunal, or private regulations of a company of monopolists. No authority could be produced for a common law right; and, on grounds of principle, literature once published was a matter *publici juris*. His Lordship indeed was mightily indignant at the idea of pecuniary gain resulting from literature (*k*). "It was not for gain," said he, "that Bacon, Newton, Milton, and Locke instructed the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of letterpress. When the bookseller offered Milton five pounds for his 'Paradise Lost,' he did not reject it and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labour; he knew that the real price of his work was immortality, and that posterity would pay it."

How could the peers resist such eloquence as this;

(*k*) 17 Cobbett, Parl. Hist., 1000.

§ 88. *Donaldson* v. *Beckett.*

indeed, the only fault to be found with such generosity and highmindedness is, that it is at other people's expense. Possibly, if applied to the remuneration of my Lord Camden's own intellectual labour, his Lordship might have considered immortality an unrealizable commodity for the wants of daily life. Concerning posterity, the lucid dicta (*l*) of that great lawyer and moralist, Mr. Thomas Hood, are applicable when he says: "The very law of nature protests against an unnatural law which requires an author to write for everybody's posterity except his own." And again: "By the present arrangement posterity is bound to pay everybody or anybody but the true creditor."

It is not clear what view Lord Camden took of the common law right in unpublished works, which he could hardly have denied to exist. Apart from all his rhetoric, while right in saying that there was no judicial decision expressly creating a common law right, he, apparently from imperfect understanding of the nature of the common law of England and its concealed character of judicial legislation, did not realise the importance of all these by-laws, proclamations, entries, and assignments, which he put aside as illegal and unworthy of notice, as forming a weighty reason for a decision in favour of a common law right. It is impossible however to overlook the fact that the persons who would have mainly gained by the existence of a common law right in perpetuity were the booksellers and not the authors.

§ 89. ffects of *naldson* *Beckett.*

The decision in *Donaldson* v. *Beckett* naturally caused great alarm in the ranks of publishers and owners of "copy." They instantly came to Parliament for relief.

(*l*) Drone on Copyright, note, p. 59.

§ 89. Effects of *Donaldson* v. *Beckett.*

On the 28th of February, 1774 (*m*), the booksellers presented a petition complaining that in reliance on their common law right, confirmed by the case of *Millar* v. *Taylor*, booksellers had invested several thousands of pounds in purchase of ancient copyrights not protected by the Statute of Anne; that this property was destroyed by the late decision; and praying for relief. The petition was referred to a committee to report on it, and they accordingly took evidence. The chief witness was a bookseller named Johnson, whose evidence (*n*) in view of past history and present controversies is very interesting. Although the Statute of Anne was introduced to give owners of copy further protection, the witness stated that it was not the custom of publishers to sue for penalties under that statute, since a shorter and more complete relief might be had by filing a bill in Chancery. He had never heard of any action being brought at common law, the bill in Chancery being the easier. In reference to the "reversionary," or "two-term" copyright, under the statute, a return to which has been proposed of late years, the witness stated that he never saw or heard of any assignment of copy where the second term of fourteen years was reserved to the author, the assignments being usually to booksellers and their assigns for ever; and that undoubtedly the bookseller gave more money for twenty-eight years' copy than he would for fourteen. With regard to the value of copyrights, he said that in the previous twenty years nearly £66,000 had been paid for copyrights by publishers. The facts he bore witness to however tended to shew that the evidence of property in a copyright required was not of the strictest, that

(*m*) 17 Cobbett, Parl. Hist. p. 1077.
(*n*) Id. p. 1086.

§ 89. Effects of *Donaldson* v. *Beckett.*

the assignment from the author was frequently assumed, and that there was some ground for calling the then system of copyright a mere trade arrangement.

On this and other evidence the Committee reported to the House, and a bill was brought in on the 22nd of April, 1774, and read a second time on the 10th of May; it was opposed by Attorney-General Thurlow and Charles James Fox, and supported by Edmund Burke (*o*). Counsel were heard for and against it: the interests of the public and of authors however are not very prominent; Scotch and country booksellers promote the opposition against the great London firms, mainly on petty trade grounds. The Bill ultimately passed the Commons, but in the House of Lords (*p*), on the motion of Lord Denbigh, supported by Lord Camden and Lord Bathurst, it was thrown out, and large and valuable properties in ancient copyrights were lost without compensation. The report significantly says; "Lord Mansfield did not attend the House on that occasion."

§ 90. Subsequent legislation.

Another and more powerful section of the community were affected by the decision, and were more fortunate in their endeavours. The Universities in 1775 obtained an Act granting (*q*) them perpetual copyright "in books given or bequeathed to the said Universities and colleges for the advancement of useful learning, and other purposes of education."

As the position of authors whose pen was their living became more honourable, it was felt that the Statute of Anne gave too short a term of remuneration, and

(*o*) 17 Cobbett, 1110.
(*p*) Id. 1402.
(*q*) 15 Geo. III. c. 53.

in 1814 an Act (*r*) was passed "to afford encouragement to literature." It substituted for the previous term of fourteen years, with a reversionary fourteen years to the author if living, an extended term of twenty-eight years, or, if the author were living at its expiration, his life. This clause however must be regarded rather as a bribe to outweigh the disadvantages of an increased supply of copies to public libraries, rendered obligatory by other clauses of the Act, than a disinterested recognition of the claims of literature.

§ 90. Subsequent legislation.

In 1837 however the matter was at last taken in hand purely in the interests of authors. In that year Serjeant Talfourd began the parliamentary battle which ended after his death in victory. Introducing his bill (*s*) in 1838 in an eloquent and lengthy speech, he was supported by Disraeli and Monckton Milnes, now Lord Houghton, and actively opposed, mainly in the interests of the public, by Hume, Grote, and the "philosophic Radicals," on the ground that any extension of copyright must enhance the price of books. During this debate Talfourd laid down the motive of the proposed change to be, "that the present term of copyright is much too short for the attainment of that justice which society owes to authors, especially those, few though they be, whose reputation is of slow growth and enduring character."

§ 91. Talfourd's Bill.

The year 1841 is memorable for the first interposition in these debates of Macaulay, in a (*t*) speech which must, like its successor in 1842, have had a very great effect on the House. Members generally were much moved

(*r*) 54 Geo. III. c. 156.
(*s*) Hansard, xlii. 557.
(*t*) Macaulay's Speeches, p. 108; Hansard, li. 341.

§ 91. Talfourd's Bill.

at the time by the hardships which had lately befallen prominent men of letters, and by petitions presented by writers then in full popular fame, or attaining to it. Scott had died just when the copyright of his earliest and most successful novels was expiring, leaving his family in great financial difficulties. Wordsworth's works were only becoming popular, when they ceased to bring him any return. Southey's literary career was known to have been much altered by his pecuniary needs, and the shortness of the copyright in his works. Alison presented a very important petition with reference to the remuneration for his 'History,' a work of great magnitude and expense and of slow returns (*u*). Thomas Hood wrote a petition, alluded to before, but unfortunately too long to quote, except as to one paragraph, which ran: "That cheap bread is as desirable and necessary as cheap books, but it hath not yet been thought necessary to ordain that after a certain number of crops all cornfields ought to be public property." The whole petition was drafted in a style quite new to the House, but unfortunately it was never presented. There was also a petition from "Thomas Carlyle (*x*), a writer of books," setting forth "that your petitioner has written certain books, being incited thereto by certain innocent and laudable considerations, that his labours have found hitherto in money or money's worth small recompense or none; but he thinks that if ever it is so, it will be at some distant time when he, the labourer, will probably no longer be in need of money, and those dear to him will still be in need of it, wherefore your petitioner humbly prays your honourable House to forbid ex-

(*u*) Drone on Copyright, p. 78.
(*x*) Trevelyan's Macaulay, ii. 133.

traneous persons, entirely unconcerned in this adventure of his, to steal from him his small winnings for a space of sixty years at the shortest. After sixty years, unless your honourable House provides otherwise, they may begin to steal."

§ 91. Talfourd's Bill.

Against these influences Macaulay rose in opposition. As Talfourd said: "Literature's own familiar friend in whom she trusted, and who has eaten of her bread, has lifted up his heel against her." And successfully; his nephew and biographer is justified in saying: "Never has any public man, unendowed with the authority of a minister, so easily moulded so important a piece of legislation into a shape which so accurately accorded with his own views as did Macaulay the Copyright Act of 1842."

In introducing his bill in 1841 (*y*), Talfourd proposed a copyright of sixty years from the death of the author, but professed himself willing to accept thirty years from death. Against this Macaulay delivered the first of his celebrated speeches on copyright (*z*). He argued that there was no natural right to property, or that if there was, it did not survive the original proprietor. Copyright was a monopoly, making books dear, and as such only to be justified within certain limits by expediency. He urged that extension of the term beyond the author's death would not benefit him, nor would the expectation of it be an inducement to labour. Copyright he defined as "a tax on readers for the purpose of giving a bounty to writers." He suggested that the descendants of a great author might frequently disapprove on various grounds of his works and so injure the public by refusing to reproduce them. All this

(*y*) Hansard, lvi. 340.
(*z*) Macaulay's Speeches, p. 109.

§ 91. Talfourd's Bill.

was enforced by copious historical illustrations, and was probably even more refreshing to listen to in the House, than it is to read in the wilderness of Hansard. The bill against which it was directed was, small wonder, rejected by forty-five votes to thirty-eight, in which minority there voted Sir E. L. Bulwer, Disraeli, W. E. Gladstone, Lord John Russell, Lord George Bentinck and Sheil, while Macaulay and Joseph Hume are the most conspicuous names in the majority.

§ 92. Act of 1842.

Before the next session of Parliament, Talfourd had died, and the late Lord Stanhope, then Lord Mahon (*a*), introduced the Bill. He proposed that the statutory period should be twenty-five years from the death of the author, and never less than twenty-eight years. Macaulay in committee brought forward as a counter proposal that the statutory period should be forty-two years or the life of the author, whichever was the longest. His speech (*b*) in proposing this had little to do with principles, but consisted of a graphic recital of the great works of literature which would receive longer copyright by his than by Lord Mahon's proposal. It was the controversy between, on the one hand, a fixed period from the death of the author for all his works, a varying period therefore for each of his works; and on the other a fixed period for each work from date of publication, the copyrights thus expiring one by one. The point is one of not very interesting detail, but Macaulay's vivid power and literary memory made the discussion so absorbing that the House was carried with him as by storm. When he sat down Sir Robert Peel told him that the last

(*a*) Hansard, lxi. 1349.
(*b*) Macaulay's Speeches, p. 118.

§ 92. Act of 1842.

twenty minutes of his speech had radically altered his views on the Law of Copyright. Macaulay's amendment was carried by sixty-eight votes to fifty-six (*c*.) Peel then suggested that the term should be extended to seven years after the author's death, for the benefit of his children; and in spite of Macaulay's opposition this was carried by a large majority. The statutory term thus stood at "forty-two years from publication, or till seven years from the death of the author, whichever shall be longest."

The Bill met with little opposition in the Lords (*d*); it was supported in Committee by Lord Lyndhurst, but met with considerable adverse criticism from Lord Brougham, who specially questioned whether the lengthened term would really benefit the author pecuniarily, or whether he would obtain more for his term of forty-two years than he would for one of twenty-eight years, (a point however only of importance when the author sells all his rights instead of arranging for each edition separately).

§ 93. *Jefferies* v. *Boosey*.

As this Act of 1842 is the foundation of our present Copyright Law, I do not propose to trace further the way in which it was patched and extended to different kinds of literary work in the piece-meal way in which alone English legislation seems able to proceed. Before however closing this historical sketch of Copyright in England, something must be said of the great case of *Jefferies* v. *Boosey* (*e*), which, though more directly concerned with international copyright and the extension of the Copyright statutes to cover it, yet raised a

(*c*) Hansard, lxi. 1398.
(*d*) Id. lxiii. 778.
(*e*) 4 H. L. C. 815.

§ 93. *Jefferies v. Boosey.*

question as to the existence and nature of common law copyright and the extent to which it was available to meet the case under discussion. The judges were called in to advise the House, and though the questions put to them did not directly raise the point, yet, amongst others, Erle and Coleridge, JJ., pronounced in favour of the existence of such a right. Pollock, C.B., however, gave it as his opinion that (*f*): "Copyright is altogether an artificial right, not naturally and necessarily arising out of the social rules that ought to prevail among mankind, but is a creature of the municipal laws of each country, to be enjoyed for such time and under such regulation as the law of each state may direct, and has no existence by the common law of England."

The Law Lords also were unanimous against a copyright at common law. Lord Campbell, L.C., said, "Copyright, if not the creature of our statute law, as I believe it to be, is now entirely regulated by it." Lord Brougham (*g*): "In my judgment it is unquestionable that the statutes alone confer the exclusive right"; while Lord St. Leonards (*h*) had "come to the conclusion long since that no common law right existed after publication."

§ 94. Colonial Copyright. Commission of 1875.

It only remains to add that, the national question being settled for a time by the Act of 1842, increased facilities for intercourse, and the spread of education led to knotty questions of International and Colonial Copyright. A Canadian Act of 1875, thought to clash with the Imperial Act of 1842, was the cause of the appointment of the Copyright Commission in 1875,

(*f*) 4 H. L. C. p. 935.
(*g*) Id. p. 962.
(*h*) Id. p. 977.

§ 94. Colonial Copyright Commission of 1875.

under the chairmanship of the late Lord Stanhope, who, as Lord Mahon, had introduced the Bill of 1842. After taking much valuable evidence it reported in May, 1878, and the changes in the Law of Copyright which it recommended still wait legislative enactment till the House of Commons shall set itself in order and make better arrangements for accomplishing the legislative work of the nation. A bill amending and codifying the Law of Artistic and Literary Copyright seems particularly suitable for the consideration of the Grand Committee on Trade, and it is to be hoped that the two bills on that subject introduced by Mr. Hastings, or some Government measure, may shortly be referred to that Committee.

§ 95. Recapitulation of history.

The History of Copyright in England therefore falls under four periods :—

I. *From the incorporation of the Stationers' Company in* 1556 (*i*) *to the expiration of the Licensing Act in* 1694; in which period there exists usage sufficient to ground a copyright at common law, side by side with a statutory system of licensing and regulation, which indirectly enforces it.

II. *From the expiration of the Licensing Act in* 1694 *to the passing of the Copyright Act in* 1709, copyright at common law exists alone.

III. *From the passing of the Copyright Act in* 1709 *to the decision in Donaldson* v. *Beckett in* 1774 there is statutory copyright for a limited term, with, as was believed, common law copyright in perpetuity extending beyond it.

IV. *From the decision in Donaldson* v. *Beckett to the present day*, statutory copyright exists alone, as far as

(*i*) Before 1556, copyright is only rudimentary.

§ 95. Recapitulation of history.

published works are concerned, and has been gradually extended in the interests of authors and the community.

§ 96. Common law copyright.

Whether or not there is now a common law copyright after publication in cases not provided for by statute, might be a question of importance in case of the discovery or invention of a new species of literary property. To this the common law might apply, not as founded on ancient custom, but in its character of judicial legislation as pointed out by Lord Lyndhurst, who says: "The common law applies itself to the varying circumstances of the time, and extends to every new species of property that springs up, the same protection that it has afforded to property previously existing."

§ 97. Answers to questions (see § 66).

Returning then to the questions put at the outset, we can answer—

I. Between the introduction of printing in 1471, and the passing of the Statute of Anne in 1709, there was no direct recognition by the judges of copyright as existing in the common law of England; nor was there any statute creating copyright. There was, however, such a state of things existing in the custom of authors and printers as to constitute a new species of customary property, which the judges would have been bound to recognise had the question come before them.

II. The Statute of Anne was an unfortunately worded compromise, not understood at the time, containing expressions favouring both the retention and the destruction of copyright at common law, and probably intended, by at least part of the House, to destroy such copyright. It should however have been construed as leaving such copyright *in statu quo*, and this was the opinion of Lord Mansfield.

§ 98. History in other countries.

History in other countries.—As the law of the *United States* on copyright has been much influenced by that of England, a few words on its growth will not be out of place.

Immediately after the Declaration of Independence, Connecticut and Massachusetts (*k*) passed Copyright Acts in the interests of authors; and in May, 1783, the old Congress recommended to the various States to secure by law to authors and publishers a term of copyright similar to that contained in the English statute of Anne, and several states followed this recommendation. In 1790 a copyright law was enacted for the whole of the States, and in 1831 this was re-enacted with extensions of the term.

In 1834 the Supreme Court of the United States had before it, in the case of *Wheaton* v. *Peters* (*l*), the question of the effect of the American statutes on the common law right, if any, and decided by three judges to two, that the Act of 1790 did not affirm an existing right; but created one. One of the majority put the case in this way (*m*): "The argument that a literary man is as much entitled to the fruits of his labour as any other member of society, cannot be controverted. And the answer is, that he realises this product by the transfer of his manuscript, or on the sale of books when first published."

In 1870 the Copyright Laws were consolidated, and in 1874 revised and re-enacted. They afford protection to unpublished as well as published works.

With regard to other countries, it will suffice to say that copyright laws exist in every European state, and most countries outside Europe of any degree of civi-

(*k*) Drone, p. 87.
(*l*) Drone, pp. 43–48; 8 Peters' Rep. 591.
(*m*) 8 Peters' Rep. 657.

§ 88. History in other countries.

lization, except Egypt and some of the South American republics. These laws mostly date from the first half of this century, and have in many cases been revised within the last fifteen years, the tendency of the revision having invariably been to increase the amount of protection afforded to authors. Usually the original copyright has been in perpetuity; and, after being cut down to a short term of protection, this has been gradually lengthened. This has been the case in England, France, Holland, Norway, Sweden, Denmark, and Spain. To take a typical instance, in *France* (*n*) before the Revolution, copyright was perpetual; a decree of 1793, gives a statutory term of "life + 10 years;" this is extended in 1810 to "life + 20;" in 1854, to "life + 30 years;" and finally, in 1866, the term is fixed at "life + 50 years."

(*n*) Lowndes, p. 12; Copinger, p. 508.

CHAPTER V.

ENGLISH LAW OF LITERARY COPYRIGHT. PART I.

§ 99. Introduction.

WE now reach the consideration of the English law of Copyright as it exists at the present time. The author of a literary work may retain such work unpublished, or communicate it privately to certain persons under certain restrictions, or publish it in the ordinary sense of the word, so that all who choose to pay the price asked may obtain the work. Though the channels of communication may vary, the principles regulating each are nearly the same. The first communication to the public vests the statutory period of protection from unauthorized reproduction, whether oral or printed. For convenience of exposition, though not on account of difference of underlying principle, it is preferable to give separate attention to each different channel, and to deal with in order—

I. The law of *unpublished* works.
II. The law of works communicated *orally* to the public, as lectures and the drama.
III. The law of works communicated to the public *both orally and in print*, as printed lectures and plays.
IV. The law of works communicated to the public *in print only*.

§ 99. Introduction.

It is not easy however to carry out this division consistently in the English law, owing to the existence in it of Statutory and Common Law Copyright. There is *Statutory Protection*, the investitive fact of which is publication. It differs for books, plays, and lectures, owing to the English method of piecemeal legislation. There is further, the Common Law protection afforded to unpublished works, and works only communicated to others under certain restrictions, as in the case of works printed for private circulation, and lectures. The two kinds of protection slightly overlap; their differences have historical explanation; in the main, indeed, their principles are the same, but their co-existence is confusing.

We may, however, adopt the division set out on the previous page, bearing in mind that in dealing with oral communications we shall find statutory results from publication and common law results from publication for a *limited* purpose, side by side. We come first then to copyright existing purely by the Common Law, and having dealt with in turn the other branches of the Municipal Law, we can then consider *Colonial* and *International* Copyright, distinguishing in the latter case between countries with whom we have, and those with whom we have not, Copyright Treaties.

Section I.

Property in Unpublished Works according to Common Law.

§ 100. Unpublished works.

"The author or owner of any literary composition has a right so long as it remains unpublished to prevent the publication of it by another person" (*a*).

(*a*) Stephen's Digest, C. C. R. p. 65, art. 1.

§ 100. Unpublished works.

Thus in 1723 (*b*), Henry, Earl of Clarendon, delivered to Gwynne an original manuscript of his father's (Lord Clarendon's) History; in 1758, the administrator of Gwynne sold it to Shebbeare for publication, and the representatives of the Earl of Clarendon applied for and obtained an injunction against such publication, the Court saying that "it was not to be presumed that when Lord Clarendon gave a copy of his work to Gwynne he intended that he should have the profit of multiplying it in print.

In the celebrated case of *Prince Albert* v. *Strange* in 1849 (*c*), the Queen and Prince Albert made, for their own amusement and not for publication, drawings and etchings from which copies were printed for distribution amongst their friends. The defendant, obtaining copies of these, proposed to exhibit them, and to sell a descriptive catalogue. The Court restrained both the publication by exhibition, and "by descriptive catalogue." The principles applied however in this case, at least as regards the catalogue, are far wider than those applied to abridgments and dramatisations in the case of published works.

So in the American case of *Bartlett* v. *Crittenden* (*d*), the plaintiff taught in his school an original system of book-keeping; the defendant, a scholar and teacher in the school, having access to the manuscript of this, copied it, and inserted 92 pages thereof in a book which he published, consisting of 207 pages. The Court restrained publication, holding that, "No one can determine this essential matter of publication but the author. His MSS., however valuable, cannot, without his consent,

(*b*) *Duke of Queensberry* v. *Shebbeare*, 2 Eden, 329.
(*c*) 2 De G. & Sm. 652; 1 Mac. & Gor. 25.
(*d*) 5 McLean, 32, 37, 40.

§ 100. Unpublished works.

be seized by his creditors as property. Publication of a substantial part is piracy."

§ 101. Nature and limits of right.

The right is one of property, perpetual unless waived, in original literary productions, which need not be of any pecuniary or literary value, but must not be of an immoral, seditious, or blasphemous nature. It rests on the common law.

Mr. Justice Yates, the vigorous opponent of literary property after publication at common law, said, in *Millar* v. *Taylor* (*e*), "Most certainly the sole proprietor of any copy may determine whether he will print it or not. . . . . It is certain every man has a right to judge whether he will make his sentiments public, or commit them only to the sight of his friends. In that state the manuscript is in every sense his peculiar property, and no man can take it away from him, or make any use of it which he has not authorized, without being guilty of a violation of his property." And the nature and extent of the right is well summarised by Lord Brougham in *Jefferies* v. *Boosey* (*f*), where he says, "The right of the author before publication we may take to be unquestionable; he has the undisputed right to his manuscript; he may withhold or he may communicate it, and, communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases on the use of it; and the fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation."

In character, the work, to be property, must be the result of the intellectual labour of the claimant or his predecessor in title. Otherwise there can be no pro-

(*e*) 4 Burr. 2379.
(*f*) 4 H. L. C. 962.

perty. Neither will the law protect productions of an immoral or injurious tendency. Thus in *Southey* v. *Sherwood*, in 1817 (*g*), though the ground of the decision is not very clear, Lord Eldon refused to prohibit the defendant from publishing 'Wat Tyler,' an early work of Southey's, on the ground apparently that it was an immoral work, and that the State would afford no protection to works of such a character. However, there was also a question whether Southey, by leaving the manuscript in the hands of a publisher for twenty-three years, had not waived his rights. The regulation as to immorality is subject to the criticism (*h*) bestowed on the law with regard to published works of that character, a criticism which has even more force where by hypothesis without the piracy the matter would not be made public.

§ 101. Nature and limits of right.

The work need not be of any pecuniary value or literary merit (*i*).

§ 102. Investitive facts.

Putting in writing the result of intellectual work is sufficient to vest the common law right in the author, but it does not appear essential. For instance, there is probably a common law right to prevent the publication of lectures of which no manuscript exists. In *Abernethy* v. *Hutchinson* (*k*), Abernethy, the celebrated physician, gave a course of lectures open only to students attending by his permission. One of these took notes of the lectures, and proceeded to republish them in the *Lancet*. Lord Eldon restrained publication on the ground that a breach of trust had been committed, holding that a student had a right, for purposes of information, to take

(*g*) 2 Merivale, 435.

(*h*) See § 26.

(*i*) *Gee* v. *Pritchard*, 2 Swanston, 402; *Woolsey* v. *Judd* (Am.), 4 Duer. N.Y. 379.

(*k*) 1 Hall & Tw. 28.

§ 102. Investitive facts.

down the whole lecture in shorthand, but no right to make such notes in order to publish them for profit. But he seems to have doubted as to the foundation of his jurisdiction, for he said (*l*): "Where a lecture is orally delivered, it is difficult to say that an injunction could be granted upon the same principle upon which literary compositions are protected; because the Court must be satisfied that the publication complained of is an invasion of the written work; and this can only be done by comparing the composition with the piracy."

A man putting into written or oral form the results of his intellectual labour, acquires protection for such results. Free application of the principle of waiver, and the reasons underlying the maxim, "De minimis non curat lex," hinder this proposition from having the unfortunate result of establishing copyright in conversation, jests, and the like.

§ 103. Transvestitive facts.

The author may deal with his copy as with any other piece of property. He may assign copies under express or implied undertaking not to publish, when property in the original manuscript will pass, but not the right to publish. In the words of an American case (*m*): "This property in manuscript is not distinguishable from other personal property. It is governed by the same rules of transfer and succession, and is protected by the same process, and has the benefit of all the remedies accorded to other property so far as applicable.

Thus in *Thompson* v. *Stanhope* (*n*) Lord Chesterfield's celebrated letters to his son having been sold by his

(*l*) 1 Hall & Tw. p. 39.
(*m*) *Palmer* v. *De Witt*, 47 N. Y. 532, 538. (1872).
(*n*) Ambler, 737.

§ 103. Transvestitive facts.

son's widow to Dodsley, the latter published them, and Lord Chesterfield's executors applied for an injunction to restrain publication. The Lord Chancellor granted it, holding that the widow had no right to print without the consent of Lord Chesterfield, and that when Lord Chesterfield declined receiving the letters from her and said she might keep them, he did not mean to give her leave to publish them. So in *Abernethy* v. *Hutchinson* (*o*) it was held that a right was given to hear and take a copy for information and instruction, but not to publish such a copy.

§ 104. Letters.

In the case of *Letters*, the writer retains copyright in the letter, so as to hinder the receiver from publishing it, except under special circumstances. It has been suggested (*p*) that the receiver of a letter may publish it without the consent of the writer for purposes of personal vindication. In the case of *Pope* v. *Curl*, in 1741, the poet Pope applied for an injunction against Curl, the bookseller, to restrain him from publishing letters to and from Pope. Lord Hardwicke granted it as to letters written by Pope, but not as to those written to him, saying (*q*): "The receiver has only a special property possibly in the paper, but this does not give a license to any person whatsoever to publish letters to the world, for at most the receiver has only a joint property with the writer," who could therefore restrain publication. In *Oliver* v. *Oliver* (*r*) it was held that the receiver of a letter might maintain an action for detinue against a person into whose possession the letter had passed.

(*o*) 1 Hall & Tw. 28.

(*p*) *Percival* v. *Phipps*, 2 Ves. & B. 19; *Folsom* v. *Marsh* (Am.), 2 Story, 100, 111.

(*q*) 2 Atk. 342.

(*r*) 11 C. B. N.S. 139.

§ 105. Conditional communications.

Communication of a work may be only partial, restricted, and conditional, for a limited purpose, and the donor may prevent the donee from transgressing the conditions of the communication. In the words of Lord Cottenham, in *Prince Albert* v. *Strange* (*s*): "In most of the cases which have been decided, the question was not as to the original right of the author, but whether what had taken place did not amount to a waiver of such right; as in the case of letters, how far the sending of the letters; in the case of dramatic compositions, how far the permitting the performance; and in the case of Mr. Abernethy's lecture, how far the oral delivery of the lecture had deprived the author of any part of his original right or property."

§ 106. Divestitive facts.

Publication destroys the common law right, and if according to the statute, vests statutory copyright; if not according to the statute, all copyright may be lost. Publication is defined as "making a thing public in any manner in which it is capable of being communicated to the public." Though not necessarily so, it is generally for sale, or at any rate, so as to be accessible to all who choose to obtain it, on conditions imposed not by the author but by the law. Publication "for private circulation only," that is, on conditions imposed by the author, does not divest the common law right (*t*).

Waiver of rights is a divestitive fact of copyright.

The late American case of *Kiernan* v. *Manhattan Quotation Company* (*u*) shews the difficulties of drawing the line as to what constitutes publication. A., the plaintiff, had bought the exclusive right to use foreign

(*s*) 1 Macn. & Gor. 25, 42.
(*t*) *White* v. *Geroch*, 2 B. & Ald. 298.
(*u*) 50 How. Pr. N. Y. 194 (cited by Drone, p. 122).

financial news supplied by B., and telegraphed it to his customers, where it was exposed to public view on printed tape connected with stock indicators. C. used A.'s news for transmission to C.'s customers. A. sued C., and it was held that giving news to the public in this way was not such publication as to defeat A.'s common law rights. § 106. Divestitive facts.

The right will be infringed by any use of an intellectual production without the consent of the owner, or not warranted by the conditions of its communication by him. The remedies are the ordinary common law action for damages sustained, and the right to an injunction to restrain publication. § 107. Infringements and remedies.

The law of England and the United States is practically the same, except that while in England the property in unpublished MSS. rests on common law only, in the United States the protection is by statute (*x*). European nations practically agree in similar protection. *Denmark* (*y*) limits the right to a term of thirty years from the author's death. The Courts in *France* (*z*) have decided that MSS. cannot be published by an author's creditors without his consent. *Russia* (*a*) provides that private letters cannot be published without the consent of author and receiver. The German (*b*) proviso is a fair sample of the rest, and is to the effect that printing MSS. without the consent of the author, even by the legal owner, is piracy. This right is perpetual. § 108. Comparative summary.

(*x*) U.S. Rev. St. § 4967.
(*y*) Copinger, p. 554.
(*z*) Cop. p. 514.
(*a*) Cop. p. 564.
(*b*) Cop. p. 531.

Section II.

Works communicated Orally. Overlapping Statutory and Common Law Rights. Lectures.

§ 109. Nature of right.—§ 110. Investitive facts.—§ 111. Divestitive facts.—§ 112. Transvestitive facts.—§ 113. Remedies.—§ 114. Sermons.—§ 115. Recommendations of Commission.—§ 116. Foreign countries.

§ 109. Nature of right.

The author of a lecture, sermon or address, in communicating orally his work to the public, may do so for a limited purpose and conditionally, and obtain a common law right. If he goes through certain formalities he may obtain statutory protection from printed reproductions, still having probably common law protection from oral ones. On the other hand, he may waive all rights, and authorize all reproductions.

Nature of Rights.—The author has the right, if his communication is only for a limited purpose, to enforce any agreement that the matter communicated should only be used for such limited purpose. For a lecture delivered but not printed there is probably a common law copyright in perpetuity (*c*). For a printed lecture (*d*), fulfilling statutory conditions, the duration of copyright is twenty-eight years, or the life of the author, whichever is longest. The lecture need not be delivered from a written manuscript (*e*). No case exists in English law expressly deciding that unauthorized oral redelivery of a lecture infringes copyright, but it would almost certainly be held to do so, and the Copyright Commission (*f*) recommend a definite enactment to that effect. American cases, though not directly deciding the point, appear to

(*c*) 5 & 6 Will. IV. c. 65, ss. 1 and 5.
(*d*) Id. § 4.
(*e*) *Abernethy* v. *Hutchinson*, 1 Hall & Tw. 28.
(*f*) C. C. Rep. § 84.

cover it; thus in *Boucicault* v. *Fox* (*g*) it is said: "Suppose Mrs. Kemble were to read a drama of her own production, would the reading be a dedication to the public and authorize any elocutionist to read it who could obtain a copy against the consent of the author?" and the question is answered emphatically in the negative. § 109. Nature of right.

The author's rights therefore are:—

1. At common law, to prevent unauthorized printing and publication of his lecture in perpetuity.

2. At common law (probably), to prevent oral delivery by unauthorized persons in perpetuity.

3. By statute to use a certain procedure during a limited term against persons printing without authority.

The investitive facts of the right are:— § 110.

I. *Of Statutory Protection* (*h*).—Delivery of the lecture, and notice in writing to two justices of the peace, living within five miles of the place of delivery, at least two days before delivery. This will not vest copyright in the cases of universities or other endowed foundations, or in the case of endowed lectures. Investitive facts.

II. *Of Common Law Protection.*—Delivery for a limited purpose, the limitation being presumed in the absence of direct announcement. The Commission suggest that notice by the lecturer that he prohibits reproduction shall be required to vest his right. The presumption here would be of waiver of his rights in the absence of any direct prohibition to reproduce.

The transvestitive facts of this right are the ordinary ones for personal property. Presumably an author may assign to another the sole right of oral redelivery. § 111. Transvestitive facts.

(*g*) 5 Blachford, 87, 98. See also *Palmer* v. *De Witt*, 47 N. Y. 530; 2 Sweeny, 530, 543.

(*h*) 5 & 6 Will. IV. c. 65, s. 5.

§ 112. Divestitive facts.

The divestitive facts of the right are:—

1. Of statutory protection, the expiration of the term of copyright, which can only occur in the case of printed lectures.

2. Of both protections, waiver of rights.

Publication does not in itself divest the right of oral redelivery. The Commission (*i*) suggest that it should; but it seems unreasonable that the author's making his work more accessible in one mode to the public should deprive him of the exclusive right of communicating it in another way.

It was also suggested by Mr. Farrer (*k*) before the Commission that if the author did not print his lecture within, say, three years of delivery, his right should be divested. There seems no more ground for this than for withdrawal of protection from any other unpublished manuscript, and the Commission rightly declined to adopt the proposal.

§ 113. Remedies.

The remedies for infringement of the right are:—

1. Statutory action for penalties, under 5 & 6 Will. IV. c. 65, if statutory conditions of notice are fulfilled.

2. Common law action for damages, the amount of which must be proved.

3. Injunction against unauthorized printing or delivery.

§ 114. Sermons.

Sermons delivered in endowed places have certainly no statutory copyright, and possibly no common law protection. Elsewhere they have copyright at common law, and probably, if due notice is given, statutory protection.

(*i*) C. C. Rep. § 84.
(*k*) C. C. Ev. q. 3100.

The Copyright Commission recommend (l):— § 115.

1. That the author's copyright should extend to prevent oral redelivery without his consent, unless the lecture has been published in print. Recommendations of Commission.

2. That the term of copyright should be, in all cases, the author's life + thirty years.

3. That newspaper reports of the lecture should be allowed unless the author expressly reserved his rights of reproduction.

Sir J. F. Stephen drafts the proposed law as follows (*m*):—

The author of any lecture and his assigns shall have—

(1.) The exclusive right of delivering such lecture for the term of copyright, commencing from the first delivery thereof, provided that if he publish such lecture his exclusive right of delivering it shall thereupon determine.

(2.) The exclusive right of publishing such lecture as a book; provided that no report of any lecture published in a newspaper shall be deemed to be an infringement of such right, unless at the time of delivering such lecture the lecturer gives public notice that he prohibits the publication thereof in newspapers.

Foreign countries generally protect lectures, sermons, and orations from unauthorized reproduction, except in the case of political speeches. § 116. Foreign countries.

The United States has no statutory protection for oral delivery, but rests it on the common law.

(*l*) C. C. Rep. § 84.

(*m*) Digest, § 19; C. C. Rep. p. 74.

SECTION III.

The Law of Works communicated to the Public both Orally and in Print, as Plays, Lectures, &c.

§ 117. Introduction.—§ 118. Faults of English Law of Dramatic Copyright.—§ 119. History before statutory protection, 1833.—§ 120. Statutory provisions.—§ 121. Author's rights in dramatic compositions.—§ 122. What is a dramatic piece?—§ 123. What is a place of dramatic entertainment?—§ 124. Infringements of author's rights. Dramatisation of novels.—§ 125. Duration of protection.—§ 126. Investitive facts.—§ 127. Transvestitive facts.—§ 128. Divestitive facts.—§ 129. Remedies for infringements.—§ 130. Law of other countries.—§ 131. International Dramatic Copyright.—§ 132. Recommendations of the Copyright Commission.

§ 117. Introduction.

Though strictly plays as merely acted, and lectures as merely delivered should have been treated under the last head, it has been more convenient, in view of the mainly oral character of lectures, to group all that has to be said with regard to them together there, and reserve the case of plays for the following head. This is more especially advantageous, because the law as to lectures is largely Common Law, whereas the law of the drama is entirely statutory. Here however the statutory law has dealt with both the performing right, or the right of representation on the stage, and the printing right. Both are in English law known as "*Copyright*," an extensive use of the term which only confuses; and it will be better to limit the term "Copyright" to the right of publishing in print, and to use for the performing or acting right either the term "Play-Right," as suggested by Drone, or "Stage-Right," as suggested by Charles Reade, the former being preferable.

§ 118. Faults of English law of Dramatic Copyright.

The English Law of Playright and Dramatic Copyright suffers from two great faults. In the first place,

playright and copyright, which are merely protections of different modes of communicating the same intellectual results to the public, are treated in different ways, and may begin and end at different times: Secondly, the fault of the English law alluded to above, that in questions of infringement it seems rather to consider whether new work has been added than whether old work has been taken, is specially prominent in the case of dramatisation of novels. These two faults render it difficult to give a satisfactory and clear statement of the English law of the drama.

§ 118. Faults of English law of Dramatic Copyright.

The first statute directly dealing with "Playright" in England is 3 Will. IV. c. 15. Before that Act, playright rests on the common law. In *Macklin* v. *Richardson* (*n*) in 1770, the plaintiff was the author and proprietor of a popular farce called 'Love à la Mode,' which was often performed but had never been printed. The defendant published it from a shorthand report of it. The Court granted an injunction, saying that the plaintiff had a right of profit from the performance of his composition, and also from printing and publishing it, and should be protected in both. This case decided that public representation did not forfeit the author's common law right to restrain unauthorized printing, and in *Morris* v. *Kelly* (*o*), where Lord Eldon restrained the unauthorized representation of a play, which had been performed in public but not printed, it was further decided that such representation did not forfeit the author's common law playright.

§ 119. History before Statute of 1833.

That playright stood apart from the Statute of Anne was decided in the case of *Murray* v. *Elliston* (*p*), where

(*n*) Ambler, 694.
(*o*) 1 Jac. & W. 481.
(*p*) 5 B. & Ald. 657.

§ 119. History before Statute of 1833.

it was held that representation of an abridged version of Lord Byron's printed tragedy of 'Marino Faljero' did not infringe his statutory copyright, and in *Coleman* v. *Wathen* (*q*), which decided that representation was not publication within the meaning of the Statute of Anne.

§ 120. Statutory provisions.

English dramatic law now rests on the Act of 3 Will. IV. (*r*), and the Copyright Act of 1842 (*s*). The first of these provided that:—

I. The author of any dramatic piece (1) composed and not printed by the author thereof or his assigns, or (2) which should thereafter be composed but not printed, should have as his own property the liberty of representing such piece at any place of dramatic entertainment in the United Kingdom.

II. As to any such piece (3) printed and published within ten years before the passing of the Act by the author or his assigns, or (4) which should thereafter be printed and published, the author should have, in case (3) from the passing of the Act, in case (4) from the time of publication, a similar playright for the limited term of twenty-eight years, or his life, whichever should be longest.

This Act therefore gave statutory playright in perpetuity in the case of pieces performed, but not printed; playright for a term in the case of pieces printed or to be printed.

The 20th (*t*) section of the Act of 1842 however has thrown the law into confusion. It recites that it is expedient to *extend* the term of playright of dramatic pieces given by the Act of William IV., to the full term

(*q*) 5 T. R. 245.
(*r*) 3 Will. IV. c. 15.
(*s*) 5 & 6 Vict. c. 45, ss. 20, 24.
(*t*) 5 & 6 Vict. c. 45, s. 20.

given by the Copyright Act, and therefore enacts that the playright of any dramatic piece shall be the property of the author for the same term as that of book-copyright; and that the same provisions as to registration shall apply, except that the first public representation of any piece shall be deemed equivalent to the first publication of any book. By clause 21, proprietors of playright are to have all the remedies provided in the former Act, and by clause 24, after enacting that owners of copyright in books should not sue for infringements before registration, it further provided that this enactment should not affect an unregistered owner of playright under the Act of William IV.

§ 120. Statutory provisions.

There are two interpretations possible of the resulting law. Either: 1. The Legislature did not intend the Act to apply to pieces performed but not printed. Playright in these therefore remains perpetual; but the playright in printed plays is, as the Act recites, *extended* to forty-two years, or the life of the author + seven years, whichever shall be the longer. Or: 2. The legislature intended the Act to apply to both printed and unprinted compositions. Misunderstanding the previous Act, they recited "*extension*" when their clause really *cut down* the term of protection. In this case, copyright and playright will be for the same term, and will begin to run respectively on the first publication of the piece as a book, and on its first representation in public as a play.

The second view will probably be taken by a Court of Law as to the duration of playright in pieces not printed; but the question is by no means free from doubt. It is also probable, though there is no express decision to that effect, that the Court, following *Donaldson* v. *Beckett* (*u*), would hold the common law right

(*u*) 2 Bro. Cases in Parl. 129.

§ 120. Statutory provisions.

destroyed after first performance in public by the statutory provisions. And in the late cases of *Wall* v. *Taylor* and *Wall* v. *Martin* (*x*), Field and Cave, JJ., held with reference to musical compositions (which stand on very much the same footing), that "the proprietor of a musical composition has no other right of performing than that given by the statute;" a statement, it is submitted, at any rate inaccurate as regards unpublished compositions.

§ 121. Author's rights in dramatic compositions.

Hence the *Author's Rights* are as follows:—

I. In play neither printed nor acted.

I. A dramatic piece in manuscript *neither printed nor represented* is the perpetual property of the author at common law.

II. In play acted but not printed.

II. *If represented but not printed;* (1.) As regards *playright*, the author has the sole playright for the statutory term dating from the first performance. (2.) As regards *copyright*, the author has the right, which may be perpetual, of restraining unauthorized publication in print of his unpublished MSS.

III. In play printed but not acted.

III. *If printed but not represented;* (1.) As regards *playright*, the author has the right which may be perpetual, of restraining unauthorized performances until he himself first performs it. This serves as an investitive fact of statutory playright. (2.) As regards *copyright*, the author has it in his work from first publication for the statutory term.

Sir J. F. Stephen, however, in his 'Digest' is, with doubt, of opinion that playright (*y*) cannot be gained if the dramatic piece has been previously published in print,

(*x*) 51 L. J. Q. B. 547; L. R. 11 Q. B. D. 102.
(*y*) C. C. Rep. p. 63, §§ 14, 16.

and the Commission in their report (*z*), also speaks of the point as doubtful. With all the deference due to such authorities, the point seems clear. At common law before the statute, although the case of *Murray* v. *Elliston* (*a*) appears to decide that representation of a printed work is not an infringement of its playright, the authority of the case is weakened by the fact that the piece performed was an abridgment or adaptation. The statutes however seem to leave no doubt upon the matter. The Act of William IV. clearly gives playright for a term to the author of a printed dramatic composition, without imposing any condition that representation should precede publication in print, and the Act of 1842 contains nothing restricting the right.

§ 121. Author's rights in dramatic compositions.

The case on which the statement appears to be based, that of *Toole* v. *Young* (*b*), really turns on another point. A. published in print, a novel, nearly (*c*) in dramatic form; he subsequently dramatised it, or adapted it for dramatic performance, and sold the playright of the adaptation to B.; C. also adapted A.'s novel, and represented his dramatic adaptation. B. sued C., and it was held that C. had a right to dramatise A.'s novel, and that his representation of his dramatisation did not infringe A.'s copyright in the novel, or B.'s playright in the authorized dramatic version.

Without going into the correctness of this decision on principle, or on precedent, it will be seen that it turned

(*z*) C. C. Rep. § 73.
(*a*) 5 B. & Ald. 657.
(*b*) L. R. 9 Q. B. 523.
(*c*) Mr. Hollingshead's (A.'s) account of his novel was that "it was so arranged that it could be produced almost verbatim on the stage"; but *some* adapting work was evidently necessary, as he says "that the piratical author *turned it in a few hours* into an acting drama." (C. C. Ev. q. 2596.)

§ 121. Author's rights in dramatic compositions.

on the fact that intellectual labour, alteration, adaptation, was necessary to represent A.'s novel on the stage. But assume that A.'s work had been published, as was possible, in acting form, with all the dialogue and stage directions, so that it could be represented on the stage without any alterations; it is clear that its previous publication in print would not, at common law or by statute, divest A. of playright in his work. C. in representing it would be representing something on which he had bestowed no intellectual labour whatever, and as will be seen, it is only the presumed intellectual labour in dramatisations of novels that hinders them from being held infringements of playright or copyright. The late Lord Hatherley in *Tinsley* v. *Lacy* (*d*) clearly stated this. He said, "The only way in which an author can prevent other persons from representing as a drama the whole or any part of a work of his composition, is himself to publish his work *in the form of a drama*, and so to bring himself within the scope of dramatic copyright." In consequence of the decision in *Toole* v. *Young* (*e*), this publication in the form of a drama must precede all other publication in a printed form, such as a novel.

This view is confirmed by the recent case of *Chappell* v. *Boosey* (*f*). There the defendants were sued for performing in public a song published by the plaintiffs, and pleaded that by publication in print the plaintiffs had lost the performing right, citing Stephen's 'Digest' and the report of the Commission. North, J., held that publication in print did *not* divest playright, and that the two rights (play- and copy-right) were dis-

(*d*) 1 Hem. & Miller, 747, 751.
(*e*) L. R. 9 Q. B. 523.
(*f*) 51 L. J. Ch. 625; 46 L. T. N.S. 854; L. R. 21 Ch. D. 232.

tinct in their times of commencement and terms of protection. § 121. Author's rights in dramatic compositions.

IV. A dramatic piece *first represented and then printed*; the author has:

(1.) *Playright* for the statutory term from first representation. IV. Play first acted and then printed.

(2.) *Copyright* for the statutory term from first publication in print. During a certain time at the end of his term he will have copyright only.

V. A dramatic piece *first printed and then represented*; the author has: V. Play first printed and then acted.

(1.) *Copyright* (statutory), from first publication in print.

(2.) *Playright* (statutory), from first representation. During a certain time at the end of his term he will have playright only.

§ 122. What is a dramatic piece?

The term "dramatic piece" is defined in the Act of 1842 as "Every tragedy, comedy, play, opera, farce, or other scenic .... or dramatic entertainment." In *Russell* v. *Smith* (*g*) Lord Denman defined it as "any piece which could be called dramatic in its widest sense, any piece which on being presented by any performer to an audience would produce the emotions which are the purpose of the regular drama." And, though this definition sins considerably against the laws of logic in containing "the term defined," not once only, but even twice, yet in connection with the facts of the case it throws some light upon the meaning of the term. A song, 'The Ship on Fire,' containing a descriptive account of a recent wreck, was sung by a performer in plain clothes, accompanying himself at the piano, without any aid from scenery. The

(*g*) 12 Q. B. 217, 236.

§ 122. What is a dramatic piece?

song was intended to express various emotions, and the performer assumed to a limited extent certain characters. It was held a "dramatic piece." So in the case of *Clark* v. *Bishop* (*h*), a song, 'Come to Peckham Rye,' sung in costume and accompanied by characteristic dances and gestures, was held a dramatic piece. The dramatic character consists in the *representative* (*i*) as opposed to the *narrative* element, and may exist without any aids to personation from scenery, costume, or other performers. It is in each case a question of degree or of fact. Thus, in a very recent case, the jury (*k*) found that a song, in which the dramatic element consisted in 'laughing Ho-Ho,' in mild imitation of the storm-fiend, was not a dramatic piece.

§ 123. What is a "place of dramatic entertainment"?

The definition of a "place of dramatic entertainment" was also considered in *Russell* v. *Smith* (*l*), where it was defined as "a place used *for the time* for the public representation for profit of a dramatic piece." In the case in question, the "place" was Crosby Hall, used for various educational and literary meetings and the like, and on that occasion used for an entertainment held to be dramatic. The clause "for profit" appears a wrong limitation (*m*);" the statute gives the author the sole right of performing, and if the representation is unauthorized, that right is infringed, whether or not the performer makes a profit from the performance.

(*h*) 25 L. T. N.S. 908.

(*i*) *Daly* v. *Palmer* (Am.), 6 Blatchford, 256, 264.

(*k*) *Wall* v. *Martin*, *Wall* v. *Taylor*, 51 L. J. Q. B. 547; L. R. 11 Q. B. D. 102.

(*l*) 12 Q. B. 217, 237.

(*m*) In the case of books, it was held in *Novello* v. *Sullow*, 12 C. B. 177, that gratuitous distribution of unauthorized copies was an infringement of copyright.

This consideration appears to cover the case of so-called "private theatricals;" the fact of their audience being limited by certain regulations should not protect them from infringing the author's rights. Here again the question is one of degree. The importance of this term, however, is much diminished by the recent decision in the musical cases of *Wall* v. *Taylor* (*n*) and *Wall* v. *Martin*. These were actions by the well-known Mr. Wall, to recover damages for unauthorized performance of a song in public. The plaintiff alleged that the song was also a dramatic composition. The defendants pleaded that the proviso of the Act of William IV., giving the sole right of performance at places of dramatic entertainment, was extended by the Act of 1842 to musical performances, which therefore were only protected from unauthorized performance in respect of "places of dramatic entertainment." But it was held by Field and Cave, JJ., that the right conferred, both with reference to musical and dramatic compositions was, "the sole right of representing in public," and was not limited to "places of dramatic entertainment." And this decision was affirmed by the Court of Appeal.

§ 123. What is a place of dramatic entertainment?"

Infringements of the Author's Rights are :—

§ 124. Infringement of author's rights. Dramatisation of novels.

I. Unauthorized representation of a dramatic piece in public during the statutory or common-law term of playright.

II. Unauthorized publication in print of such piece during the author's statutory or common-law term of copyright.

It is not an infringement of an author's playright to dramatise and represent a novel he has printed (*Reade*

(*n*) L. J. 51 Q. B. 547; L. R. 11 Q. B. D. 102.

§ 124. Infringement of author's rights.

v. *Conquest*, first case (*o*), *Toole* v. *Young* (*p*)). To print such dramatisation is an infringement of his copyright in the novel. (*Tinsley* v. *Lacy* (*q*); *Reade* v. *Lacy* (*r*).)

Dramatisation of novels.

If the novel dramatised be founded on a play, the acting of such dramatisation is an infringement of the playright in the play (*Reade* v. *Conquest*, second case (*s*)), though not of the copyright in the novel. Printing such dramatisation infringes both the copyright in the novel and the copyright in the play. (*Reade* v. *Lacy* (*r*).) But a dramatisation of a novel does not necessarily infringe the playright of another dramatisation of the same novel (*Toole* v. *Young* (*p*)).

This curious mixture is the result of decided cases; but some possible combinations of facts have not yet been brought forward for adjudication. For instance, A. represents a play; B. founds a novel on that play; does B. by printing his novel violate A.'s copyright in his play? C. dramatises B.'s novel, he thereby does not infringe B.'s copyright, but he (*t*) apparently infringes A.'s playright; by printing his dramatisation he infringes B.'s copyright; does he infringe A.'s copyright?

Novelisation of dramas.

On the principles of English law apparently the "novelisation" of a play is not an infringement of the rights of its author. But if the printing of a dramatisation infringes the copyright of the author of the novel, surely also the printing of a "novelisation" should infringe the copyright of the author of the play. There is as much original work requiring in novelising as in

(*o*) 9 C. B. N.S. 755.
(*p*) L. R. 9 Q. B. 523.
(*q*) 1 Hem. & M. 747.
(*r*) 30 L. J. Ch. 655.
(*s*) 11 C. B. N.S. 479.
(*t*) *Reade* v. *Conquest*, 2nd case, 11 C. B. N.S. 479.

dramatising; but the case seems never to have arisen in English Courts. The consent of the author is however in practice sometimes obtained (*u*). § 124. Infringement of author's rights.

All this confusion results from the English doctrine that the dramatisation of a novel produces a new and original work capable of copyright; while yet the Courts are forced to recognise that it is not original by treating the printed dramatisation as a possible infringement of the copyright in the novel. Novelisation of dramas.

An author communicates to the public the results of intellectual labour. Whether in making other communications to the public any other person infringes his rights should be tested by the principle laid down as between plays and plays in *Chatterton* v. *Cave* (*x*): *Has there been a substantial and material taking of these results?* In the case of most dramatisations of novels, there certainly has, and the law has recognised this by prohibiting in some cases the printing of such dramatisations. In acted plays, we have the text, the actors' abilities, and the stage accessories, costumes, and scenery; these last two being additions founded and based on the text. But the text is the most important part of the play, so important that it has been doubted whether there can be copyright in anything but the actual words of the play. Surely then in the case of dramatisations of novels there has been "a substantial and material taking" of the labour of an author, and where there has been such taking, every reason on which literary property is based is a reason for protection against such infringements. The English law here is another example of the English position referred to above, that addition condones subtraction, the question

(*u*) See Tom Taylor's evidence, C. C. Ev. q. 2652.
(*x*) L. R. 10 C. P. 572, 575; L. R. 3 App. Cases, 483.

§ 124. Infringement of author's rights.

in the English Courts being not so much "Has old and valuable work been taken?" as "Has new and valuable work been added?"

Novelisation of dramas.

It is an infringement of an author's right to perform parts of his play or opera (*y*), as for instance single songs from an opera, subject to the principle of *Chatterton* v. *Cave* (*z*), that the part taken must be substantial and material.

Infringement may also be committed by taking scenic effects and dramatic situations, without any accompanying words. Thus Brett, J., in *Chatterton* v. *Cave* (*z*) said, "I think scenic effects and situations are more peculiarly the subject of copyright than the words themselves," and in an American case (*a*) it was held that "written work consisting wholly of directions set in order for conveying the ideas of the author on a stage by means of characters who represent the narrative wholly by action is as much a dramatic composition as any other." But on the other hand, in *Martinetti* v. *Maguire* (*b*), the 'Black Crook' was not protected from piracy, apparently on the ground that it was a "mere spectacle." In this case however it was in evidence that great part of the scenery consisted in the "female form divine," and the learned judge's morality appears to have overpowered his grasp of the general law.

Immorality and blasphemy in plays prevent protection from vesting; and it is also required that there should be some amount of original work in the play claiming protection. Dramatisations of novels have playright of their own. Playright can also be obtained in the adaptation of a play in which there is no playright, as in the

(*y*) *Planché* v. *Braham*, 4 Bing. N. C. 17.
(*z*) L. R. 10 C. P. 575; L. R. 3 App. Cases, 483.
(*a*) *Daly* v. *Palmer*, 6 Blatchford, 256, 264.
(*b*) 1 Deady 216 (Am.)

§ 124. Infringement of author's rights.

case of *Hatton* v. *Keen* (*c*), where the defendant established a playright in adapted plays of Shakespeare. Copyright and playright can also be obtained in translations of a foreign play in which there is no copyright, but this does not hinder others from making their own translations from the common source.

§ 125. Duration of protection.

The duration of the protection afforded is perpetual at common law. By statute for both copyright (*d*) and playright (*e*), it is forty-two years from first publication, or life + seven years, whichever is longer.

§ 126. Investitive facts.

The investitive facts of the right are :—

I. *Of playright.*

At common law :

1. Intellectual production in some form permanent or capable of permanence.

Under the Statute :

2. First representation in public.
3. (Condition precedent to suing.) Registration under 5 & 6 Vict. c. 45, ss. 20-24.

II. *Of copyright.*

At common law :

1. Intellectual production in a permanent form.

Under the Statute :

2. First printing and publication.
3. Registration under 5 & 6 Vict. c. 45, ss. 13, 24.

One (*f*) who employs another to write a play for him, and even goes so far as to suggest the subject, does not by that alone acquire copyright; nor (*g*) do minor

(*c*) 7 C. B. N.S. 268.

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

(*e*) 5 & 6 Vict. c. 45, s. 20.

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

(*g*) *Levy* v. *Rutley*, L. R. 6 C. P. 523. See also *Shelley* v. *Ross*, L. R. 6 C. P. 531.

§ 126. Investitive facts.

alterations or additions with or without the consent of the author necessarily constitute joint authorship. Registration (*h*) is necessary before infringement of copyright can be sued for; a modified form of registration is desirable as evidence (*i*) of playright, but is not a condition precedent to an action for infringement (*k*).

§ 127. Transvestitive facts.

The transvestitive facts of the right are:—

1. Consent of author (*l*), which must be in writing.

(*h*) 5 & 6 Vict. c. 45, s. 24.

(*i*) Ibid. s. 20. *Clarke* v. *Bishop*, 25 L. T. N.S. 908.

(*k*) In the case of a play which has been printed, the proprietor of the copyright must make entry in the register of—

1. The title of such play;
2. The time of first publication thereof;
3. The name and place of abode of the publisher thereof;
4. The name and place of abode of the proprietor of the copyright, or of any portion (5 & 6 Vict. c. 45, s. 13);

on the form given in the schedule of the Act of 1842, a copy of which is supplied at Stationers' Hall. The publisher whose "name and abode" is registered must be the *first* publisher of the work: *Coote* v. *Judd*, L. R. 23 Ch. D. 727. The place of abode of the publisher may be his place of business: *Nottage* v. *Jackson* (not yet fully reported). A fee of 5*s*. is payable to the Registrar.

In the case of an assignment of such copyright, there must be registered—

1. The assignment;
2. The name and place of abode of the assignee.

A form for registration is given in the schedule, and a similar fee of 5*s*. is payable. (5 & 6 Vict. c. 45, s. 13.)

In the case of a play acted, but not printed, it is sufficient to register—

(1.) The title of the play.
(2.) The name and place of abode of the author.
(3.) The name and place of abode of the proprietor of the copyright.
(4.) The time and place of first representation or performance.

(5 & 6 Vict. c. 45, s. 20.) Any failure to register will not deprive the author of any remedies to which he may be entitled under 3 Will. IV. c. 15.

A play neither acted nor printed of course needs no registration.

(*l*) 3 Will. IV. c. 15, s. 2; *Shepherd* v. *Conquest*, 17 C. B. 427.

The writing of the agent of an author will suffice as evidence of assignment, and the Secretary (*m*) of the Society of Dramatic Authors is treated as his agent. The transfer need not be witnessed (*n*), or under seal (*o*). § 127. Transvestitive facts.

A part owner cannot assign the whole (*p*) copyright or playright without the consent of his co-owners.

2. In the event of death intestate, copyright and playright descend as personal property.

3. Registration of the transfer is a condition precedent to the bringing of an action. By 5 & 6 Vict. c. 45, s. 22, an assignment of copyright does not transfer playright unless the intention to do so is expressly entered on the register. This clause is the result of the decision in *Cumberland* v. *Planché* (*q*), where it was held that the assignment of the copyright of a drama passed the sole right of representing it, as incidental to the copyright. The clause was, however, held in *Lacy* v. *Rhys* (*r*) not to apply to an unregistered deed expressly conveying both copy and acting right. Cockburn, C.J., *arguendo* suggested that possibly an unregistered assignee would not have the benefit of the Act of Victoria, but only of the Act of William IV.

§ 128. Divestitive facts.

The Divestitive Facts of the Right are—

1. Expiration of the statutory term, which may be at different times for playright and copyright.

2. Waiver by the author, which (possibly) must under the Act of William IV. be in writing.

(*m*) *Morton* v. *Copeland*, 16 C. B. 517.
(*n*) *Cumberland* v. *Copeland*, 1 Hurl. & C. 194.
(*o*) *Marsh* v. *Conquest*, 17 C. B. N.S. 418.
(*p*) *Powell* v. *Head*, 12 Ch. D. 686.
(*q*) 1 A. & E. 580.
(*r*) 4 B. & S. 873; and see *Marsh* v. *Conquest*, *supra*.

§ 129. Remedies for infringement.

Remedies. I. *For Infringement of Playright.* 1. (*s*) A penalty of forty shillings, or the full amount of benefit derived or damage sustained by the plaintiff from the infringement, whichever shall be greater, to be recovered by the author from anyone representing or causing to be represented without the authority of the author any dramatic piece. No one is liable to penalties unless he or his agent actually takes part in the representation (*t*). Thus owners of theatres, who let their theatre and apparatus to travelling companies, are not therefore liable for penalties for infringement incurred by such companies. But in *Marsh* v. *Conquest* (*u*) the proprietor of a theatre who let his theatre for one night to one of his company, his son, for a benefit was held liable.

In the evidence of dramatic authors (*x*) before the Commission this was complained of as working considerable injustice in the case of country theatres, taken by strolling companies for a week or less. They perform copyright pieces without consent, and are off before they can be reached, while the owners of the theatre are not responsible. Though the Commission do not refer to the matter in their report, the suggested liability of the owner seems desirable.

2. An injunction to restrain unauthorized performance.

II. *For Infringements of Copyright the Author has:*

1. An action for damages under s. 15 of Act of 1842,
2. Seizure of piratical copies under Act of 1842. § 23, or damages in case of their non-delivery.
3. An injunction to restrain unauthorized printing.

(*s*) 3 Will. IV. c. 15, § 2.

(*t*) *Russell* v. *Bryant*, 8 C. B. 836; *Lyon* v. *Knowles*, 3 B. & S. 556.

(*u*) 17 C. B. N.S. 418.

(*x*) Mr. Palgrave Simpson, C. C. Ev. qq. 2381–8, 2441.

III. For infringements of the common law right in an unpublished or unrepresented play, a common law action for damages and an injunction. § 129. Remedies for infringement.

Actions (*y*) must be brought within a year of the infringement. It is not necessary that the infringement should be committed knowingly (*z*).

Law of other Countries.—United States. By § 4952 of the Revised Statutes the author of any drama shall have the sole right of printing and performing the same on complying with the provisions as to deposit of printed title and copies. Statutory playright (*a*) therefore depends on statutory copyright; the play must be printed to give the author the statutory sole right of performing it. The duration of the term is twenty-eight years from the registration of the title of the work, with, on its expiration, a further fourteen years on re-registration of the work by the author and his widow. The author must be a resident citizen of the United States. The author has, however, a common law (as well as statutory) right in an unpublished manuscript, and public performance (*b*) of a manuscript play does not divest this right, or defeat a statutory copyright afterwards secured. Neither will unauthorized publication divest the right (*c*), and the defendant must prove the authorization, not compel the plaintiff to prove the want of authority. § 130. Laws of other countries.

(*y*) 3 Will. IV. c. 15, s. 3.
(*z*) *Lee* v. *Simpson*, 3 C. B. 871.
(*a*) *Boucicault* v. *Hart*, reversing several previous decisions, 13 Blatchford, 47.
(*b*) *Keene* v. *Wheatley*, 9 Am. Law Reg. 33; *Palmer* v. *De Witt*, 47 N. Y. 532.
(*c*) *Shook* v. *Nenendorf*, 11 D. R. N. Y. 985; *Boucicault* v. *Wood*, 2 Biss. 34, 39, 40.

§ 130. Laws of other countries.

A curious theory (*d*), if not now part of the law, for some time found support in *dicta* of judges, to the effect that reproduction of a dramatic performance, not resulting from a breach of contract or confidence, or from a shorthand report, but merely from the exercise of memory is not an infringement of play- or copy- right. This however was disapproved as to copyright in the case of *Keene* v. *Kimball* (*e*), and completely reversed in *French* v. *Conolly* (*f*), where it was held that reproduction of a play on the stage by the aid of memory or stenographic notes is illegal. The proposition finds some slight support in English law in an *obiter dictum* of Bacon, V.C., in *Boosey* v. *Fairlie* (*g*), that apart from the statute it would be allowable to carry an opera away by memory, and perform it. It seems however utterly untenable on the ground of principle. Mental powers no more justify a literary, than physical strength a physical, robber; if it is allowable to pirate a play from memory, piracy of copyright should be justifiable if the compositor could set up the type from memory and without copy.

Authors may reserve the right to dramatise or translate their works, and unauthorized dramatisation are therefore piracy (§ 4952).

The penalties for infringement are to be assessed by the Court, and are not (*h*) to be less than one hundred dollars for the first, and fifty for every subsequent performance.

(*d*) *Keene* v. *Wheatley* (v.s.); *Keene* v. *Clarke*, 5 Rob. N. Y. 38; *Crowe* v. *Aiken*, 2 Biss. 208.

(*e*) 82 Mass. 545.

(*f*) 1 N. Y. Weekly Digest, 196.

(*g*) L. R. 7 Ch. D. 301, 309.

(*h*) § 4966.

§ 130. Laws of other countries.

France (*i*). Playright and copyright rest on the same law, and have the same duration, the life of the author and fifty years after his death. Unpublished MSS. however are protected apart from statutory penalties even though performed on the stage. The right of publication does not necessarily carry with it playright.

It is piracy under the French law:

(1.) To take down an unpublished play by shorthand during representation for the purpose of printing.

(2.) To publish an abridgment of a play so as to interfere with its sale.

(3.) To dramatise a novel without the author's consent.

(4.) To imitate a play in any language without the consent of the author of the original.

The Law of Germany (*k*) draws a distinction between dramatic and dramatico-musical works on the one hand, and purely musical works on the other. The former can only be represented with the consent of the author. The latter, if printed, can be performed by anyone (*l*), unless the author has reserved his right by a notice on the title-page of the published work. The duration of the right is for the life of the author and thirty years after his death. The penalties for infringement vary with the defendant's state of mind; knowing infringement is punished by a fine of the gross receipts of the performance; infringement in ignorance by a fine of the net profits only.

(*i*) Copinger, p. 518.

(*k*) Id. p. 534.

(*l*) This corresponds to the change in the law recommended by the Copyright Commission, and attempted to be effected by the Musical Copyright Act of 1882.

§ 130. Laws of other countries.

In *Italy*, while copyright is based half on the monopoly and half on the royalty system, playright is for a continuous period of eighty years as a monopoly.

Russia has no provisions regulating playright.

§ 131. International copyright (dramatic).

It will be more convenient here to deal with that part of international copyright relating to the drama. It has so far been assumed that the dramatic composition is communicated to the public, whether by printing or performance, for the first time in the United Kingdom. We have further to deal with the case where such first communication takes place abroad. The International Copyright Act (*m*) allows the Crown to grant playright to dramas first performed abroad on the terms of the previous English Dramatic Acts (*n*), subject to such limitations of the author's right as may seem good, and to certain provisions as to registration. Another clause (*o*) provides that the authors of works "first published out of Her Majesty's dominions shall have no copyright" (or playright) "therein other than such, if any, as they may become entitled to under this Act." The object was to enable the English Government to make terms with foreign countries for the mutual recognition of national copyright, and several conventions were concluded under the Act. The question of its effect with regard to countries with which no convention existed was brought before the English Courts in the case of *Boucicault* v. *Delafield* (*p*). B., a British subject, wrote a play and performed it in public in the United States, with which country England had not a copyright

(*m*) 7 & 8 Vict. c. 12.
(*n*) Id. § 5.
(*o*) Id. § 19.
(*p*) 1 Hem. & Miller, 597.

convention. A. performed the play in England. The question of the effect of first publication abroad thus arose, and B.'s counsel pleaded:—(1) that the Act only applied to foreigners, and not to British subjects, and therefore that an English author had the benefit of English copyright wherever he first published; (2) that "first published" in the Act only referred to publication by printing, and not to representation on the stage. On both these points however the Court decided against the plaintiff (*q*), thus settling that first publication outside Her Majesty's dominions, apart from conventions, prevents the author from acquiring copyright in England. The question was again raised in *Boucicault* v. *Chatterton* (*r*), on similar facts, there being no doubt that the only communication to the public abroad had been by representation on the stage. The Court of Appeal affirmed the law as laid down in *Boucicault* v. *Delafield*; thus settling that to obtain play- or copy- right in the United Kingdom, apart from copyright conventions, the author must make first publication, either by printing or performance, in the United Kingdom.

§ 131. International copyright (dramatic).

The law of the United States on this point is to the contrary effect, as was decided in the case of *Palmer* v. *De Witt* (*s*). R., a British subject residing in England, wrote a play and caused it to be performed for some time in London, but did not print it. A., an American citizen, printed and sold copies of it in New York. The Courts granted an injunction to restrain him on the ground that R.'s common law rights in the unpublished

(*q*) The decision was weakened by an allegation during the case that the play had been *printed* as well as *performed* in America.

(*r*) L. R. 5 Ch. D. 267.

(*s*) 47 N. Y. 532.

§ 131. International copyright (dramatic).

MSS. had not been destroyed by the performance in London.

A further Act (*t*) empowered the Crown to grant to foreign authors the right of preventing publication in the United Kingdom of translations of their works during a limited period of five years, but provided that nothing in the Act should be (*u*) construed to prevent fair imitations or adaptations for the English stage of any drama published abroad. To vest the right the authorized translation of a play must be published within three months of registration of the original in England, which registration again must be made within three months of first publication abroad. In *Wood* v. *Chart* (*x*) the Court held that the authorized translation published, to secure the sole right, must be literal and unabridged; and, as "fair imitations and adaptations" were expressly declared not to be infringements, foreign authors did not gain much advantage. Three months was too short a time in which to decide on the success of a piece and make and publish a translation; while the forms of registration and deposit required were burdensome, and their omission fatal. Consequently another Act (*y*) gave power to the Crown to abolish, in the case of any particular country or countries, the exception as to "fair imitations and adaptations." This and the previous Act are both connected with negotiations with France.

The questions as to the abolition of the formalities of deposit and registration (*z*), the lengthening of the time

(*t*) 15 & 16 Vict. c. 12.
(*u*) Id. § 6.
(*x*) L. R. 10 Eq. 193.
(*y*) 38 Vict. c. 12.

(*z*) The provisions of 5 & 6 Vict. c. 45, as to registration of plays (see § 126 *supra*), apply to the registration of foreign works for which International Copyright is sought (7 & 8 Vict. c. 12, ss. 6–9). Provi-

within which an authorized translation must be published to vest the sole right, and the duration of such sole right when vested, are dealt with elsewhere (*a*). It need only be added here that if part publication of the translation of a book within one year of first publication is too short a time in the case of foreign books, complete publication of a translated play within three, or at most six months of the appearance of the original is certainly too short a period in the case of foreign plays.

§ 131. International copyright (dramatic).

Recommendations of the Commission:—

§ 132. Recommendations of the Copyright Commission.

1. That the duration of both playright and copyright be the same as that of the term for books, life + thirty years (§ 74).

2. That publication either in print or by performance shall vest playright and copyright simultaneously for the proposed term (§ 75). (At present it is submitted that playright and copyright by statute have separate investitive facts, and may commence and end at separate times (*b*).)

3. That the right of dramatising a novel be vested in its author for the term of his copyright (§§ 80–81).

4. That first performance of a dramatic piece out of the British dominions should not destroy the performing right in this country (§ 61).

As to *International* Copyright. 5. That the present requirements as to registration and deposit of original foreign plays and authorized translations be abolished (§ 276).

6. That the sole right to translate his play be reserved

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sions as to the registration of authorized translations will be found in 15 & 16 Vict. c. 12, s. 8.

(*a*) See § 236.

(*b*) *Chappell* v. *Boosey*, 51 L. J. Q. B. 625; L. R. 21 Ch. D. 232.

§ 132. Recommendations of the Copyright Commission.

to a foreign dramatist for three years from first publication or performance (§ 290).

7. That should he not publish an authorized translation or adaptation in England, within such three years, it shall be open to anyone to acquire copyright in such a translation or adaptation as if it were an original work (§ 293).

8. That should the author so publish a translation of his work, he should be protected against unauthorized translations, imitations or adaptations in this country for a period of ten years from its publication or first public representation in this country (§ 292).

9. That copyright in the translation or adaptation should be the same as in the case of original works, and include playright (§ 291).

10. That where the foreign author has an adaptation made for him, the rights in such dramatisation shall belong to him and not to the adaptor, unless the latter is a British subject adapting for himself under a licence or assignment (§ 292).

Note.—The difference between recommendations 8 and 9 is this. For ten years from the publication of an authorized translation, not only are others to be forbidden to make any unauthorized use of such translation, but also to make any use of the original play, the source of the translation. At the end of ten years they may translate or adapt the original play, but must not in so doing make any use of the authorized translation or adaptation.

CHAPTER VI.

MUSICAL COPYRIGHT IN ENGLAND.

§ 133. Introduction.—§ 134. Unpublished musical works.—§ 135. History till 1842.—§ 136. Statutory provisions.—§ 137. Performing right in music.—§ 138. Musical Copyright Act, 1882.—§ 139. Rights of the author.—§ 140. Registration.—§ 141. Subject of copyright.—§ 142. Infringements of copyright.—§ 143. Assignments.—§ 144. Remedies for infringement.—§ 145. Laws of foreign countries.—§ 146. Recommendations of Copyright Commission.

Introduction. § 133.

MUSICAL compositions in the English law go hand in hand with the drama, probably on account of the double nature of each as adapted to printing and to public performance, and also because they shade into each other gradually through operas and songs in character. I therefore deal with the law regulating them here, although by so doing the exposition of the English law of literary copyright is interrupted.

Unpublished musical works. § 134.

Unpublished musical compositions have the common law protection extended to all unpublished work. As explained in the case of dramatic compositions, the author has protection at common law from public performance until his first public performance of his work, when statutory "playright" begins; he has also protection at common law from reproductions in print until the first authorized publication of his work in print, when statutory copyright begins, the two rights being distinct with different beginnings and different endings (*a*).

History till 1842. § 135.

The first decision on the subject of statutory copyright is *Bach* v. *Longman* (*b*) in 1777, where Lord Mansfield

(*a*) *Chappell* v. *Boosey*, L. R. 21 Ch. D. 232.
(*b*) 2 Cowper, 623.

§ 135. History till 1842.

held that a musical composition came within the statute of Anne, and that its author was therefore entitled to protection from unauthorized printing. It is interesting to notice, as bearing on the history of privileges and patents granted by the Crown where the grantees felt that their alleged rights needed further protection, that this case recites that "by royal licence dated 15th December, 1763, his Majesty did grant unto the plaintiff his royal licence for the sole printing and publishing the works mentioned in the licence for fourteen years from the date of the same." This class of licence appears to have survived much longer than the licence for books, probably because the right of property was more doubtful. Licences for printing music had been granted in the reign of Elizabeth, as in 1598 (*c*), when a licence was granted to Thomas Morley "to print set song books in any language, to be sung in church or chamber, and to print ruled paper for printing songs;" infringements being punished by the forfeiture of £10.

The decision in *Bach* v. *Longman* was followed with regard to copyright in music in several other cases (*d*), but the Act under which they were decided having now been superseded by Talfourd's Act (*e*), which also extended to musical compositions the sole right of performance, which Bulwer Lytton's Act (*f*) had given to plays, it is unnecessary to notice them more particularly.

§ 136. Statutory provisions.

Talfourd's Act in 1842 (*g*) defined "dramatic piece" to include "every tragedy, &c. . . . or other scenic, musical or dramatic entertainment." But the latter part of this

(*c*) Cal. S. P. Dom. 1598–1601, p. 94.

(*d*) *Storace* v. *Longman*, 2 Camp. 27; *Clementi* v. *Golding*, 2 Camp. 25; *Platt* v. *Button*, 19 Vesey, 447; *Chappell* v. *Purday*, 4 Y. & C. Exch. 485.

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

(*f*) 3 & 4 Will. IV. c. 15.

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

definition has been interpreted by Brett, M.R., as only referring to a "whole concert or entertainment," and not to individual pieces in the programme (*h*). Clause 20 expressly extends to musical compositions the benefit of that Act and the Act of Will. IV. (*i*). As the provisions with regard to musical compositions are almost identical with those just set out as applicable to plays, I do not propose to repeat them, but only to give briefly the effect of the leading cases in which a musical work has been the subject of controversy, and to add a few remarks on the latest legislation on the subject.

§ 136. Statutory provisions.

It will be noted that there are certainly three distinct parts of copyright in a song—the right to print the music; the right to print the words; and the right to perform the music. As all three of these may be in different hands, great inconvenience and injustice have arisen through the fact that a statutory penalty of 40*s.* is imposed on every one performing a dramatic or musical composition in public without the consent of the owner of the copyright. This proviso was made use of to obtain penalties from singers at country concerts and other entertainments who sang copyright songs or words in public in ignorance of the penalty attaching thereto. Their only means, indeed, of ascertaining the copyright character of such songs or words was by searching the London register, for no warning appeared on the copy of the song they had bought. And the popular feeling against this mode of procedure was heightened by the fact that these penalties were frequently not exacted by the author or composer of the song, but were often demanded by a so-called association, in reality a Mr. Wall, who had bought up the rights of

§ 137. Performing rights in music.

(*h*) *Wall* v. *Taylor*, L. R. 11 Q. B. 102, 108.
(*i*) 3 & 4 Will. IV. c. 15.

§ 137. Performing rights in music.

relatives of the composers. Evidence was given before the Copyright Commission (*k*) that Mr. Wall's society were the assignees of, or acted as agents for the owners of, the copyright or the right in the words of, amongst others, songs of Wallace and Balfe; and that they refused to give any information to inquiries as to the songs over which they held rights unless a payment of twenty-one guineas was made. Mr. Wall's method of procedure may be judged of by the fact that in the recent case of *Wall* v. *Taylor* (*l*) Mr. Justice Day ordered him, though partly successful, to pay the costs of the defendant, and the Court of Appeal, while giving judgment in his favour, ordered him to pay his own costs, as a mark of disapproval of his conduct.

§ 138. Musical Copyright Act, 1882.

To meet this objectionable course of procedure, the Musical Copyright Act, 1882 (*m*), was passed. This Act is an extraordinary specimen of the ability of Parliament; and its character cannot be imputed to oversight, for it was much altered and amended by the House of Lords.

Clause 1 provides that the proprietor of the copyright in any musical composition first published after August 10, 1882, who shall be entitled to or desirous of retaining in his own hands exclusively the right of public performance, shall print on the title-page of every copy a notice that the right of public performance is reserved.

Clause 2, which is very complicated, deals with the situation where the copyright, or right of printing and the right of performance are in different hands, with the following result (*n*):—

(*k*) C. C. Ev. qq. 2093, 2211, 2263, 2276, &c.

(*l*) L. R. 11 Q. B. D. 102.

(*m*) 45 & 46 Vict. c. 40.

(*n*) I give this interpretation with considerable diffidence, as the clause, which is exceedingly intricate, admits of another interpreta-

§ 138.
Musical Copyright Act, 1882.

I. In the case of music—

(1.) First published after August 10, 1882.

(2.) Where the performing right and copyright have come into separate hands between August 10, 1882, and the date of first publication, *i.e.*, *before* first publication.

(3.) If the owner of the performing right desire to reserve rights of sole performance—

(4.) He shall give the owner of the copyright notice in writing before the date of first publication, to print a notice on each copy that the right of performance is reserved; and

(5.) By clause 3, if the owner of the copyright then fails to print such a notice, he shall be liable to pay £20 to the owner of the performing right.

II. In the case of music—

(1.) First published after the 10th August, 1882.

(2.) In which the performing right and copyright came into different hands *after* first publication thereof.

(3.) If the notice of reservation has been duly printed on each copy published *before* the separation of rights.

(4.) The proprietor of the performing right, if he desire to retain the sole right, shall give notice in writing to the owner of the copyright, *before* any further copies are printed, to print a notice on each copy that the right of performance is reserved.

(5.) On failure to print such a notice, the owner of the copyright shall forfeit £20 to the owner of the performing right.

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tion on the basis of its applying to compositions first published *before* August 10, 1882, of which—

I. No copy shall have been published between August 10, 1882, and the separation of playright and copyright in them.

II. Copies shall have been published between the two dates referred to, but the statutory notice of reservation shall have been printed on each copy.

For the reason hereafter referred to, the point is not of very great importance.

§ 138. Musical Copyright Act, 1882.

Clause 4 relates solely to costs.

It will hardly be believed that after all this elaborate machinery, the Act contains no clause inflicting any loss of copyright or penalty on an owner of the performing right who does *not* print the notice of reservation on each copy. And, except that possibly he is guilty of a misdemeanour in disobeying a statutory provision, there is nothing to stop such an owner from recovering penalties precisely as he did before the Act! Such is the wisdom of our legislators.

§ 139. Rights of the author. (1.) Performing right.

The author of a musical composition and his assigns have—

(1.) The sole right of performing such compositions *in public* for forty-two years from the first performance, or for the life of the author and seven years after his death, whichever shall be the longer term.

This right is not limited to performance at places of dramatic entertainment (*o*), but extends to all public performances or representations. Brett, M.R., says in the case cited (*p*): "There must be a performance or representation according to the ordinary acceptation of those terms. Singing for one's own gratification without intending thereby to represent anything, or to amuse anyone else, would not, I think, be either a representation or performance according to the ordinary meaning of these terms, nor would the fact of some other person being in the room at the time of such singing make it so; but where to give effect to the song it is necessary that the singing should be made to represent something, or where it is performed for the amusement of other persons, then I think when this takes place it would be in each case a question of fact."

It is submitted that this must be taken with the

(*o*) *Wall* v. *Taylor*, L. R. 9 Q. B. D. 727.
(*p*) L. R. 11 Q. B. D. 107 (C. A.).