

THE LAW OF COPYRIGHT.

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THE
LAW OF COPYRIGHT.

BY

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"O IMITATORES, SERVUM PECUS!"

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PREFACE.

THE publication of this Edition has been delayed in the hope that Parliament might undertake a systematic revision of the Copyright Laws. This was recommended by the Copyright Commission in 1878, with no substantial result. Of late years authors, artists, and publishers, have combined to press upon Parliament and the Government reform and codification of the numerous and ill-drawn Acts which deal with various branches of the Copyright Law. A Committee of the House of Lords took a great deal of evidence, and gave much trouble to the drafting of separate Bills for Literary and Artistic Copyright, and a Literary Copyright Bill was mentioned in the Speech from the Throne; but nothing further has happened, or seems likely to happen. Musical publishers, whose property was being destroyed, owing to the failure of Parliament to protect, against impudent thieves, the property it had created, took the law into their own hands; and a series of fights in the public streets forced Parliament to pass, with considerable opposition, a measure which gave some, but an inadequate, protection to musical property. Now that it has been decided that, while there is no machinery for

ascertaining the name and address of a street hawker, you cannot get an order for destruction of the pirated songs that hawker is selling with knowledge they are pirated, unless you serve a summons, addressed to him by name, on him, or at his address, there is presented a striking object-lesson of the difficulty of getting Parliament to extend to Literary and Artistic Property the protection they would hasten to afford to pheasants, were they threatened.

The most noteworthy decision since the publication of the last edition of this work in 1896, has been the much-discussed case of *Waite v. Lane*. Probably no case of recent years has given rise to more animated differences of opinion, both among lawyers and laymen not ordinarily interested in legal decisions. The House of Lords has spoken, and the law is established. But for its decision, it would seem startling that a person should be the author of a work, to which he has contributed neither the words, nor their arrangement, nor the ideas contained in them, when his only relation to that work is that he has correctly copied from dictation the language of the speaker who composed the thoughts in words. The so-called author shares his authorship with the mechanical phonograph, but under the protection of the House of Lords acquires a property in his copy from dictation.

Another gap in the copyright laws was discovered when it was found that the owners of mechanical pianos might make profit out of the sale of rolls, from which copyright musical compositions could be reproduced, without paying a penny to the authors or owners of

the copyright in the music they appropriate for their own profit.

It is a slight consolation for this defect that it has been laid down that the Sculpture Acts apply to toy soldiers.

I have been much assisted in the preparation of this edition by the labours of my friends, Mr. A. B. Langridge, of the Middle Temple, and Mr. F. D. Mackinnon, of the Inner Temple.

T. E. S.

3, TEMPLE GARDENS,
January 15th, 1903.

ADDENDUM.

In *Graves v. Gorrie* (32 Ontario R. 266; 1 Ont. 309; 3 Ont. 697) the Canadian Courts have decided that the English Statute of 1862 (25 & 26 Vict. c. 68) does not protect English copyright pictures from infringements in the Colonies. This case is under appeal to the Privy Council.—*Note* at p. 211.

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THE LAW OF COPYRIGHT.

INTRODUCTION.

BEFORE the year 1709, when the Statute of Anne (*a*) was passed, Copyright, or the exclusive right of multiplying copies of a literary or artistic work already published, if it existed at all in the English law, did so by common law, for there was no statutory foundation for such a right. Whether such a common law right existed is now a question of purely historical interest (*b*); for since the decision of the House of Lords in *Donaldson v. Beckett* (*c*), it has been clear law that after publication copyright can only exist by virtue of some statute. Before publication there is a common law right of restraining publication which has the same effect as copyright (*d*); after publication, the statutes alone are material. The work for which copyright is claimed may be communicated to the public in various ways, and in the English law each method of communication is treated in a separate statute. Thus books (*e*), plays, which may be either represented or printed (*f*) lectures, which may be both orally delivered and printed (*g*),

(*a*) 8 Anne, c. 19.

(*b*) See Chapter I. below.

(*c*) (1774) Brown, Cases in Parliament, p. 129; p. 37, *post*.

(*d*) Chapter II., *post*.

(*e*) 5 & 6 Vict. c. 45, and Chapter VI., *post*.

(*f*) 3 & 4 Will. IV. c. 15; 5 & 6 Vict. c. 45; Chapter IV., *post*.

(*g*) 5 & 6 Will. IV. c. 65; 5 & 6 Vict. c. 45; Chapter III., *post*.

engravings (*h*), sculptures (*i*), paintings, drawings and photographs (*k*), and music (*l*), have each a separate statute or statutes to establish and regulate copyright therein. These statutes are without exception of most involved and inartistic draftsmanship, and present to the Legislature a suitable, even an urgent, case for codification, though little has been done to attain this desirable end since the Report of the Copyright Commission in 1878. Valuable work has been achieved in the Committee of the House of Lords, presided over by Lords Herschell and Monkswell, in the sessions of 1898, 1899, and 1900, but the Government appears unable to find time to consider the bills which the Committee has drafted.

English statutes deal with copyright in the United Kingdom; some of their provisions extend the right to works produced in the colonies, and also confer colonial rights on works produced in the United Kingdom (*m*).

A system of international copyright has also been established by means of English legislation and Orders in Council, embodying and giving effect to conventions on the subject with foreign nations. Under their provisions works produced in the British dominions enjoy copyright in the foreign countries which are parties to such conventions, and works produced in those foreign countries may obtain copyright in the British dominions (*n*).

(*h*) Chapter VII. Section I., *post*.

(*i*) Chapter VII. Section II., *post*.

(*k*) 25 & 26 Vict. c. 68, and Chapter VII. Section III., *post*.

(*l*) Chapter V., *post*.

(*m*) Chapter VIII., *post*.

(*n*) Chapter IX., *post*.

CHAPTER I.

HISTORY OF THE ENGLISH LAW OF COPYRIGHT.

Introduction.—Questions at issue.—Copyright before Statute of Anne.—Early days of printing.—Royal privileges.—History of Stationers' Company.—Registers of Stationers' Company.—Resistance to the Company.—Sources of the sole right of printing in 1623.—History, 1625–1643.—Decree of 1637.—Protest of Authors: Ordinance of 1643.—Ordinances of Long Parliament.—Licensing Act of 1662.—Position of Literary Property in 1660.—Statutory protection ceases.—By-law of 1681.—Charter of 1684.—By-law of 1694.—Recapitulation of period previous to 1710.—Cases prior to Statute of Anne.—Result.—Statute of Anne.—Result of Statute of Anne.—Cases under Statute of Anne.—*Miller v. Taylor*.—*Donaldson v. Beckett*.—Effects of *Donaldson v. Beckett*.—Subsequent legislation.—Talfourd's Bill.—Act of 1842.—*Jefferys v. Boosey*.—Colonial Copyright: Commission of 1875.—Recapitulation of history.—Common Law Copyright.—Answers to questions.—History in other countries.

BEFORE dealing with the law as it exists at the present day, the History of the English Law of Copyright ^{Introduction.} 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 eighteenth century as to the legal interpretation to be placed on certain alleged facts which themselves were disputed. Pages of argument, 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

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the historical interest attaching to the growth of the law, especially on a question considered in the eighteenth century of the greatest importance, it may be useful to spend a little time in exploring this extinct volcano of controversy.

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 (*a*) in 1709, 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 recognized indirectly by statute, that the judges, if the question were brought before them, were bound to recognize copyright or literary property? In other words, did copyright after publication exist at common law before the Statute of Anne?

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

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 a custom, having reached a certain degree of general acceptance and long duration, comes before the Courts they are bound to recognize and give effect to it, unless it is clearly unreasonable. And it is contended with great show of truth that such a general recognition

(*a*) 8 Anne, c. 19.

of ownership in literary works had existed for a long period of time when the Statute of Anne was passed.

Copyright
before
Statute of
Anno.

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 the other part upon ordinances of the Long Parliament, is used to create prejudice; while the whole matter is further obscured 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.

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, at the King's expense by Cor-sellis 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, and an Act of 1485 (b) allowed the importation of printed books from abroad. This freedom of trade continued

Early
days of
printing.

(b) 1 Rich. III. c. 9, s. 12.

Early
days of
printing.

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 in certain classes of books, and granted the sole privilege of printing them by patent to its assigns (d). 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 said to be reported at the expense of the Crown; and this labour expended was alleged to give the sole right of printing such works to the Sovereign. Further, almanacs were claimed by the King as his prerogative (e), 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 printer, Corsellis, had been brought to England at the King's expense. . . .

All, however, that these claims of prerogative right,

(c) 25 Hen. VIII. c. 15.

(d) *Basket v. Cambridge University* (1758), 1 W. Blackstone, 105; Willes, J., in *Millar v. Taylor* (1769), 4 Burrows, 2329; Lord Mansfield, *Ibid.*, p. 2401.

(e) *Stationers' Co. v. Carnan* (1775), 2 W. Bl. 1002, in which case the claim was rejected.

together with the grants of "privileges" by the Crown to private persons, seem to show 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. Early days of printing.

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 its holders is given in *Basket v. Cambridge University* (1758), 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. 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).

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 work 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 in the former year by Wynkyn de Worde was reprinted by a printer named Trevers, and Worde's second edition,

(*h*) Herb. Ames, T. A. i. 264; iii. 1782. It was also the first work printed in Roman type in England.

(*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.

[from the 1530's]

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published in 1533, and protected by the privilege of the King, contains a vigorous attack on the former piracy.

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, such as the one 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. Royal privileges.

It has been urged that the existence of these royal grants was conclusive against the existence of copyright, as showing 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 his grants to private persons of privileges were usually granted in consideration of the labours of the author or the expense of the printer, served to justify the

(n) *Bach v. Longman* (1777), 2 Cowper, 623.

(o) Lowndes, p. 126.

Royal
privileges.

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. The patents collected by Rymer in his *Fœdera*, and those contained in the calendars of Domestic State papers, in nearly every case involve something more than a simple recognition of literary property (*p*). The State papers show 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, after specifying the service required, winds up with a 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" (*q*). In 1597 (*r*) a privilege to print certain school books for fourteen years had been granted to Henry Stringer, the Queen's footman; and in 1631 (*s*) 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

(*p*) Collected in the Appendix to the first edition of this work.

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

(*r*) S. P. Domestic, 1595-97, p. 352.

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

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 (t) 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.

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. In 1556 the records of the Star Chamber contain the entry (u):—"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.

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 (x): "That certain seditious and heretical books both in rhymes and tracts are daily printed, renewing and spreading great aud

(t) S. P. Dom. 1629-1631, p. 285, on date June 17, 1630.

(u) Burn on Star Chamber, p. 55.

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

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Company.

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 (*y*).

(*y*) 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, 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 a £1000 fine, as he was said to have gained £1000 by the book" (S. P. Dom. 1623-25, p. 298). A certain Sparkes 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

In 1559 (z) 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 (a) 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 (b) forbade persons to print against the force and meaning of any ordinance, in any of the statutes or laws of the realm.

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of the
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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 the by-laws of the Company, infringements of which by its members

Registers
of the
Stationers'
Company.

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 as the Stationers possessed explains the absence of any direct acknowledgment of their rights in the ordinary Courts.

(z) Herb. Ames, T. A. iii. 1600.

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

(b) Herb. Ames, T. A. iii. 1620.

Registers
of the
Stationers'
Company.

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 (c) 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 (d) 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 licence 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 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 (e), and thus gave a practice sufficiently universal for the judges to found a common law right on. And

(c) Carte; Maugham, *Lit. Prop.*, p. 17.

(d) Willes, J., in *Millar v. Taylor* (1769), 4 Burr. 2313.

(e) Such regulation was easy, as in 1583 a return showed 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).

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.

The effect, however, of the Company's restrictive by-laws was that a large number of "copies" (*f*) 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 (*g*). 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 commonly 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 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

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

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

Resistance restraint contained in any statute or law of the realm, or to the Company. *contrary to any allowed ordinance set down for the good government of the Stationers' Company (h).*

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 (i):—"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 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 those of the former impressions which he hath on his hands."

Sources of sole right of printing in 1623.

The regulations were still evaded by printing beyond sea, and in 1623 a further decree forbade the printing beyond sea of "such allowed books as have been imprinted within the realm by such *to whom the sole printing*

(h) Herb. Ames, T. A. iii. 1668.

(i) Herb. Ames, T. A. iii. 1672-75.

thereof by letters patent or lawful ordinances or authority doth appertain." (k) Here the sources of the right of "sole printing" are recognized by statute as :—

Sources of
sole right
of print-
ing.

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 to private persons in exercise of an alleged prerogative. The peculiar position that these grants occupied is shown by the fact that the celebrated *Statute of Monopolies* (l) 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.

A Royal Proclamation in 1625 (m), interesting in its anticipation of modern arguments, recites :—“ That divers books, written in Latin and 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

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(k) Maugham, Lit. Prop., p. 13.

(l) 21 Jac. I. c. 3.

(m) Rymer, Fœdera, xviii. 8.

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1625-1643.

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 of the Star Chamber, “touching the *Regulation* of Printers and founders of letters,” (n) 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 licence, 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 book of the Company of Stationers.*

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

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* (o), as showing a common law right independent of entry in the register.

In 1640 the Court of Star Chamber fell a victim to

(n) Tracts, vol. xlviij., Middle Temple Library. Lowndes, p. 15
Maugham, p. 13.

(o) 4 Burr. 2314.

the Long Parliament, and in 1641 the place of its Ordinances was temporarily taken by another (*p*), 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 recognized and incorporated it.

History,
1625-1643.

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 (*q*), 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 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 (*r*) 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

Protest of
authors,
and Or-
dinance
of 1643.

Protest of
authors,
1643.

(*p*) Maugham, Lit. Prop., p. 13.

(*q*) Carte's Letters, 1735; Maugham, Lit. Prop., p. 14; Lowndes, p. 16.

(*r*) *I.e.*, they *do* enjoy, and it must not be taken away.

Protest of
authors,
and Or-
dinance
of 1643.

would be abused by vicious impressions, to the great discouragement of learned men, and extreme danger 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 recognized before; the petition to Lord Cromwell quoted above (s) 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 for redressing Disorders in Printing" (t). 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 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.*

(s) See p. 8.

(t) Scobell, Acts and Ordinances, p. 44.

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.

Protest of
authors,
and Or-
dinance
of 1648.

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.

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

Ordi-
nances of
Long Par-
liament.

(u) Scobell, p. 134.

(x) *Ibid.*, ii. 88.

Ordi-
nances of
Long Par-
liament.

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 (y) 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 licenses for printers, "forasmuch as the life and growth of all arts and mysteries consisteth in a due regulation thereof."

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 (z) of 1662: "An Act for preventing 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 recognized incidentally.

§ 3. All books are "to be entered in the book of the

(y) 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.

(z) 13 & 14 Car. II. c. 33.

register of the Company of Stationers in London." . . . Licensing Act of 1662.
 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," (a) which by its unfortunate wording roused one of the greatest controversies 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 shown which does create it; the inference is therefore irresistible that such

Position of literary property in 1660.

(a) 8 Anne, c. 19.

Position
of literary
property
in 1660.

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 recognized the custom of literary property, the custom itself—or rather the way in which the custom worked—was strongly objected to by authors and others (*b*). 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."

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 (*c*): "The property of the author hath always been owned as sacred among the traders, and generally forborne to be invaded; but

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

(*c*) *Ibid.*, p. 30.

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."

Position
of literary
property
in 1660.

The Licensing Act after several renewals, and one lapse of six years (*d*), 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 (*e*):—

Statutory
protection
ceases.
By-law of
1681.

"Whereas several members of this Company have 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

By-law of
Stationers'
Company,
1681.

(*d*) 1679-1685.

(*e*) Quoted in *Millar v. Taylor* (1769), 4 Burr. 2307.

Statutory
protection
ceases.
By-law of
1681.

thereof, which privilege and interest is now of late often violated and abused, *it is therefore Orduined*, 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."

Confirm-
ing Char-
ter 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 (*f*) 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 and enjoy the sole *right, power, privilege, and authority of printing such book or copy as in that case had been usual heretofore*" (*g*).

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

(*g*) 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.

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.

Confirm-
ing Char-
ter of
1684.

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 (*h*).

By-law of
Stationers'
Company.
1694.

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 briefly to sum up the existing state of things.

Recapitu-
lation of
period
previous
to 1710.

Since 1558, literary property "in books and copies" had been recognized 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, both in the 16th and 17th centuries, contain entries in sufficient numbers to show 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" (*i*). And the jury, in *Millar v. Taylor*, on the evidence before

(*h*) Quoted in *Millar v. Taylor* (1769), 4 Burr. 2308.

(*i*) Carte; Maugham, *Lit. Prop.*, p. 17.

Recapitulation of period previous to 1710.

them, found, as part of their special verdict (*k*), "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 (*l*) 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 recognized by the common law. Hardly any records of protection to the right, afforded by the State, are in existence, and there seems to be no entry of a prosecution in the ordinary Courts, for printing without license (*m*). 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.

Cases prior to the Statute of Anne.

The cases which appear in the books are usually cases in which the alleged rights of the Stationers' Company, or of authors, clash with those of the King's patentees (*n*).

(*k*) 4 Burr. 2307.

(*l*) Or more usually the printers, their assigns.

(*m*) 4 Burr. 2313.

(*n*) These rights had clashed in cases which did not come before the ordinary Courts. A long struggle between the Stationers' Company

Thus in 1666 (*o*), *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 summarizes 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* (*p*), 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 *Stationer's Co. v. Seymour*, in 1678 (*q*), 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."

All these cases deal with a Crown right granted by express patent and only by implication uphold a

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.)

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

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

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

Cases
prior to
the Sta-
tute of
Anne.

common law right. 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.

Result.

There was then prior to the Statute of Anne no statute expressly creating, or judicial decision expressly recognizing, copyright; there was such constant usage among authors and printers, recognized indirectly both by statutes and judicial decisions, that, when the question arose for decision, a court of law might reasonably recognize 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* (r), and of eight judges against four in *Donaldson v. Beckett* (s).

Statute of
Anne.

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 discontented. As Lord Mansfield observed (t), 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

(r) (1769) 4 Burr. 2303.

(s) (1774) 2 Bro. Cases in Parl. 129; 4 Burr. 2408.

(t) 4 Burr. 2406.

in valuable "copies," importuned Parliament for further protection. They petitioned in 1703, 1706, and 1709. ^{Statute of Anne.} They said that (u) "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."

Amongst other heads of a bill suggested by some petitioners, were (v): (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 (w). The occasion of its introduction must be borne in mind; it originated with booksellers and publishers to protect further a property they already conceived themselves to have. Its material parts, as finally settled, ran as follows:—

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

(u) Lowndes, pp. 29-31.

(v) *Ibid.*, p. 29.

(w) 8 Anne, c. 19.

Statute of Anne. (According to Willes, J., in *Millar v. Taylor* (x), 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" (y).)

Preamble. "Whereas printers &c. . . . have of late frequently *taken the liberty* (a) of printing, reprinting (b), 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—

(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) "*reprinting*": it was argued that "*reprinting*" 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, AND NO LONGER (a), and that the author of any book not yet printed and his assigns shall have a similar right for fourteen years from first publication, *and no longer*" (a).

(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

(x) (1769) 4 Burr. 2333.

(y) Com. Journ. xvi. 260. Mr. Topham had, on Feb. 20, 1706, brought in a bill "For the better securing the rights of copies of printed books." —C. J. xv. 316.

the Stationers' Company, "as hath been usual." Clause 4 contained a Statute of proviso for fixing the prices of books if they appear too high and Anne. unreasonable. Clause 5 required nine copies of each work to be delivered to nine public libraries.

§ 9. "Provided that nothing in this Act contained Clause 9. 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."

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 Clause 11. 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."

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.

It seems 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. Result of Statute of Anne.

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

Result of
Statute of
Anne.

law right in perpetuity, 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 (z) 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 imposed in the interests of the public. The clause of the Act of Anne for fixing the price of books was also repealed, a recognition that "regulation" is not always "consistent with the life and growth of all arts and mysteries" (a).

The first cases to test the effect of the Act of Anne arose on 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 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 (b).

Cases
under
Statute of
Anne.

In 1735, in the case of *Eyre v. Walker* (c), Sir Joseph Jekyll restrained the defendant from publishing the 'Whole Duty of Man,' said to have been first assigned

(z) 12 Geo. II. c. 36.

(a) See Ordinance of 1652, p. 22.

(b) 4 Burr. 2325.

(c) *Ibid.* 2325.

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. Cases under Statute of Anne.

In the same year, in the case of *Motte v. Falkner* (d), 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. Walker* (d), 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* (e), 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 recognized 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 shown by the fact 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 (f).

Under these circumstances the question was for the first time brought to a decision in the Courts of common Millar v. Taylor.

(d) 4 Burr. 2325.

(e) *Ibid.* 2326.

(f) *Ibid.* 2319.

Millar v. Taylor.

law in the celebrated case of *Millar v. Taylor* (g). The poet Thomson had published his 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 extremely able historical survey of the question, to which all subsequent authors are much indebted (h), Mr. Justice Aston assented 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 (i). 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

(g) 4 Burr. 2303.

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

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

of a copyright at common law undisturbed by the statute. *Millar v. Taylor.*

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* (*k*). The facts were the same as in *Millar v. Taylor*, except that Millar's executors had sold the "copy" to Beckett, who sued 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 result. (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.) *Donaldson v. Beckett.*

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?

Answers
of the
judges.

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

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

*Donaldson
v. Beckett.*

Answers
of the
judges.

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 laid 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?

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 mono-

polists. 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 (*l*). “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.”

Donaldson
v. Beckett.

How could the peers resist such eloquence as this: 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 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. Rhetoric apart, while correctly stating that there was no judicial decision expressly creating a common law right, he seems to have

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

*Donaldson
v. Beckett.*

overlooked the nature of the common law of England and its concealed character of judicial legislation, and not to have realized 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.

*Effects of
Donaldson
v. Beckett.*

After all the persons who would have mainly gained by the existence of a common law right in perpetuity were the booksellers and not the authors, and 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. 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" copy-

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

(*n*) *Ibid.* p. 1086.

right, under the statute, a return to which has been proposed of late years, the witness had never seen 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; 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 show that the evidence required of property in a copyright was not of the strictest, that 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.

Effects of
Donaldson
v. *Beckett*.

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 prominently put forward; 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."

(o) 17 Cobbett, 1110.

(p) *Ibid.* 1402.

Subse-
quent
legisla-
tion.

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 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" (*q*).

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 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.

Talfourd's
Bill.

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 he had left the Commons, in victory. Introducing his bill in 1838 in an eloquent and lengthy speech (*s*), he was supported by Disraeli and Monckton Milnes, afterwards 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

(*q*) 15 Geo. III. c. 53. Under this Act, the late Master of Balliol's works have been bequeathed to Balliol College.

(*r*) 54 Geo. III. c. 156.

(*s*) Hansard, xlii. 557.

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." ^{Talfourd's Bill.}

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

(*t*) Macaulay's Speeches, p. 108; Hansard, li. 341.

(*u*) Drone on Copyright, p. 78.

Talfourd's
Bill.

books" (*w*), 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 extraneous 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."

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." (*x*)

17. 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

(*w*) Carlyle, *Miscellaneous Essays*.

(*x*) Trevelyan's *Macaulay*, ii. 133.

(*y*) *Hansard*, lvi. 340.

(*z*) *Macaulay's Speeches*, p. 109.

was, it did not survive the original proprietor. Copy-^{Talfourd's} right was a monopoly, making books dear, and as such ^{Bill.} 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 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.

Before the next session of Parliament, Talfourd had ^{Act of} been raised to the Bench, and the late Lord Stanhope, ^{1842.} then Lord Mahon, introduced the Bill (*a*). 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

(*a*) Hansard, lxi, 1349.

(*b*) Macaulay's Speeches, p. 118.

Act of
1842.

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 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).

Jefferys
v. Boosey.

Since 1842 artistic Copyright has been dealt with by

(c) Hansard, lxi. 1398.

(d) *Ibid.* lxiii. 778.

an Act of 1862 (*e*); the Drama is the subject of an Act of 1833, known as Bulwer Lytton's Act (*f*); Lectures are partially provided for by an Act of 1835 (*g*); and Music has been very unsatisfactorily legislated for in 1882, 1888, and 1902 (*h*). The whole patchwork and piecemeal collection of Acts waits and has waited for years for a codifying and simplifying measure which Parliament cannot find the leisure to consider. Before however closing this historical sketch of Copyright in England, something must be said of the great case of *Jefferys v. Boosey* (*i*), which, though more directly concerned with International Copyright and the extension of the Copyright statutes to cover it, yet raised a 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 (*j*): "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,

(*e*) 25 & 26 Vict. c. 68.

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

(*g*) 5 & 6 Will. IV. c. 65.

(*h*) 45 & 46 Vict. c. 40; 51 & 52 Vict. c. 27; 2 Edw. VII. c. 15.

(*i*) (1854) 4 H. L. C. 815.

(*j*) *Ibid.* p. 935.

*Jefferys
v. Boosey.*

“Copyright, if not the creature of our statute law, as I believe it to be, is now entirely regulated by it.” Lord Brougham (*k*): “In my judgment it is unquestionable that the statutes alone confer the exclusive right”; while Lord St. Leonards (*l*) had “come to the conclusion long since that no common law right existed after publication.”

Colonial
Copyright.
Commis-
sion 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, 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 (*m*).

Recapitu-
lation of
history.

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

(*k*) 4 H. L. C. p. 962.

(*l*) *Ibid.* p. 977.

(*m*) This passage, from the first edition of 1883, remains unaltered in the fourth edition in 1903. Various private bills dealing with literary and artistic copyright were introduced in the sessions of 1898, 1899, and 1900, and considered by a Committee of the House of Lords, presided over by the late Lord Herschell, and by Lord Monkswell, and in which Lords Knutsford and Thring were active members. The Government included a Literary Copyright Bill in the King's Speech for 1901, but it was not pressed forward. A private measure has very little chance of passing, and the Government do not seem able to find time for a public measure.

I. *From the incorporation of the Stationers' Company in 1556 (n) to the expiration of the Licensing Act in 1694;* Recapitulation of history. 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 alone exists.

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 extending beyond it in perpetuity.

IV. *From the decision in Donaldson v. Beckett to the present day,* statutory copyright alone exists, as far as published works are concerned, and has been gradually extended.

Whether or not there is now a common law copyright after publication in cases not provided for by statute, Common law copyright. 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."

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

(n) Before 1556, copyright is only rudimentary.

Answers
to ques-
tions.

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 as 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*, in accordance with the opinion of Lord Mansfield.

History
in the
United
States.

The United States.—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 passed Copyright Acts in the interests of authors (*o*); 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

(*o*) Drone, p. 87.

before it, in the case of *Wheaton v. Peters* (*p*), 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 (*q*): "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 realizes this product by the transfer of his manuscript, or on the sale of books when first published."

History
in the
United
States.

In 1870 the Copyright Laws were consolidated, and in 1874 revised and re-enacted. They afford protection to unpublished as well as published works. The attempts to create a system of International Copyright to which the United States should be parties were at last successful in the year 1891, when the Chace Act gave copyright in the United States to works of foreign authors (*r*).

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 civilization, except Egypt and some of the South American republics. These laws mostly date from the first half of the last century, and have in many cases been lately revised, 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

History
in other
countries.

(*p*) Drone, pp. 43-48; 8 Peters' Rep. 591.

(*q*) 8 Peters' Rep. 657.

(*r*) *Vide post*, Cap. IX.

History
in other
countries.

France (s) 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."

(s) Lowndes, p. 12; Copinger, 3rd ed.

CHAPTER II.

THE AUTHOR'S RIGHTS AT COMMON LAW.

The common law right before publication.—Rights arising from special relations.—Right to the use of a title or form of publication.—Rights in works before publication.—Unpublished works.—Nature and limits of right.—Investitive facts.—Transvestitive facts.—Letters.—Conditional communications.—Divestitive facts.—Infringements and remedies.

COPYRIGHT, or the exclusive right of multiplying copies of a literary or artistic work already published, is now the creature of statute (*a*). The various rights possessed by authors at common law, though in effect they may prevent the multiplication of copies of a work, cannot rightly be called "copyright," but are merely common law incidents of property (*b*). Once a work has been published, it is free to all the world to copy it, unless restrained by statute. But, before publication, the author or his assigns can prevent any disclosure of the nature and contents of the work. The author, in the words of Lord Brougham, "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 upon the use of it" (*b*). In the case of pictures and drawings, statutory copyright begins on

The common law right before publication.

(*a*) *Jefferys v. Boosey* (1854), 4 H. L. C., at p. 954. *Cf. per* Lindley, L.J., in *Tuck v. Priester* (1887), 19 Q. B. D. 640.

(*b*) *Jefferys v. Boosey* (1854): *per* Lord Brougham, at p. 962; *cf. per* Lord Watson in *Caird v. Sime* (1887), 12 A. C., at p. 344; and *per* Lord Esher in *Exchange Telegraph Co. v. Gregory* (1896), 1 Q. B., at p. 153.

The common law right before publication.

the making of the picture (*c*), and thus between its making and its publication the statutory and the common law right appear to be co-existent (*d*). The case of lectures and plays is a little more complicated, and is discussed subsequently (*e*).

Rights arising from special relations.

But in addition to the common law right against all the world of preventing the publishing of an unpublished work, there may be special rights enforceable at common law, and depending on the special relations of the parties. As a general principle, an agent, servant, or apprentice has no right to employ against his former principal or master materials obtained for his principal in the course of his employment (*f*) or which he has obtained for himself in breach of the implied confidence reposed in him in such a position (*g*). Thus, a printer employed to print a certain number of copies of an artistic or literary work for its author will be restrained from printing on his own behalf any further copies, on the ground of the breach of faith and breach of contract on his part (*h*). A photographer employed to take a negative and print a certain number of copies for his employer will not be allowed to print others for his own benefit (*i*). An apprentice to a firm of fire-engine manufacturers who in the last days of his apprenticeship compiled a table of fire-engine dimensions from his employers' drawings, was restrained from publishing the contents of such table (*g*);

(*c*) *Tuck v. Priester* (1887), 19 Q. B. D. 629.

(*d*) Cap. VII. sect. 4.

(*e*) Caps. III., IV.

(*f*) *Lamb v. Evans* (1893), 1 Ch., at p. 226, doubting *Reuter's Telegram Co. v. Byron* (1874), 43 L. J. Ch. 661.

(*g*) *Merryweather v. Moore* (1892), 2 Ch. 518; *Robb v. Green* (1895), 2 Q. B. 315; *Louis v. Smellie* (1895), 11 Times L. R. 515.

(*h*) *Tuck v. Priester* (1887), 19 Q. B. D., at p. 639; cf. *Morison v. Moat* (1851), 9 Hare, 241; *Prince Albert v. Strange* (1849), 1 MacN. & G. 25.

(*i*) *Pollard v. Photographic Company* (1888), 10 Ch. D. 345.

and an agent to publishers of a trade directory was restrained from using, in the service of rival publishers, the materials he had obtained in his former employer's service (*k*). And this is independent of any question of statutory protection or of general rights of property.

Rights arising from special relations.

The common law affords another method of protection, which was until recently confused with copyright, when it restrains one man from selling a work under a title and in a form calculated to lead the purchaser to believe that it is another man's work. This, however, is not an invasion of copyright. It is akin to common law fraud (*l*).

Right to the use of a title or form of publication.

This class of case was alleged to be within the copyright statutes, on the ground of copyright in the title used or imitated. The case of *Dicks v. Yates* (*m*) has finally destroyed this contention; and if a plaintiff is to succeed in cases of this kind he must now show that the defendant has represented his work to be the same, or that the public would understand it to be the same, as the plaintiff's, in such a way as to prejudice or damage the plaintiff (*n*). The confusion may arise from similarity of title or of form, with or without similarity of matter.

Each case of this kind must depend on its own peculiar facts, but some general principles may be gathered from the numerous authorities on the subject.

(*k*) *Lamb v. Evans* (1893), 1 Ch. 218.

(*l*) *Per James, L.J., Dicks v. Yates* (1881), 18 Ch. D. 90. The presence of actual fraudulent intent is not necessary; it is enough if the result be to mislead. See *per Bowen, L.J., Walter v. Emmott* (1885), 54 L. J. Ch., at p. 1064; *Clement v. Maddick* (1859), 1 Giff. 98.

(*m*) *Vide supra*. See also *Maxwell v. Hogg* (1867), L. R. 2 Ch. 307; *Kelly v. Hutton* (1868), L. R. 3 Ch. 703; *Kelly v. Byles* (1879), 13 Ch. D. 682; and *post*, p. 118.

(*n*) *Borthwick v. Evening Post* (1888), 37 Ch. D., at p. 460; *per Lord Eldon in Hogg v. Kirby* (1803), 8 Vesey, 225.

Right to
the use of
a title or
form of
publica-
tion.

In the first place, the plaintiff must show that some name or form of publication has become attached in the public understanding to his own productions, before he can complain that the defendant is colourably imitating that name and form. Thus, in *Licensed Victuallers' Newspaper Company v. Bingham* (o) the plaintiff company issued on February 3, 1888, the first number of a weekly newspaper called the *Licensed Victuallers' Mirror*, and registered it at Stationers' Hall on February 4. They had previously advertised their intention to produce such a paper, without mentioning its name. On February 6, when about twenty copies of the first number of the plaintiff's paper had been sold, the defendant issued the first number of a weekly paper under the same name. On February 9, when about eighty copies of the plaintiff's paper had been sold, the company commenced an action against the defendant, and applied for an injunction on February 24, at which time about a hundred copies each of their first and second numbers had been sold, and a large number of their third, published on February 17. North, J., refused the injunction, on the ground that on February 6 the plaintiff's paper was not an article known in the market, or having any reputation which would induce the public to buy the defendant's paper as being that of the plaintiff's; and this judgment was affirmed by the Court of Appeal, on the same ground, that the plaintiff showed no reputation by user. For a similar reason *The Sphere*, and *The Spear*, recent illustrated periodicals of misleading similarity of title, were unable to stop each other, because neither had any public reputation when the other was first published. In the same way, in *Goodfellow v. Prince* (p), a firm of wine merchants failed to establish their identification with "*Le*

(o) (1888) 38 Ch. D. 139.

(p) (1887) 35 Ch. D. 9.

Court et Cie," as a brand for champagne; and in *Schove v. Schmincké* (q) the plaintiff did not prove that the name "Castle Album" was exclusively connected with his publications by the trade; while in *Francke v. Chappell* (r) a still more extravagant claim to appropriate the name "Richter concerts" to concerts organised by the plaintiff, even though Dr. Richter did not conduct them and did conduct concerts organised by the defendant, failed on the same ground.

Right to the use of a title or form of publication.

Secondly, the plaintiff, having established a reputation by user, must prove that the defendant is so acting as to pass his paper or book off as that of the plaintiff, either by using a similar title, or a similar form, or both. Thus in *Walter v. Emmott* (s) the plaintiff was the proprietor of the *Mail*, an old-established paper published three days a week at 11 A.M., at the price of twopence, and consisting of a reprint of the most important parts of the *Times*. The defendant began to publish a halfpenny daily paper called the *Morning Mail*, at 3 A.M. every day. There was some evidence of confusion amongst news-agents and advertisers as to the two papers. It was held by the Court of Appeal that there was no such evidence of misleading the public as to justify an interlocutory injunction. Both Cotton and Bowen, L.JJ., expressed the opinion that the right was not based on property, but on untrue representations by the defendant, not necessarily fraudulent, as to what he was selling. So also in *Bradbury v. Beeton* (t), *Punch and Judy*, a weekly

(q) (1886) 33 Ch. D. 546; cf. *Talbot v. Judges* (1887), 3 Times L. R. 398, where the plaintiff's publication was a bogus one.

(r) (1887) 57 L. T. 141. *Seem*, that in *Primrose Agency v. Knowles* (1886), 2 Times L. R. 401, the same result should have followed, but the facts were peculiar.

(s) (1885) 51 L. J. Ch. 1059.

(t) (1869) 18 W. R. 33.

Right to
the use of
a title or
form of
publica-
tion.

penny comic paper, was held not to interfere with the threepenny *Punch*. But in *Walter v. Head* (u), a mock edition of the *Times* for 1891 was restrained by the proprietors of the real *Times*.

In *Mack v. Petter* (x) the proprietor of the 'Birthday Scripture Text-Book' restrained the production of a similar work called the 'Children's Birthday Text-Book'; in *Ingram v. Stiff* (y) the owner of the *London Journal* succeeded in stopping the publication of the *London Daily Journal*; and in *Reed v. O'Meara* (z) the proprietor of the *Grocer and Oil Trade Review* prevented the *Grocer and Wine Merchant* from using the word "Grocer" as part of its title; but in *Kelly v. Byles* (a) the 'Bradford Post Office Directory' was held not to interfere with the 'Post Office Directory for West Yorkshire.'

In *Cowen v. Hutton* (b) the plaintiff was the proprietor of the *Newcastle Daily Chronicle*, an ordinary daily newspaper, known in Newcastle as the *Chronicle*; the defendant was the proprietor of a Manchester paper which had an evening edition circulated widely in the north of England, called the *Sporting Chronicle and Prophetic Bell*, and he opened a publishing office in Newcastle for the supply of that paper. The plaintiff moved to restrain him, but, on evidence that the papers were dissimilar in appearance and contents, the Court of Appeal dismissed the application almost contemptuously. The question in each case will be whether the publication of the defendant's paper or book in the mode in which he is publishing it is likely

(u) (1881) 25 Sol. J. 757; see note (1885), 54 L. J. Ch. 1061.

(x) (1872) L. R. 14 Eq. 431. See also *Chappell v. Sheard* (1855), 2 K. & J. 117; *Kelly v. Hutton* (1868), L. R. 3 Ch. 703.

(y) (1859) 5 Jur. N. S. 947.

(z) (1888) 21 L. R. (Ir.) 216.

(a) (1879) 13 Ch. D. 682.

(b) (1882) 46 L. T. 897.

to induce the public to believe that it is the plaintiff's paper or book.

It will not be sufficient to show that some confusion may exist in the minds of the public as to the relations of the two papers; reasonable probability of damage from this confusion must also be proved. Thus in *Borthwick v. Evening Post* (c) the proprietor of the *Morning Post* claimed an injunction against the defendant's evening newspaper, the *Evening Post*. There was some evidence that people had thought the *Evening Post* was published at the office of the *Morning Post*, but no evidence of any falling off in sale of the latter paper, or purchase of one paper in mistake for the other. There was a good deal of dissimilarity in the papers, and the placards announcing them. The Court of Appeal, while strongly suspecting the reasons which had led the defendants to choose their title, and while thinking that people might be misled as to the connection between the two papers, could find no evidence that the confusion would injure the *Morning Post* in any way, and therefore refused the injunction. The case was, however, near the line, and the judgments delivered are very instructive.

The plaintiff will not prove damage by showing that the defendant's publication would interfere with some future development of his own work. Thus in *Walter v. Emmott* (d) the fact that the *Morning Mail* might prevent the alteration of the *Mail* to a morning paper, and in *Borthwick v. Evening Post* (c), the fact that the latter paper might prevent an evening edition of the *Morning Post* under the name of the *Evening Post*, were held immaterial.

(c) (1888) 37 Ch. D. 449.

(d) (1885) 54 L. J. Ch. 1059.

Right to the use of a title or form of publication.

The common law right before publication.

In addition to these two methods of stopping reproductions of literary or artistic work, resting the one on breach of confidence or trust (*e*), the other on conduct calculated to deceive the public (*f*), there remains the common law right, as an incident of property in a manuscript or work of art which has not been published and so given to the world, to prevent the publication of such a work by another person (*g*).

Thus in 1723 (*h*), 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 (*i*), 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 dramatizations in the case of published works.

(*e*) *Ante*, p. 54.

(*f*) *Ante*, pp. 55-59.

(*g*) See *ante*, p. 53, and Stephen's Digest, C. C. R., p. 65, s. 1.

(*h*) *Duke of Queensberry v. Shebbeare* (1758), 2 Eden, 329.

(*i*) (1849) 2 De G. & Sm. 652; 1 Mac. & Gor. 25; cf. *Gilbert v. Star Newspaper* (1895), 11 Times L. R. 4.

So in the American case of *Bartlett v. Crittenden* (*k*), 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 system, 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, be seized by his creditors as property. Publication of a substantial part is piracy."

The common law right before publication.

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

Nature and limits of right.

Mr. Justice Yates, the vigorous opponent of literary property after publication at common law, said, in *Millar v. Taylor* (*l*):—"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 summarized by Lord Brougham in *Jefferys v. Boosey* (*m*), 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

(*k*) (1849) 5 McLean, 32, 37, 40.

(*l*) (1769) 4 Burr. 2379.

(*m*) (1854) 4 H. L. C. 962.

Nature
and limits
of right.

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 or artistic labour of the claimant or his predecessor in title. Otherwise there can be no property. Neither will the law protect productions of an immoral or injurious tendency. Thus in *Southey v. Sherwood*, in 1817 (*n*), 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 work need not be of any pecuniary value or literary or artistic merit (*o*).

Investi-
tive 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 (*p*). But in *Abernethy v. Hutchinson* (*q*) Lord Eldon said:—"Where

(*n*) (1817) 2 Merivale, 435.

(*o*) *Gee v. Pritchard* (1818), 2 Swanston, 402; *Woolsey v. Judd* (Am.) (1855), 4 Duer. N. Y. 379.

(*p*) For instance, in *Caird v. Sime* (1887), 12 A. C., at p. 335, it appears that the lectures protected were not in MS.

(*q*) (1825) 1 Hall & Tw. 28, at p. 39; and see *post*, p. 72.

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.”

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 the property in the original manuscript will pass, but not the right to publish. In the words of an American case (r): “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* (s), Lord Chesterfield's celebrated letters to his son had been sold by his son's widow to Dodsley, and the latter published them; 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* (t) it was held that a right was given to hear a lecture and take notes for information and instruction, but not to

(r) *Palmer v. De Witt* (1872), 47 N. Y. 532, 538.

(s) (1774) Ambler, 737.

(t) (1825) 1 Hall & Tw. 28; cf. *Caird v. Sime* (1887), 12 A. C. 326; *Nico's v. Pitman* (1884), 26 Ch. D. 374.

Trans-
vestitive
facts.

publish such notes. In the absence of express contract, the purchaser of a manuscript may, in publishing it, alter or add to it at his will (*u*); but questions of considerable difficulty may arise if he suggests that the work, as published, is the work of its original author (*x*).

Letters.

In the case of *Letters*, the writer of a letter on his own behalf (*y*) retains copyright in the letter, so as to hinder the receiver from publishing it, except under special circumstances. It has been suggested (*z*) that the receiver of a letter may publish it without the consent of the writer for purposes of personal vindication; but this exception, if it exists, will be carefully limited, and probably confined either to using the letter as evidence in a court of justice, or when it is the only proof of defendant's innocence of an injurious and unfounded imputation (*a*). 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 (*b*): "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* (*c*) it was held that the receiver of a

(*u*) *Cox v. Cox* (1853), 11 Hare, 118.

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

(*y*) *Howard v. Dunn* (1863), 32 Beav. 462.

(*z*) *Percival v. Phipps* (1813), 2 Ves. & B. 19; *Folsom v. Marsh* (Am.) (1811), 2 Story, 100, 111.

(*a*) cf. *Gee v. Pritchard* (1818), 2 Swanston, 402; *Lyttou v. Devey* (1884), 54 L. J. Ch. 293.

(*b*) (1741) 2 Atk. 342.

(*c*) (1861) 11 C. B. N. S. 139.

letter might maintain an action for detinue against a person into whose possession the letter had passed. Under ordinary circumstances the property in the paper on which the letter is written is in the receiver, while the writer can prevent its publication to others (d).

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 (e). In the words of Lord Cottenham, in *Prince Albert v. Strange* (f): "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."

Letters.

Condi-
tional
communi-
cations.

Publication destroys the common law right, and vests statutory copyright in books if the conditions of the statute as to authorship, place of publication and regis-

Divosti-
tive facts.

(d) *Lytton v. Devey* (1884), 54 L. J. Ch. 293.

(e) For an instance of a case launched on (1) the common law right in unpublished matter; (2) the statutory right in the same matter when subsequently published; and (3) malicious interference with the business of the person publishing, see *Exchange Telegraph Co. v. Gregory*, 1896, 1 Q. B. 147, where the defendant, who, either before or after its publication, was copying the plaintiff's tape report of Stock Exchange prices, which he obtained from subscribers to the plaintiff, in breach of their contract with the plaintiff, was restrained on all three grounds above stated. See also *Exchange Telegraph Co. v. Central News*, 1897, 2 Ch. 48.

(f) (1849) 1 MacN. & G. 25, 42; cf. *Caird v. Sime* (1887), 12 App. C. pp. 337, 344.

Divesti-
tive facts.

tration are complied with. Publication is defined as "making a thing public in any manner in which it is capable of being communicated to the public" (g). 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 (h). In *Kenrick v. Danube Collieries Co.* (i) printing one hundred copies of a report on a proposed company, and showing or giving some of them to persons interested in floating the company, was held not to be such a publication as divested the common law right.

Waiver of rights is a divestitive fact of copyright.

The American case of *Kiernan v. Manhattan Quotation Company* (k) shows the difficulty of drawing the line as to what constitutes publication. A., the plaintiff, had bought the exclusive right to use foreign 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. So in *Exchange Telegraph Co. v. Gregory* (l), where

(g) Cf. *Blank v. Footman* (1888), 39 Ch. D. 678. In *McFurlane v. Hulton* (1899), 1 Ch. at p. 889, Cozens-Hardy, J., says: "A paper is published when and where it is offered to the public by the proprietor."

(h) *Jefferys v. Boosey* (1854), 4 H. L. C. at p. 962; *Caird v. Sime* (1887), 12 A. C. at p. 344; as to sale of MSS., see *White v. Geroch* (1819), 2 B. & Ald. 298.

(i) (1891) 39 W. R. 473.

(k) (1876) 50 How Pr. N. Y. 194 (cited by Drone, p. 122).

(l) (1896) 1 Q. B. 147; see also *Exchange Telegraph Co. v. Central News* (1897), 2 Ch. 48.

information as to prices on the Stock Exchange was telegraphed to the plaintiff's customers on the terms that they should not use it outside their offices, the defendant was restrained from using information obtained in breach of such contracts. ^{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 for an injunction to restrain publication (*m*). ^{Infringements and remedies.}

(*m*) *Cf. Tuck v. Priester* (1887), 19 Q. B. D. 48.

CHAPTER III.

LECTURES.

Rights before publication.—Lectures.—Publication of lectures.—
Lectures at Universities.—Remedies.

Rights
before
publica-
tion

THE author of any literary composition has the right at Common Law to prevent its publication, until he himself has made it public (*a*): and this right will not be destroyed by the fact that the author communicates such a composition to a limited number of persons under express or implied conditions restraining them from publishing it themselves. Such limited communication may, as we have seen, be by writing a letter, or lending a manuscript, or by publication for private circulation, or by recitation or oral delivery before a select or limited audience (*b*).

Lectures.

The author of a literary composition delivered as a lecture will therefore, until he has "published" his lecture, have a common law right to prevent publication of it by others (*b*). After he has published his lecture, his rights will depend on his compliance with 5 & 6 Will. IV. c. 65:—"An Act for preventing the publication of lectures without consent." This Act gives the copyright for twenty-eight years in a published lecture to the lecturer or his assignee, provided that the lecturer

(*a*) See above, pp. 60–62.

(*b*) *Caird v. Sime* (1887), 12 App. C. at pp. 337, 344; *Nicols v. Pitman* (1884), 26 Ch. D. 374.

has given notice in writing of his intended delivery of his lecture to two justices of the peace living within five miles of the place of delivery of the lecture two days at least before delivering it (c). This Act, however, does not apply to any lecture delivered in a university or public school or college (d), or on any public foundation, or by any individual under any gift, endowment, or foundation, and it is expressly provided that the law relating thereto should remain the same as if the Act had not been passed.

The important question with regard to any lecture as to which the statutory notice has not been given is, has it been published? If it has been published in print, it will receive statutory protection as a book under 5 & 6 Vict. c. 45. No case exists in English law expressly deciding that unauthorized oral delivery of a printed lecture infringes copyright in the printed book. Stirling, J., in *Hanfstaengl v. Empire Palace (Daily Graphic and Westminster Budget)* (e), said *obiter*: "Suppose that at a public meeting some portion of a copyright work was recited or read from an authorized copy of the book; that would be no infringement of the rights of the owner of the copyright." American cases, though not directly deciding the point, appear to cover it; thus in *Boucicault v. Fox* (f) 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

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

(d) Cf. *Nicols v. Pitman* (1884), 26 Ch. D. 374, where the Working Men's College in Great Ormond Street was held to be a "College" within this section.

(e) (1894) 3 Ch. at p. 116.

(f) (1862) 5 Blatchford, 87, 98; see also *Palmer v. De Witt* (1872), 47 N. Y. 530; 2 Sweeny, 530, 543.

Publica-
tion of
lectures.

the consent of the author?" and the question is answered emphatically in the negative. The question has not yet arisen in the English courts.

Rights
before
publica-
tion.

If the lecture has not been printed, the question is whether the circumstances under which it was orally delivered amount to a publication. A lecturer who addresses himself to the public generally, without distinction of persons or selection or restriction of hearers, abandons his ideas and words to the use of the public at large, that is, he publishes them (*g*). On the other hand, where it is matter either of express contract or implied condition that the audience are admitted for the purpose of receiving instruction or amusement, and not in order that they may take a full note of what they hear, and publish it for their own profit and the information of the public at large, publication does not take place (*g*). And the Courts are disposed to hold that where the audience is limited by tickets or payment, the understanding between the lecturer and the audience is that they are quite at liberty to take full notes for personal purposes, but are not at liberty, having taken those notes, to publish them afterwards for profit. Thus in *Nicols v. Pitman* (*h*) a lecture on "The Dog as the Friend of Man," delivered at the Working Men's College, Great Ormond Street, to an audience admitted only by ticket, was held not to have been published so as to deprive the author of his common law right, on the ground of implied contract with the audience (*i*). So also in *Abernethy v.*

(*g*) Per Lord Watson in *Caird v. Sime* (1887), 12 App. C. at p. 344. Cf. *Walter v. Lane* (1900), A. C. 539, where, though Lord Rosebery had made a speech to the world at large, a reporter obtained copyright in his *verbatim* report of Lord Rosebery's spoken words.

(*h*) Per Kay, J., *Nicols v. Pitman* (1884), 26 Ch. D. at p. 381.

(*i*) Cf. *Turner v. Robinson* (1860), 10 Ir. Ch. 121, 510, on the effect of exhibition of a picture in galleries, as publication.

Hutchinson (*k*), a course of lectures to students by a physician at Guy's Hospital was held to be only communicated on the condition that notes taken should not be reprinted for profit, and a proposed republication was restrained by injunction (*l*). Rights before publication.

The question of lectures delivered at schools, colleges, or universities is a similar one. The Act of 1835 (*m*) expressly leaves the law as to them where it was before the passing of the Act. That is to say, if they have been published there is no copyright in them except such as is derived from publication in print; if they have not been published, other persons are prohibited from publishing them by the common law. The question of publication has already been considered. It seems that sermons, being preached in edifices the doors of which are in theory open to all mankind, are published (*n*). So, also, where a lecture is delivered on behalf of the university, and as the authorized exposition of the university teaching, it may be that there is publication (*o*). But the decision of the House of Lords in *Caird v. Sime* (*p*) shows that the lectures of a university professor are not necessarily published by delivery to his class, indeed are probably delivered under such circumstances that no republication can take place without his consent. There the lectures which had been republished were those delivered Lectures at universities.

(*k*) (1825) 1 Hall & Tw. 28; see the history of the case in the report of *Caird v. Sime* (1887), 12 App. C. 326.

(*l*) These decisions seem in conflict with the decisions in *Boucicault v. DeLafield* (1863), 1 H. & M. 597, and *Boucicault v. Chatterton* (1876), 5 Ch. D. 267, that a play acted in America to an audience admitted by payment was "published" so as to prevent rights in it being acquired in England.

(*m*) 5 & 6 Will. IV. c. 65.

(*n*) *Per* Lord Halsbury (1887), 12 App. C. at p. 338.

(*o*) *Ibid.* at p. 337.

(*p*) (1887) 12 App. C. 326; *cf.* *Abernethy v. Hutchinson* (1825), 1 Hall & Tw. 28.

Lectures
at univer-
sities.

by Professor Caird, Professor of Moral Philosophy in the University of Glasgow, to his class in the university, admission to which was open to all matriculated students of the university on payment of a prescribed fee. It was held by the House of Lords that the delivery of lectures by the professor was only conditional publication; that the students attending them might take notes for their own information, but might not publish them; and publication of such a student's notes was restrained.

The nature of the common law right has already been dealt with. The question has been raised whether it is necessary that the lecture should be reduced to a written form to obtain protection. In *Abernethy v. Hutchinson* (q) Lord Eldon said: "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." This, however, merely seems to raise questions as to the sufficiency of the evidence, for Lord Eldon goes on to treat the publication for profit of notes of a lecture which had not been committed into writing by the lecturer as a breach of trust or of implied contract (r).

The remedies of the author of a lecture for infringement of his right, are:—

Remedies. 1. A statutory action for penalties if the statutory conditions of notice have been fulfilled (s).

2. An action for an injunction and for damages for breach of the common law right of an author before publication (t).

(q) (1825) 1. Hall & Tw. 39.

(r) Cf. *per* Kay, J. (1884), *Nicols v. Pitman*, 26 Ch. D. at p. 380.

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

(t) *Ante*, pp. 60-67.

CHAPTER IV.

COPYRIGHT IN WORKS COMMUNICATED TO THE PUBLIC
BOTH ORALLY AND IN PRINT, SUCH AS PLAYS.

Introduction.—Faults of English Law of Dramatic Copyright.—History before statutory protection, 1833.—Statutory provisions.—Author's rights in dramatic compositions.—What is a dramatic piece?—What is a place of dramatic entertainment?—Infringements of author's rights.—Dramatization of novels.—Duration of protection.—Investitive facts.—Registration.—Transvestitive facts.—Divestitive facts.—Remedies for infringements.

THOUGH in strictness plays as merely acted, and lectures as merely delivered, should have been treated under the same head, it has been more convenient to group all that has to be said with regard to lectures in the last chapter, and to reserve the case of plays. The law as to lectures chiefly rests on the common law, whereas the law of the drama is almost entirely statutory. For statute law has dealt with both the performing right, or the right of representation on the stage (*a*), and the printing right (*b*). Both are in English law known as "*Copyright*," an extensive use of the term which only confuses; and it would 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.

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

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

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, that tendency of the English law, which in questions of infringement seems rather to consider whether new work has been added than whether old work has been taken, is specially prominent in the case of dramatization of novels.

History
before
Statute of
1833.

The first statute directly dealing with "Playright" in England is an Act of 1833 (c), commonly known as "Bulwer-Lytton's Act." Before that Act, playright rests on the Common Law. In *Macklin v. Richardson* (d) 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, and 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* (e), where Lord Eldon restrained the unauthorized representation of a play which had been performed in public but not printed, it was further decided that

(c) 3 & 4 Will. IV. c. 15. By virtue of the Short Titles Act, 1896 (59 & 60 Vict. c. 14), is to be cited as "The Dramatic Copyright Act, 1833."

(d) (1770) Ambler, 694.

(e) (1820) 1 Jac. & W. 481.

such representation did not forfeit the author's common law playwright.

History
before
Statute of
1833.

That playwright stood apart from the Statute of Anne was decided in the case of *Murray v. Elliston* (*f*), where it was held that representation of an abridged version of Lord Byron's printed tragedy of 'Marino Faliero' did not infringe his statutory copyright, and in *Coleman v. Wathen* (*g*), which decided that representation was not publication within the meaning of the Statute of Anne (*h*).

English dramatic law now rests on the Dramatic Copyright Act of 1833 (*i*), and the Copyright Act of 1842 (*j*). The first of these provided that:—

Statutory
provisions.

I. The author of any dramatic piece (*k*) (1) composed and not printed and published 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 (*l*) in any part of the British Dominions.

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 playwright for the limited term of twenty-eight years, or his life, whichever should be longest.

This Act therefore gave statutory playwright in perpetuity in the case of pieces performed, but not printed;

(*f*) (1822) 5 B. & Ald. 657.

(*g*) (1793) 5 T. R. 245.

(*h*) 8 Anne, c. 19.

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

(*j*) 5 & 6 Vict. c. 45, ss. 20-24.

(*k*) Below, p. 80.

(*l*) Below, p. 82.

Statutory
provisions.

playright for a term in the case of pieces printed or to be printed, and did not deal with copyright, or the right of printing.

The 20th section of the Act of 1842 (*l*), however, has thrown the law into confusion. It recites that it is expedient to *extend* the term of the sole liberty of representing dramatic pieces, *i.e.*, playright, given by the Dramatic Copyright Act, to the full term given by the Copyright Act, and 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 section 21, proprietors of playright are to have all the remedies provided in the former Act, and section 24, after enacting that owners of copyright in books should not sue for infringements before registration, further provides that this enactment is not to affect an unregistered owner of playright under the Dramatic Copyright Act.

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 remain 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

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

first representation in public as a play, or possibly where publication in print comes first, both rights will commence on such publication (*m*). Statutory provisions.

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* (*n*), would hold the common law right destroyed by the statutory provisions after first performance in public. And in *Wall v. Taylor* (*o*), 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.

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

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

Author's rights in dramatic compositions.

I. In play neither printed nor acted.

II. In play acted but not printed.

(*m*) This would be convenient, but it would seem to follow that public representation should also date as the beginning of playright, and of copyright. The difficulties of this subject will be appreciated by any one who tries to work out the results on American and English Copyright, of the facts in relation to any particular play.

(*n*) (1774) 2 Bro. Cases in Parl. 129.

(*o*) (1882) 9 Q. B. D. at p. 732.

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 (*p*). (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' was, with doubt, of opinion that playright (*q*) cannot be gained if the dramatic piece has been previously published in print, and the Copyright Commission in their report (*r*) also speak of the point as doubtful. With all the deference due to such authorities, the point seems clear. It is true that at common law before the statute, the case of *Murray v. Elliston* (*s*) appears to decide that representation of a printed work is not an infringement of its playright, but the authority of this 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 1833 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.

The case on which the statement appears to be based, that of *Toole v. Young* (*t*), really turns on another point. A. published in print, a novel, nearly (*u*) in dramatic

(*p*) It is not clear that this is the right view; it may be that playright will be held to date from first publication in print.

(*q*) C. C. Rep. p. 63, ss. 14, 16.

(*r*) C. C. Rep. s. 73.

(*s*) (1822) 5 B. & Ald. 657.

(*t*) (1874) L. R. 9 Q. B. 523.

(*u*) 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";

form; he subsequently dramatized it, or adapted it for dramatic performance, and sold the playwright 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 dramatize A.'s novel, and that his representation of his dramatization did not infringe A.'s copyright in the novel, or B.'s playwright in the authorized dramatic version.

Author's
rights in
dramatic
composi-
tions.

Without going into the correctness of this decision on principle, or on precedent, it will be seen that it turned 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 playwright 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 dramatizations of novels that hinders them from being held infringements of playwright or copyright. Lord Hatherly in *Tinsley v. Lacy* (v) 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.*

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.)

(v) (1863) 1 Hem. & Miller, 747, 751.

Author's rights in dramatic compositions.

Young (w), 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 case of *Chappell v. Boosey (x)*. 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 playwright, and that the two rights (play- and copy-right) were distinct in their times of commencement and terms of protection.

IV. Play first acted and then printed.

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

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

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

- (1.) *Copyright* (statutory), from first publication in print.
- (2.) *Playright* (statutory), apparently from first representation. During a certain time at the end of his term he will have playwright only.

What is a dramatic piece?

The term "dramatic piece" is defined in the Act of 1842 as "Every tragedy, comedy, play, opera, farce, or

(w) (1874) L. R. 9 Q. B. 523.

(x) (1882) 21 Ch. D. 232; see also *per* Lord Blackburn in *Fairlie v. Boosey* (1879), 4 App. C. at p. 727.

other scenic . . . or dramatic entertainment." (y) In *Russell v. Smith* (z) 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." 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 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* (a), 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* (b) 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 one case (c), the jury 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. So in *Fuller v. Blackpool Winter Gardens* (d), the Court of Appeal held that a song called 'Daisy Bell' was not a dramatic piece, but a musical composition, and was inclined to restrict the definition to pieces akin to "Tragedies, operas, comedies, etc."

What is a dramatic piece?

(y) An adaptation, with additions, of a non-copyright piece may be the subject of copyright. *Tree v. Bowkett* (1896) 74 L. T. 77 (a case as to *Tribby*).

(z) (1848) 12 Q. B. 217, 236. (a) (1872) 25 L. T. N. S. 908.

(b) *Daly v. Palmer* (Am.) (1868), 6 Blatchford, 256, 264. In *Lee v. Simpson* (1847), 3 C. B. 871, the introduction to a pantomime was held a "dramatic piece."

(c) *Wall v. Martin* (1883), 11 Q. B. D. 102.

(d) (1895) 2 Q. B. 429, see *post*, p. 101.

What is a
"place of
dramatic
entertain-
ment"?

The definition of a "place of dramatic entertainment" was also considered in *Russell v. Smith* (e), 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 (f); 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.

The importance of this term, however, is much diminished by the recent decision in the case of *Wall v. Taylor* (g). This was an action 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 1833, 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 performances in respect of "places of dramatic entertainment." But it was held by the Court of Appeal, that the right conferred by the Act of 1842, 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." The remedy by way of penalties under 3 & 4 Will. IV.,

(e) (1848) 12 Q. B. 217, 237.

(f) *Duck v. Bates* (1884), 13 Q. B. D. 843. In the case of books, it was held in *Novello v. Sudlow* (1852), 12 C. B. 177, that gratuitous distribution of unauthorized copies was an infringement of copyright.

(g) (1883) 11 Q. B. D. 102.

c. 15, only applies, however, to places of dramatic entertainment.

Infringements of the author's rights are:—

- I. Unauthorized representation of a dramatic piece (*h*) or a substantial part thereof (*i*), in public during the statutory or common law term of playright. Infringement of author's rights.
- II. Unauthorized publication in print of such piece (*h*) during the author's statutory or common law term of copyright.

This publication need not be for profit, but must be in a public place; and it has been held that the board-room of Guy's Hospital, where a play was performed free of charge for the amusement of the patients and nurses, was not such a public place (*j*). Knowledge that the representation is unauthorized is not necessary (*k*).

It is not an infringement of an author's playright to dramatize and represent a novel he has printed (*l*). To print such dramatization is an infringement of his copyright in the novel (*m*). Dramatization of novels.

If the novel dramatized be founded on a play, the acting of such dramatization is an infringement of the playright in the play (*n*), though not of the copyright in the novel. Printing such dramatization infringes both

(*h*) Representation of a piece substantially similar will not be an infringement, if, in fact, such piece is original and not derived directly, or indirectly (*Schlesinger v. Turner* (1890), 63 L. T. 764), from the plaintiff's play, and the similarity is merely a coincidence. *Reichardt v. Sapte* (1893), 2 Q. B. 308. Such a case will rarely happen.

(*i*) *Cf. Brady v. Daly* (Am.) (1899), 68 Davis, 148.

(*j*) *Duck v. Bates* (1884), 13 Q. B. D. 843.

(*k*) *Lee v. Simpson* (1847), 3 C. B. 871.

(*l*) *Reade v. Conquest*, first case (1861), 9 C. B. N. S. 755.

(*m*) *Tinsley v. Lacy* (1863), 1 Hem. & M. 747; and see *Warne v. Seebohm* (1888), 39 Ch. D. 73, and *post*, p. 85.

(*n*) *Reade v. Conquest*, second case (1862), 11 C. B. N. S. 479; *Schlesinger v. Turner* (1890), 63 L. T. 764.

Infringe-
ment of
author's
rights.

the copyright in the novel and the copyright in the play (*o*). But a dramatization of a novel does not necessarily infringe the playwright of another dramatization of the same novel (*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. dramatizes B.'s novel; he thereby does not infringe B.'s copyright, but he apparently infringes A.'s playwright (*q*); by printing his dramatization he infringes B.'s copyright; does he infringe A.'s copyright?

Noveliza-
tion of
dramas.

On the principles of English law, apparently the "novelization" of a play is not an infringement of the rights of its author. But if the printing of a dramatization infringes the copyright of the author of the novel, surely also the printing of a "novelization" should infringe the copyright of the author of the play. There is as much original work required in making a novel out of a play as in dramatizing; but the case seems never to have arisen in English Courts. The consent of the author is, however, in practice sometimes obtained (*r*).

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

(*o*) *Reade v. Lacy* (1861), 1 J. & H. 524.

(*p*) *Toole v. Young*, L. R. 9 Q. B. 523; *Schlesinger v. Bedford* (1890), 63 L. T. 762.

(*q*) *Reade v. Conquest*, 2nd case (1862), 11 C. B. N. S. 479.

(*r*) See Tom Taylor's evidence, C. C. Ev. q. 2652.

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* (s): *Has there been a substantial and material taking of these results?* In the case of most dramatizations of novels there certainly has, and the law has recognized this by prohibiting in some cases the printing of such dramatizations. 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 dramatizations 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 in the English Courts is, not so much:—"Has old and valuable work been taken?" as:—"Has new and valuable work been added?"

The unauthorized dramatization of novels, however, received a severe check in the decision in *Warne v. Seebohm* (t). There the defendant had dramatized Mrs. Burnett's story, 'Little Lord Fauntleroy,' and publicly represented his version. To do so, four MS. copies were made, one for the Lord Chamberlain, and three for the

(s) (1878) L. R. 10 C. P. 572, 575; 3 App. Cas. 483.

(t) (1888) 39 Ch. D. 73.

Drama-
tization of
novels.

actors. This was held to be an infringement of the copyright in the book; an order was made that all passages copied, taken, or colourably imitated from the plaintiff's book should be delivered up, and an injunction against multiplying copies was granted. This decision, as was pointed out, could be evaded by purchasing copies of the plaintiff's book, and cutting out extracts for use in the MS.; but this would be difficult. As a copy of every play produced must be sent to the Lord Chamberlain (*u*), this decision would seem seriously to embarrass the unlicensed adapter.

Infringe-
ments.

It is an infringement of an author's playwright to perform parts of his play or opera (*w*), as for instance single songs from an opera, subject to the principle laid down in *Chatterton v. Cave* (*x*), 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* (*x*), said:—"I think scenic effects and situations are more peculiarly the subject of copyright than the words themselves;" and in an American case (*y*) 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* (*z*), the 'Black Crook' was not protected from

(*u*) 6 & 7 Vict. c. 68, s. 12.

(*w*) *Planché v. Braham* (1837), 4 Bing. N. C. 17; *Brady v. Daly* (1899) 68 Davis, 148.

(*x*) (1878) 3 App. Cas. 483; cf. *Beere v. Ellis* (1889), 5 Times L. R. 330.

(*y*) *Daly v. Palmer* (1868), 6 Blatchford, 256, 264. This would apply to such a pantomime as *L'Enfant Prodigue*.

(*z*) (1867) 1 Deady, 216 (Am.).

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 of the "female form divine," and the learned judge's morality appears to have overpowered his grasp of the general law. Infringe-
ments.

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. Dramatizations of novels have playwright of their own. Playright can also be obtained in the adaptation of a play in which there is no playright, as in the case of *Hatton v. Kean* (a), 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.

The duration of the protection afforded is perpetual at common law. By statute, for both copyright (b) and playright (c), it is forty-two years from first publication, or author's life + seven years, whichever is longer. Duration
of protec-
tion.

The investitive facts of the right are:—(d)

Investitive
facts.

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, in the United

(a) (1859) 7 C. B. N. S. 268; cf. *Tree v. Bowkett* (Trilby) (1896) 74 L. T. 77.

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

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

(d) Cf. *Reichardt v. Sapte* (1893), 2 Q. B. 308.

Investitive
facts.

Kingdom under the Act of 1833, in the
British Dominions under the Act of 1886 (e).

II. *Of copyright.*

At common law :

1. Intellectual production in a permanent form.

Under the statute :

2. First printing and publication, in the United Kingdom under the Act of 1842, in the British Dominions under the Act of 1886 (e).
3. Registration under 5 & 6 Vict. c. 45, ss. 13, 24, a condition precedent to suing.

Under the Act of 1833, the dramatic composition must be communicated to the public, whether by printing or performance, for the first time in the United Kingdom. But the International Copyright Act of 1886 (e) extends this Act to dramatic pieces first produced in a British possession. The International Copyright Act of 1844 (f) provides that the authors of works "first published out of Her Majesty's dominions shall have no copyright" (or playwright) "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* (g). B., a British subject, wrote a play and performed it in public in the United States, with which country England had not a copyright convention. A. performed the play

(e) 49 & 50 Vict. c. 8.

(f) 7 & 8 Vict. c. 12, s. 19.

(g) (1863) 1 Hem. & Miller, 597.

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 (*h*), 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* (*i*), 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 confirming the views of the Lords in *Routledge v. Low* (*j*), 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, now (under the Act of 1886) the British Dominions.

Investitive facts.

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* (*k*). 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

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

(*i*) (1876) 5 Ch. D. 267.

(*j*) (1868) L. R. 3 H. L. 100. Simultaneous publication in England and the United States will not affect the English or American right, and is frequently resorted to.

(*k*) (1872) 47 N. Y. 532.

Investitive
facts.

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 MS. had not been destroyed by performance in London.

One 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 playright; the playright is in the author, and a written assignment from the author to his employer will be necessary to transfer it. Thus where a theatrical manager paid an author to adapt a named piece (*l*), and where the proprietor of a music hall employed the conductor of his orchestra to write music for a ballet (*m*), in neither case did the employer obtain copyright in the work produced (*n*). Nor do minor alterations or additions, with or without the consent of the author, necessarily constitute joint authorship (*o*).

Registra-
tion.

Registration is necessary before infringement of copyright can be sued for (*p*); registration is not a condition precedent to an action for infringement of playright (*p*), though it is desirable as evidence of the right (*q*).

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 ;

(*l*) *Shepherd v. Conquest* (1856), 17 C. B. 427.

(*m*) *Eaton v. Lake* (1888), 20 Q. B. D. 378.

(*n*) See pp. 130–134, *post*, as to copyright in works so produced.

(*o*) *Levy v. Rutley* (1871), L. R. 6 C. P. 523. Cf. *Shelley v. Ross* (1871), *ibid.* p. 531.

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

(*q*) *Ibid.* s. 20. *Clark v. Bishop* (1872), 25 L. T. N. S. 908.

4. The name and place of abode of the proprietor of the copyright, or of any portion thereof (*r*):
 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 (*s*). The place of abode of the publisher may be his place of business (*t*). A fee of 5s. is payable to the Registrar.

Registration.

Such copyright may be assigned by entering in the register:—

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 5s. is payable (*u*); but an assignee by a written instrument outside the register need only enter himself as proprietor in the register, without entering his assignment, or seeing that his assignor is registered.

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 (*x*).

A play neither acted nor printed of course needs no registration, and registration is not necessary to protect playwright (*y*).

(*r*) 5 & 6 Vict. c. 45, s. 13; see the notes on registration of books at pp. 147-152, *post*.

(*s*) *Cooté v. Judd* (1883), 23 Ch. D. 727.

(*t*) *Nottage v. Jackson* (1883), 49 L. T. at p. 340.

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

(*x*) *Ibid.* s. 20.

(*y*) *Vide post*, pp. 92, 104.

Transvestitive facts.

The transvestitive facts of copyright or playwright are:—

1. The consent of the author, which must be in writing (*z*). The writing of the agent of an author will suffice as evidence of assignment, and the Secretary of the Society of Dramatic Authors has been treated as his agent (*a*). The transfer need not be witnessed (*b*), or under seal (*c*). A part owner cannot assign the whole copyright or playwright without the consent of his co-owners, nor can he grant a valid licence for performance without his co-owners (*d*).

2. In the event of death intestate, copyright and playwright descend as personal property (*e*).

3. Registration of the assignment is a condition precedent to the bringing of an action for infringement of copyright, but not of playwright. By 5 & 6 Vict. c. 45, s. 22, an assignment of copyright does not transfer playwright unless the intention to do so is expressly entered on the register. This section is the result of the decision in *Cumberland v. Planché* (*f*), where it was held

(*z*) 3 Will. IV., c. 15, s. 2; *Shepherd v. Conquest* (1856), 17 C. B. 427; *Eaton v. Lake* (1888), 20 Q. B. D. 378. Cf. *Roberts v. Bignell* (1887), 3 Times L. R. 552; as to what amounts to a consent in writing, see *Taylor v. Neville* (1878), 47 L. J. Q. B. 254. In *Lacy v. Toole* (1867), 15 L. T. 512, an agreement to "let A. have" a play was treated as an assignment. The "writing" includes "print." Interpretation Act (1889), 52 & 53 Vict. c. 63, s. 20.

(*a*) *Morton v. Copeland* (1855), 16 C. B. 517.

(*b*) *Cumberland v. Copeland* (1862), 1 Hurl. & C. 194.

(*c*) *Marsh v. Conquest* (1864), 17 C. B. N. S. 418.

(*d*) *Powell v. Head* (1879), 12 Ch. D. 686. But in *Lauri v. Renad* (1892), 3 Ch. 402, Kekewich, J., allowed an assignee from three out of four tenants in common to sue a stranger in defence of his right without joining the fourth tenant in common as plaintiff. The C. A. pronounced no opinion on the point.

(*e*) 5 & 6 Vict. c. 45, s. 25.

(*f*) (1834) 1 A. & E. 580.

that the assignment of the copyright of a drama passed the sole right of representing it, as incidental to the copyright. The section was, however, held in *Lacy v. Rhys* (g) not to apply to an unregistered deed expressly conveying both copy- and acting-right. Cockburn, C.J., during the argument suggested that possibly an unregistered assignee would not have the benefit of the Act of Victoria, but only of the Act of William IV.

Transvestitive facts.

The Divestitive Facts of the Right are:—

Divestitive facts.

1. Expiration of the statutory term, which apparently 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.

Remedies. I. *For Infringement of Playright.* 1. (h) A penalty (i) of forty shillings, or the full amount of benefit derived or damage sustained by the plaintiff from the infringement, whichever shall be greater, and a full and reasonable indemnity as to costs (k), to be recovered by the author from any one 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 (l). Thus owners of theatres, who let their

Remedies for infringement.

(g) (1864) 4 B. & S. 873; and see *Marsh v. Conquest*, *supra*.

(h) 3 Will. IV. c. 15, s. 2.

(i) This sum is really liquidated damages, and therefore interrogatories can be administered to the defendant to prove infringements: *Adams v. Batley* (1887), 18 Q. B. D. 625; cf. *Saunders v. Wiel* (1891), 2 Q. B. 321.

(k) The provision for recovering double costs in 3 Will. IV. c. 15, s. 2, is repealed, and the words in the text substituted, by 5 & 6 Vict. c. 97, s. 2, and, though only forty shillings is recovered, the plaintiff is entitled to High Court costs in spite of the Rules of the Supreme Court. *Reeve v. Gibson* (1891), 1 Q. B. 652.

(l) *Russell v. Briant* (1849), 8 C. B. 836; *Lyon v. Knowles* (1863), 3 B. & S. 556. These cases were followed in *Kelly v. Gavin and*

Remedies
for
infringe-
ment.

theatre and apparatus to travelling companies, are not therefore liable for penalties for infringement incurred by such companies. But in *Marsh v. Conquest* (m) 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. So far as musical compositions are concerned, other than operas or stage plays, proprietors (n), tenants or occupiers of theatres or other places of performance, are protected from actions for their performance unless they have wilfully caused or permitted such performance knowing it to be unauthorized (o). A release of one person liable to a penalty frees the other persons so liable; a covenant not to sue him does not (p).

Actions must be brought within a year of the infringement complained of (q). It is not necessary that the infringement should be committed knowingly (r).

2. An injunction to restrain unauthorized performance.

II. *For Infringements of Copyright.*

1. An action for damages under 5 & 6 Vict. c. 45, s. 23.

Lloyds (1902), 1 Ch. 631, which see as to the words "cause to be." But before the Act of 1888 in *Monaghan v. Taylor* (1886), 2 Times L. R. 685, and *Roberts v. Bignell* (1887), 3 Times L. R. 552, the proprietor of a music hall, who knew that a song was being sung there, was held liable.

(m) (1864) 17 C. B. N. S. 418.

(n) In *French v. Day and Gregory* (1893), 9 T. L. R. 548, the manager, under proprietors, of a theatre was held not to have represented or caused to be represented a play performed at his theatre; *sed quære*.

(o) 51 & 52 Vict. c. 17, ss. 3, 4 (1888).

(p) *Duck v. Mayeu* (1892), 2 Q. B. 511.

(q) 3 Will. IV. c. 15, s. 3. This provision does not, like the corresponding provision in the Books Act, even purport to be repealed by the Public Authorities Protection Act, 56 & 57 Vict. c. 61, § 2. See *post*, p. 157.

(r) *Lee v. Simpson* (1847), 3 C. B. 871.

2. Seizure of piratical copies under 5 & 6 Vict. c. 45, s. 23, or damages in case of their non-delivery. Remedies for infringement.
3. An injunction to restrain unauthorized printing (s).

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

Recommendations of the Copyright Commission :—

1. That the duration of both playwright and copyright be the same as that of the term for books, life + thirty years (s. 74).
2. That publication either in print or by performance shall vest playwright and copyright simultaneously for the proposed term (s. 75). (At present it is submitted that playwright and copyright by statute have separate investitive facts, and may commence and end at separate times (t).)
3. That the right of dramatizing a novel be vested in its author for the term of his copyright (ss. 80–81).
4. That first performance of a dramatic piece out of the British dominions should not destroy the performing right in this country (s. 61).

(s) And see below, p. 156.

(t) *Chappell v. Boosey* (1882), 21 Ch. D. 232.

CHAPTER V.

MUSICAL COPYRIGHT.

Unpublished musical works.—History till 1842.—Statutory provisions.—Performing right in music.—Musical Copyright Act, 1882.—Rights of the author.—Registration.—Subject of copyright.—Infringements of copyright.—Assignments.—Remedies for infringement.—Musical Copyright Act, 1902.

MUSICAL compositions in the English law go hand in hand with the drama, probably on account of the double nature of each as adopted to printing and to public performance, and also because they shade into each other gradually through operas and songs in character. And on any musical composition questions may arise as to the copyrights or performing rights in the air, the words, or the accompaniment, which may be in different hands, while the words of the song may have the character of a dramatic piece (*a*).

Unpub-
lished
musical
works.

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 against publication until his first public performance of his work, when statutory "playright" begins; he has also protection at common law against reproductions in print until the first authorized publication of his work in print, when

(*a*) But on this, see the decision of the C. A. as to 'Daisy Bell,' in *Fuller v. Blackpool Winter Gardens* (1895), 2 Q. B. 429.

statutory copyright begins, the two rights being distinct, with different beginnings and different endings (*b*).

Unpub-
lished
musical
works.
History
till 1842.

The first decision on the subject of statutory copyright is *Bach v. Longman* (*c*) in 1777, where Lord Mansfield held that a musical composition came within the Statute of Anne (*d*), 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 (*e*), 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 (*f*), but as the Act under which they were decided has now been superseded by Talfourd's Act (*g*), which also

(*b*) *Chappell v. Boosey* (1882), 21 Ch. D. 232; see above, pp. 77-80.

(*c*) 2 Cowper, 623.

(*d*) 8 Anne, c. 19.

(*e*) Cal. S. P. Dom. 1598-1601, p. 94.

(*f*) *Storace v. Longman* (1788), 2 Camp. 27; *Clementi v. Golding* (1809), 2 Camp. 25; *Platt v. Button* (1815), 19 Vesey, 447; *Chappell v. Purday* (1841), 4 Y. & C. Exch. 485.

(*g*) 5 & 6 Vict. c. 45 (1842).

Statutory provisions.

extended to musical compositions the sole right of performance which Bulwer Lytton's Act (*h*) had given to plays, it is unnecessary to notice them more particularly.

Talfourd's Act in 1842 (*i*) defined "dramatic piece" to include "every tragedy, &c. . . . or other scenic, musical or dramatic entertainment." But the latter part of this 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 (*j*). Section 20 expressly extends to musical compositions the benefit of that Act and the Act of 1833 (*k*).

The right of printing a musical composition rests upon the Act of 1842 (*l*), a "sheet of music" being included in the term "book" as defined by that Act (*m*). The right of performing a musical composition is to be collected from the provisions of the Act of 1833 (*k*), and the Act of 1842 (*l*), together with the Musical Copyright Acts, 1882 and 1888 (*n*). 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 the reader is referred to the preceding chapter.

Performing rights in music.

It will be noted that there are certainly three distinct rights in a song:—the right to print the music, which may be in different hands as to the tune and accompaniment; the right to print the words; and the right to

(*h*) 3 & 4 Will. IV. c. 15 (1833).

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

(*j*) *Wall v. Taylor* (1883), 11 Q. B. D. 102, 108.

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

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

(*m*) A perforated roll for an Æolian organ is not a sheet of music, or a copy of one, nor would the barrel of a barrel-organ or musical-box be such a copy: *Boosey v. Whight* (1900), 1 Ch. 122.

(*n*) 45 & 46 Vict. c. 40; 51 & 52 Vict. c. 17; see *post*, p. 99.

perform the music. As these three rights may belong to different persons, great inconvenience and injustice arose through the fact that a statutory penalty of 40s. was imposed on every one performing a dramatic or musical composition in public without the consent of the owner of the copyright. This provision 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 relatives of the composers. Evidence was given before the Copyright Commission (*o*) 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 as to the songs over which they held rights unless a payment of twenty-one guineas was made.

To meet this objectionable course of procedure, the Musical Copyright Act, 1882 (*p*), was passed. Section 1 provides that the proprietor of the copyright in any musical composition first published after August 10,

(*o*) C. C. Ev. qq. 2093, 2211, 2263, 2276, &c.; and *cf.* *In re Wall* (1888), 4 Times L. R. 749.

(*p*) 45 & 46 Vict. c. 40; *Fuller v. Blackpool Gardens* (1895), 2 Q. B. 429.

Musical
Copyright
Act, 1882.

1882, who shall be entitled to and 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.

Section 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:—

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 section 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 of 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.

As the Act of 1882 still allowed the plaintiff to recover forty shillings for each infringement and gave him his costs if he recovered more than forty shillings, an amending Act was passed in 1888 (*q*) under which both the penalty and the costs were left in the absolute discretion of the Court or Judge trying the case, and further protection was given to innocent proprietors or tenants of places at which unauthorized performances of musical compositions took place (*r*). The question then arose what effect this had on the performance of a song, whose words had a dramatic character, so that the words by themselves might be considered as a dramatic piece. Kennedy, J., in *Fuller v. Blackpool Winter Gardens* (*s*) held that the words of 'Daisy Bell' were such a dramatic piece, and therefore that the protection of the Acts of 1882 and 1888 did not apply to them. The Court of Appeal differed from this view and doubted whether anything substantially a song could be also a dramatic piece. 'Daisy Bell' they held to be clearly not dramatic.

It was held in *Fuller v. Blackpool Winter Gardens* (*s*) that the failure to print such a notice, or the printing of a notice only reserving a limited right, as of performance at music halls, prevented the owner of the performing right from asserting any exclusive right, although the Act contained no express words to that effect.

Section 4 relates solely to costs, which it places in the discretion of the judge who tries the case, if the plaintiff does not recover more than forty shillings as penalty or damages. Under the previous Act (*t*) the

(*q*) 51 & 52 Vict. c. 17, ss. 1, 2.

(*r*) *Ibid.* s. 3.

(*s*) (1895) 2 Q. B. 429.

(*t*) 3 & 4 Will. IV. c. 15, s. 1, as amended by 5 & 6 Vict. c. 97, s. 2; cf. *Reeve v. Gibson* (1891), 1 Q. B. 652.

plaintiff recovered a full indemnity as to costs as of right (*u*).

Rights of
the author.

The author of a musical composition and his assigns have:—

(1) Per-
forming
right.

(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 (*v*), but extends to all public performances or representations. Brett, M.R., said in *Wall v. Taylor (v)*:—"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 such case a question of fact."

It is submitted that this must be taken with the further limitation that the performance, to be an infringement of the right of another must be such as to affect the commercial value of that right either by giving

(*u*) As under the International Copyright Acts foreign authors get the same rights as if their works were first produced in England, some difficulties arise as to whether the notice on their songs must be in the English language, or whether the language of the country of origin will suffice.

(*v*) *Wall v. Taylor* (1882), 11 Q. B. D. 107; *cf. Duck v. Bates* (1884), 13 Q. B. D. 843.

profit to the performer or depriving the proprietor of copyright of profit (*w*). Rights of the author.

(2.) He has the sole right of publishing such compositions in print for the same period (*x*), dating from first publication in print. (2) Copyright.

To obtain such a right, the work must be first published or performed in the British dominions (*y*), but if the opinion of Lords Cairns and Westbury in *Routledge v. Low* is right, the author need not even be temporarily residing in the British dominions at the time of publication (*z*). This, of course, does not apply to works which are the subject of International Copyright.

The work must be registered to protect copyright: but it will be sufficient to register in the case of a published musical composition (*a*):— Registration.

(1.) The title thereof.

(2.) The time of first publication.

(3.) The name and place of abode of the publisher thereof.

(4.) The name and place of abode of proprietor of the copyright. The place of business of the proprietor may be registered as his "place of abode" (*b*). And it seems even to be sufficient if an address where letters will find him or be forwarded to him is registered (*c*).

(*w*) *Duck v. Bates* (1884), 13 Q. B. D. 843.

(*x*) Forty-two years, or life of author + seven years.

(*y*) See 49 & 50 Vict. c. 33 s. 8, extending these rights to the colonies.

(*z*) *Jefferys v. Boosey* (1859), 4 H. L. C. 815; *Routledge v. Low* (1868), L. R. 3 H. L. 100; *vide post*, pp. 126-129. *Buxton v. James* (1851), 5 De G. & S. 80, must be read in the light of the two cases in the House of Lords. Publication in the United Kingdom and abroad may be simultaneous, without affecting the British Copyright.

(*a*) 5 & 6 Vict. c. 45, ss. 13, 20; and see pp. 147-150, *post*.

(*b*) *Nottage v. Jackson* (1883), 49 L. T. at p. 340.

(*c*) *Lover v. Davidson* (1856), 1 C. B. N. S. at p. 186.

Rights of
the author.

If the musical composition has not been published, it will be sufficient to register the title, the name and place of abode of the proprietor and author or composer, and the time and place of its first representation or performance.

In the case of a pianoforte arrangement of an opera, the name of the arranger, and not of the composer of the opera, must be entered (*d*).

The Court of Queen's Bench in *Russell v. Smith* (*e*) held registration unnecessary to protect the performing right in a musical composition. The question is too technical for discussion here, but it may be doubted whether this decision is right.

Subject of
copyright.

The subject of copyright is any original musical composition. A single sheet of music, though bound in a book with other pieces, is capable of copyright (*f*). Copyright may also be had in a piece of music, where the claimant has adapted words of his own to an old air, adding thereto a prelude and accompaniment (*g*). So where a non-copyright air was furnished with words and a preface by B., who also procured a friend to compose an accompaniment, the result, under the name of 'Pestal,' was held to be the subject of copyright (*h*).

There can be copyright in a pianoforte arrangement from a non-copyright opera (*i*), though it is open to any other person to make another arrangement direct from the opera. The fingering and editing of standard music

(*d*) *Wood v. Boosey* (1868), L. R. 3 Q. B. 223. For a complicated case of registration of International Copyright, see *Fairlie v. Boosey* (1879), 4 App. C. 711.

(*e*) (1848) 12 Q. B. at p. 237.

(*f*) *White v. Geroch* (1819), 2 B. & Ald. 298.

(*g*) *Lover v. Davidson* (1856), 1 C. B. N. S. 182.

(*h*) *Chappell v. Sheard* (1855), 2 K. & J. 117; *Leader v. Purday* (1849), 7 C. B. 4.

(*i*) *Wood v. Boosey* (1868), L. R. 3 Q. B. 223.

has been held by Charles, J., to be the subject of copyright in an unreported case.

Copyright will be infringed by any public performance or publication of a whole or part of the musical composition, or of a composition substantially the same as the original, *i.e.*, which, though adapted to a different purpose, can still be recognized by the ear (*k*). Such performance or publication must tend to damage the commercial value of the property. Infringe-
ments of
copyright.

Thus it is PIRACY:—

To perform songs out of a copyright opera (*Planché v. Braham (l)*).

To distribute gratuitously copies of a musical composition, as by distributing lithographed copies to a musical society (*Novello v. Sudlow (m)*).

To make a pianoforte arrangement from a copyright opera (*Wood v. Boosey (n)*).

To found quadrilles and waltzes on a copyright opera, though only parts of the melodies be taken (*D'Almaine v. Boosey (o)*).

To construct a full score from the non-copyright pianoforte arrangement of a copyright opera (*Boosey v. Fairlie (p)*).

It is not PIRACY:—

To make perforations on a roll which, used in conjunction with a mechanical instrument, will produce a copyright tune, or even to add to such

(*k*) *D'Almaine v. Boosey* (1835), 1 Younge & Collyer, 289.

(*l*) (1837) 4 Bing. N. C. 17.

(*m*) (1852) 12 C. B. 177.

(*n*) (1868) L. R. 3 Q. B. 223.

(*o*) (1835) 1 Y. & C. 289.

(*p*) (1879) 7 Ch. D. 301; 4 App. C. 711.

Infringements of copyright.

roll directions such as *forte*, *piano*, taken from the copyright music (*q*).

Assignments.

Any assignment must be in writing (*r*); and therefore a registered written assignment overrides a previous parol assignment (*Leyland v. Stewart* (*s*)).

Remedies for infringement.

The owner of the performing right in music can recover 40s., or the full value either of the benefit resulting to the infringer, or of the loss to the plaintiff, whichever shall be the greater (*t*), from each person infringing his performing right in public (*u*), but this is subject to the absolute discretion of the Court to reduce the penalty to a nominal amount or deprive him of costs (*v*), and to the protection given to innocent owners, tenants or occupiers of the place where the performance takes place (*w*), except in the case of musical compositions which are operas or stage plays (*x*).

The owner of the copyright has an action for damages after registration as provided in the case of books.

Injunctions can also be obtained to prevent piratical performance or printing (*y*).

Of late years the owners of musical copyright have suffered great loss by persistent piracies of popular songs. No printers' name was on these copies, contrary to

(*q*) *Boosey v. Whight* (1900), 1 Ch. 122.

(*r*) But a written assignment may be inferred from a long course of dealing only consistent with one. *Dennison v. Ashdown* (1897), 13 Times L. R. 226.

(*s*) (1876) 4 Ch. D. 419.

(*t*) 3 Will. IV. c. 15, s. 2.

(*u*) *Wall v. Taylor*, 11 Q. B. D. 102.

(*v*) 51 & 52 Vict. c. 17, ss. 1, 2, and pp. 101-102, *ante*.

(*w*) 51 & 52 Vict. c. 17, s. 3.

(*x*) *Ibid.* s. 4.

(*y*) See full details at pp. 93-95, *ante*, and pp. 155-157, *post*.

statute (z), and they were sold in the streets by hawkers who were not worth suing. The music publishers took the law into their own hands, and seized these pirated copies by force. The result of this was the passing of the Musical (Summary Proceedings) Copyright Act, 1902 (a). Remedies
for
infringe-
ments.

This gives power to a constable to seize, either by order of a Court of summary jurisdiction, or on the request in writing of the apparent owner of the copyright, pirated copies, to be conveyed before a Court of summary jurisdiction, and on proof that they are infringements of copyright to be forfeited or destroyed, or otherwise dealt with as the Court may think fit.

The Act is not very clear as to what is to happen in Court when the copies are brought there. It seems that the certificate of registration and the production of the original song, will be sufficient *primâ facie* proof that the songs are infringements of copyright. The question has been raised whether the order can be made *ex parte*, or whether a summons under the Summary Jurisdiction Act, 1848, s. 1, must be served on the hawker, before an order for destruction can be made. The Divisional Court in *ex parte Francis* (b) have decided that the summons is necessary, but it is to be hoped that the Court or the police will detain the copies or hand them over to the complainant until the hawker applies for them, when he can be served with a summons.

The Act is, however, still inadequate, as the hawker in the street only keeps a few copies with him. What is wanted is a power of search, and a provision that the hawker may be arrested, and fined or imprisoned

(z) 32 & 33 Vict. c. 24, Schedule 2.

(a) 2 Edw. VII. c. 15.

(b) *Ex parte Francis*, *Times* newspaper, Jan. 13, 1903.

unless he truly discloses to the Court the source from which he obtained the piracies, and satisfies the Court that he had no knowledge in selling them that they were piracies.

APPENDIX.

The only special recommendations of the Copyright Commission with regard to musical works, other than those already set out with reference to dramatic compositions, are:—

1. (c) That the author of the words of songs, as distinguished from the music, should have no copyright in their representation of publication with the music, except by special agreement.

2. (d) That to prevent abuse of the 40s. penalty for infringement of musical copyright, every musical composition should have printed on it a note of the reservation of the right of public performance, and the name and address of the person who may grant permission for such performance.

3. That unless such note was printed, the owner should not be able to recover any penalty or damages for infringement.

4. That the Court should have power to award compensation for damage suffered, instead of the minimum 40s. penalty, in case of infringement.

The second and third recommendations have been dealt with by the Musical Copyright Act of 1882 (e), and the fourth by the Act of 1888 (f).

(c) C. C. Rep. s. 75.

(d) C. C. Rep. s. 171.

(e) 45 & 46 Vict. c. 40, and above, p. 99.

(f) 51 & 52 Vict. c. 17, ss. 1, 2.

CHAPTER VI.

COPYRIGHT IN BOOKS.

Definitions.—Newspapers.—Maps.—Qualities required in copyright work.—Literary value.—Advertisements.—Titles of books.—Originality.—Translations.—Annotations.—New editions.—Publication in the United Kingdom.—Duration and extent of right.—Persons who may acquire the right.—Investitive facts.—Works written on commission.—Rights of author.—Infringements of copyright.—Literary piracy.—Abridgments.—Translations.—Literary larceny.—Duties of author.—Registration.—Transvestitive facts.—Remedies against infringements.—Remedies against author.

THE Act of 1842 defines "*Copyright*" as:—"The sole ^{Definitions.} and exclusive liberty of printing or otherwise multiplying copies of any 'book;'" and the term "*book*" is defined as:—"every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published" (*a*). Thus a folding card with verses on will be protected as a "*book*" (*b*), or a single leaf with an application form on it (*c*).

"*Separately published*" is not confined to publication as a separate book, but applies also to parts of a volume

(*a*) 5 & 6 Vict. c. 45, s. 2. In *White v. Geroch* (1819), 2 B. & Ald. 298, Abbott, C.J., laid down that any literary composition, whether large or small, was a book within the former Act.

(*b*) *Hildesheimer v. Dunn* (1891), 64 L. T. 452.

(*c*) *Southern v. Bailes*, unreported, before Chitty, J., Aug. 1894.

separate and clearly distinguished in the volume, as in the case of a volume of stories by different authors (*d*).

News-
papers.

Newspapers.—In *Cox v. Land and Water Company* (*e*), where the proprietor of the *Field*, a newspaper whose first number was not registered under s. 18 of the Act of 1842, brought an action against the defendants for piracy, they pleaded that the newspaper was not registered, and consequently that the plaintiff could not sue. Malins, V.-C., held that a newspaper was not a “book” under s. 2; was not mentioned in s. 19; did, however, come under s. 18, but did not require registration, and that its right to protection rested either on s. 18, or on the “general rules of property,” presumably the common law right. In support of his position he quoted the cases of *Mayhew v. Maxwell* (*f*) and *Strahan v. Graham* (*g*), in neither of which was there registration. But in both these cases the question was not as to general copyright, but of restraint from publication contrary to the terms of a special contract, and it was therefore held that registration was not necessary (*h*).

In 1881 a similar question came before Jessel, M.R., in *Walter v. Howe* (*i*), where the *Times*, an unregistered newspaper, published an article, and the defendant reprinted it. The question of copyright in the particular article was the material point, but the Master of the Rolls also held that a newspaper, being a “sheet of

(*d*) *Johnson v. Newnes* (1894), 3 Ch. at p. 669. See *Aflalo v. Bullen*, C. A., *Times*, Dec. 19, 1902.

(*e*) (1869) L. R. 9 Eq. 324.

(*f*) (1860) 1 J. & H. 312.

(*g*) (1867) 16 L. T. N. S. 87.

(*h*) With reference to *Sweet v. Benning* (1855), 16 C. B. 459, the V.-C. says, “I suppose the *Jurist* was not registered at all;” whereas the first page of the report of the case states that the *Jurist* was registered before action brought.

(*i*) (1881) 17 Ch. D. 708.

letterpress," was a "book" under s. 2 of the Act, and also a "periodical work" under s. 19, and that therefore under s. 19 its non-registration prevented the plaintiff from suing. He refused to follow the case of *Cox v. Land and Water Company* (l), saying that it practically repealed the Act of Parliament. News-
papers.

The decision in *Walter v. Howe* (m) has been approved by the Court of Appeal (n), and it must therefore be taken as settled that a newspaper is a book within s. 2 of the Act of 1842, though its registration and the copyright in any particular article therein are dealt with in special sections (o). Illustrations in a newspaper, whether on the same paper or on a loose sheet, will be protected as part of the "book" (p). It does not follow because A. is the registered proprietor of copyright in a newspaper that he is therefore proprietor of the copyright in any particular article therein; this must depend on his relations with the author of that particular article (o).

There may be copyright in the particular language or modes of expression in which news is conveyed, and therefore one newspaper proprietor can prevent another

(l) (1869) L. R. 9 Eq. 324.

(m) (1881) 17 Ch. D. 708.

(n) *Trade Auxiliary Co. v. Middlesborough, &c., Association* (1889), 40 Ch. D. 425; see also *per* Lord Davey in *Walter v. Lane* (1900), A. C. at p. 551; and *per* North, J., *Cate v. Devon Newspaper Co.* (1889), 40 Ch. D. at p. 503.

(o) 5 & 6 Vict. c. 45, ss. 18, 19; and below, pp. 130-135. See also the decision in *Petty v. Taylor* (1897), 1 Ch. 465, that the proprietor of copyright in the letterpress, registered as the proprietor of copyright in the "book," has not from that alone copyright in illustrations bound up with the letterpress.

(p) *Comyns v. Hyde* (1895), 13 R. 172; following *Maple v. Junior Army and Navy Stores* (1882), 21 Ch. D. 369. Difficult questions may arise if the copy complained of, though a copy of the illustration in the book, is not made from the illustration but from the picture it reproduces.

News-
papers.

from copying special telegrams or articles from his paper (*q*), provided he can prove his copyright in each telegram or article (*r*). In *Exchange Telegraph Co. v. Gregory* (*s*) protection was granted to the "tape" telegrams of Stock Exchange prices.

Maps.

In *Stannard v. Lee* (*t*) the Court of Appeal held, reversing the decision of Bacon, V.-C., that *maps* were books under the Act of 1842, and not engravings under the Engravings Acts, and that they must therefore be registered. But a chart or plan which is really an instrument, apparatus, or tool, for achieving a certain practical purpose, such as a card for measuring and cutting out ladies' sleeves, cannot obtain literary copyright as a "map, chart, or plan," even if certain words or figures are printed on it (*u*).

Qualities
required in
copyright
work.

For an intellectual work to be capable of protection as copyright it must be:—

I. *Innocent*, that is:—

1. *Not seditious or libellous* (*w*), (the libel being against the State).
2. *Not immoral* (*x*); a work bearing on the love adventures of a courtesan was not protected (*x*), and certain French photographs were held by

(*q*) *Walter v. Steinkopff* (1892), 3 Ch. 489; *cf.* the action of the *Pall Mall Gazette* in stopping reproductions of its telegrams as to Australian cricket.

(*r*) *Walter v. Steinkopff*, *v.s.*; and *cf.* 5 & 6 Vict. c. 42, ss. 18, 19; and *post*, pp. 130–135.

(*s*) (1896) 1 Q. B. 147.

(*t*) (1871) L. R. 6 Ch. 346.

(*u*) *Hollinrake v. Truswell* (1894), 3 Ch. 420; *cf.* *Boosey v. Whight* (1900), 1 Ch. 122.

(*w*) *Hime v. Dale* (1803), 2 Camp. 27; *Southey v. Sherwood* (1817), 2 Mer. 435.

(*x*) *Stockdale v. Onwhyn* (1826), 5 B. & C. 173.

the Court of Appeal indecent and not entitled to protection (*y*).

Qualities
required in
copyright
work.

3. *Not blasphemous* (*z*); thus Lord Eldon refused protection to Laurence's 'Lectures on Physiology,' as "hostile to revealed religion, and the doctrine of the immortality of the soul." The same Chancellor (*a*) refused protection to Lord Byron's 'Cain,' and in 1823 Sir J. Leach took a similar course with regard to 'Don Juan.' In the Scotch case of *Hopps v. Long* (1874) (*b*), a Unitarian discussion of the life of Jesus was considered copyright as a decent discussion not endangering the public peace, safety, or morality.
4. *Not fraudulent*, or professing to be what it is not with intent to deceive. Thus a work of devotion professing falsely to be translated from the work of a celebrated German writer (*c*), was not protected; but the proprietors of a catalogue were not deprived of copyright therein, because some of the articles mentioned were described as "patent," though the patent had expired (*d*). It has not yet been decided whether falsely

(*y*) *Baschet v. London Illustrated Standard Co.* (1900), 1 Ch. 73. If part of a book is immoral, the whole book has probably lost the protection of literary copyright; but an innocent photograph or print does not lose protection by being found in the same volume with an immoral one (*same case*).

(*z*) *Lawrence v. Smith* (1822), 1 Jacob, 471.

(*a*) *Murray v. Benbow* (1822), 1 Jacob, 474.

(*b*) Cited in Copinger, p. 94, 3rd edit.

(*c*) *Wright v. Tallis* (1845), 1 C. B. 893.

(*d*) *Hayward v. Lely* (1887), 56 L. T. at p. 421; *cf. Macfarlane v. Oak Foundry Co.* (1883), 10 Sc. Sess. C. 4th Ser. 801, where misdescription under the Designs or Patent Acts was held no defence to an action under the Copyright Acts.

Qualities
required in
copyright
work.

describing a work as "registered" under the Copyright Acts is an answer to an action under those Acts which do not require registration as a condition precedent to an action; where the registration is required its absence is a defence, without reference to the false statement (e).

Literary
value.

II. *The work must contain the expression in words or pictures or signs of ideas giving information or instruction or pleasure (f).* This limitation is not required in the case of unpublished MSS.; but the purpose of the Act is to protect "useful books," though very little "usefulness" or material value will suffice to obtain protection. In *Cable v. Marks (g)*, in which an attempt was made to obtain copyright for a perforated card, with some verses on it, which, throwing the "Shadow of the Cross" on the wall, went by the name of the Christograph, Bacon, V.-C., held it "not a literary production in any sense of the words." In *Schove v. Schmincké (h)*, Chitty, J., held that an album for holding photographs, seven of the pages of which bore pictures of castles with short letterpress descriptions, and which was called "The Castle Album," was not a "book" within the Act of 1842, not being "a literary work." In *Davis v. Comitti (i)* the same judge held that a card for the face of a barometer, utterly meaningless without the barometer, but with it a scientific instrument of some value, was not a "book" capable of copyright. In *Hollinrake v. Truswell (j)* the

(e) Cf. principles laid down in *Leather Co v. American Leather Co.* (1863), 4 De G. J. & S. 137.

(f) *Hollinrake v. Truswell* (1894), 3 Ch. 420 at pp. 424, 427, 428; cf. *Boosey v. Whight* (1900), 1 Ch. 122.

(g) (1882) 47 L. T. 432; 52 L. J. Ch. 107.

(h) (1886) 33 Ch. D. 546.

(i) (1885) 52 L. T. 539.

(j) (1894) 3 Ch. 420. Similar charts had given rise to conflicting decisions in the United States; cf. *Drury v. Ewing* (1862), 1 Bond, 540; *Baker v. Selden* (1879), 11 Otto, 99.

Court of Appeal refused protection to a cardboard pattern sleeve containing directions for measuring and cutting out ladies' sleeves. This was followed in *Boosey v. Whight* (k), where on a perforated roll used in a mechanical instrument for producing sound, the defendants had printed directions for performance, such as "*piano*," "*forte*," taken from plaintiff's song. The roll was held not actionable, as being a mechanical device; the few printed words were treated as unimportant adjuncts. Literary
value.

On the other hand, in *Hildesheimer v. Dunn* (l), a folding card containing a map of the lines of the hand and a description thereof in verse, was admitted to copyright; and Chitty, J., gave protection to a form of application on a single sheet of paper (m). But in *Chilton v. Progress Printing and Publishing Co.* (n) the Court of Appeal refused to protect a sporting prophet's "tips" for particular races, consisting simply of the name of a horse and the name of a race, on the ground that the mere names in their conjunction had nothing of a literary character, and were merely the expression of an opinion which could not be monopolized.

The law of literary copyright is not intended to protect ideas or inventions, except as embodied in words. Thus in the case of *Perris v. Hexamer* (o), the Supreme Court of the United States refused to allow the proprietor of the copyright in a map of New York published on a special system to prevent the publication of maps of Philadelphia on the same system.

(k) (1900) 1 Ch. 122.

(l) (1891) 64 L. T. 452.

(m) In *Southern v. Bailes*; unreported; before Chitty, J., Aug. 1894.

(n) (1895) 2 Ch. 29.

(o) (1878) 9 Otto, 674; cf. *Baker v. Selden* (1879), 11 Otto, 99, where the idea of a peculiar system of bookkeeping was refused protection.

Literary
value.
Advertise-
ments.

As a general rule there is no copyright in single advertisements or labels. In the American case of *Coffeen v. Brunton* (*p*), where the plaintiff's label on a medicine had been pirated, it was held that, not having complied with the patent laws, he had not property in the medicine; that he had no copyright in the label, as it was not a "book" within the provisions of the American statute; but that he had an equitable ground for protection if the defendant had represented his medicine to be the same as the plaintiff's to the injury of the plaintiff (*q*). In the English case of *Page v. Wisden* (*r*) copyright was refused to a cricket scoring sheet where the only novelty introduced by the plaintiff appeared to be a line for recording the runs at the fall of each wicket. There may be copyright in a collection or sheet of advertisements, or in an arrangement or compilation of headings to advertisements (*s*).

Lindley, L.J., has described (*t*) works entitled to copyright, as works which "the author, or composer, as he is called in s. 18, has bestowed some brainwork upon, and not a mere collection of copies of public documents. If they had been such mere collections there might have been some question, but there has been an abridgment and mental work and an amount of labour which entitles the author of the work to a copyright." Lord Herschell in the Scotch case of *Leslie v. Young* (*u*) held that a compiler from sources open to all can only claim and enforce copyright in his

(*p*) (1849) 4 McLean, 516.

(*q*) *Cf. Higgins v. Keuffel (Am.)* (1890), 33 Davis, 428.

(*r*) (1869) 20 L. T. 435.

(*s*) *Lamb v. Evans* (1893), 1 Ch. 218.

(*t*) *Trade Co. v. Middlesborough, &c., Association* (1889), 40 Ch. D. at p. 435.

(*u*) *Leslie v. Young* (1894), A. C. at p. 340.

compilation, if it is the result in some respect or other of independent work on his part, and if advantage has been taken by others of that independent labour. Where, therefore, A. had simply reprinted railway time tables with the omission of some stations and trains, B., who had reprinted from him the same tables, was exonerated by the House of Lords. A telegraph code has been held entitled to copyright (*v*).

Catalogues will be protected as copyright, unless they are "merely a dry list of names" (*w*), or a simple announcement of the sale of goods which everybody might sell and announce for sale (*x*). But even in this case the verbatim copying of a simple list of goods, the compilation of the plaintiff, will be restrained (*y*).

In *Cobbett v. Woodward* (*z*), an injunction to restrain publication of an illustrated catalogue of furniture was refused as to the illustrations, but granted as to certain parts of the letterpress. In *Grace v. Newman* (*a*), however, the piracy of a stonemason's illustrated catalogue was restrained, and this case was followed by the Court of Appeal, *Cobbett v. Woodward* (*z*) being disapproved, in *Maple v. Junior Army and Navy Stores* (*b*), where an

(*v*) *Ager v. P. & O. Steam Nav. Co.* (1884), 26 Ch. D. 637.

(*w*) *Hotten v. Arthur* (1863), 1 H. & M. 603; some *dicta* in which, excluding copyright in postal directories, appear to go too far.

(*x*) *Maple v. Junior Army and Navy Stores* (1882), 21 Ch. D. 369.

(*y*) *Collis v. Cater* (1898), 78 L. T. 613; where the subject matter was a list of chemical drugs and patent remedies.

(*z*) (1872) L. R. 14 Eq. 407.

(*a*) (1875) L. R. 19 Eq. 6.

(*b*) (1882) 21 Ch. D. 369. *Marshall v. Bull*, C. A. (1901), 85 L. T. 77. See also *Bogue v. Houlston* (1852), 5 De G. & Sm. 267; *Hayward v. Lely* (1887), 56 L. T. 418; *Harris v. Smart* (1889), 5 Times L. R. 594; *Cooper v. Stephens* (1895), 1 Ch. 567; approved in *Marshall v. Bull*, v.s. The difficulty in catalogue cases is to ensure that all editions are properly registered; see *post*, pp. 124-126, as to new

Literary
value.

illustrated catalogue of furniture was protected as to the illustrations, though it was held there was no copyright in the letterpress, which was a simple announcement of the sale of goods which every one might sell and announce for sale (c).

Titles of
books.

With respect to *Titles*, the case of *Dicks v. Yates* (d), in the Court of Appeal, must be taken as finally deciding that, except in very rare cases, there cannot be any copyright in the title of a book; and the remedy for its use by other people, if any exists, will be akin to that for common law fraud (e). In that case the title claimed was 'Splendid Misery'; the plaintiff's novel was published in *Every Week*; the defendant's, an entirely different novel, written by Miss Braddon, in the *World*. The defendant proved that a novel bearing a similar title had been published in the early part of the century. In refusing an injunction, Jessel, M.R., after commenting on the lack of originality in the title, said:—"I do not say that there could not be copyright in a title, as for instance in a whole page of title, or something of that kind requiring invention. I am of opinion that there cannot be copyright at all in these common English words. Their adoption as the title of a novel might make a trade-mark, and entitle the owner of the novel to say:—'You cannot sell a novel under the same title so as to lead the public to believe they are buying my novel when they are actually buying yours.'" James, L.J., said:—

editions. The copyright in the illustrations is not necessarily the property of the owner of the copyright in the letterpress, though he be registered as the proprietor of copyright in the "book." *Petty v. Taylor* (1897), 1 Ch. 465.

(c) But see *Collis v. Cater* (1898), 78 L. T. 613.

(d) (1881) 18 Ch. D. 76, 89.

(e) See above, pp. 55-60.

“Where a man sells a work under the name or title of another man, or another man’s work, that is not an invasion of copyright, it is a common law fraud:”—and at the end of the case, “there cannot be in general any copyright in the title or name of a book,” in which opinion the Master of the Rolls concurred. This case may be regarded as putting on the right ground the law as to protection of titles, and settling a long and confused controversy.

Titles of books.

The Court will interfere, if at all, on the ground of injury to the property denoted by the title, by its use to denote a work liable to be mistaken for the plaintiff’s. Fraud is unnecessary as a ground for interference; it will be sufficient if injury results or is likely to result from the similarity (*f*).

The law of the *United States* is similar. In *Osgood v. Allen* (*g*) the Court said:—“The right secured by the Act however is the property in the literary composition, the product of the mind and genius of the author, and not the name and title given to it. When the title itself is original, and the product of an author’s own mind, and is appropriated by infringement, as well as the whole or part of the literary composition itself, in protecting the other portions . . . Courts would probably protect the title. But no case can be found either in England or this country in which, under the law of copyright, Courts have protected the title alone, separate from the book which it is used to designate.”

III. *Originality*. In the much-discussed decision in *Walter v. Lane* (*h*) the verbatim reporter of Lord

Originality.

(*f*) See above, pp. 55-60; and the general principles laid down in *Reddaway v. Banham* (1896), A. C. 199; (camel-hair belting).

(*g*) 1 Holmes, 185, 191.

(*h*) (1900) A. C. 539.

Origin-
ality.

Rosebery's speeches obtained a copyright in his report, apparently even against Lord Rosebery. This appears to show that it is not necessary that the work in which copyright is claimed should be "original," in the sense that its "author" should have invented or supplied either a single word or idea of the book, or the arrangement of the words. He may have copied the literary composition of another from that other's recitation without adding anything but the written reproduction of the spoken words. The House of Lords do appear to think that the words composing the book must not have been published in print before, to which extent the work must be original. It is idle to discuss whether decisions of the House of Lords are right; otherwise there is much to be said for the view of the Court of Appeal and Lord Robertson that a mere copyist does not produce a "book" within the Copyright Act, and that the phonograph is not an "author."

Where there is a common source of information or ideas, itself not copyright, it is open to all to use it, and to obtain copyright in the results of labour so bestowed (*i*). From the nature of the case results obtained by different workers having a similar end must be very similar, but the likeness of one man's work to that of his predecessor in the same field does not hinder it from obtaining copyright, provided it is the result of his independent labours. He is, however, only allowed a very limited use of the copyright labours of his predecessors. Thus in *Kelly v. Morris* (*j*), a case having reference to directories,

(*i*) See *post*, pp. 144-147.

(*j*) (1866) L. R. 1 Eq. 697, 701; *cf. Trade Co. v. Middlesborough Association*, 40 Ch. D. 425; *Cute v. Devon Newspaper Co.*, *ibid.* p. 500; cases as to lists of bills of sale obtained from public departments.

two of which, if correct, must be nearly identical, ^{Originality.} Page Wood, V-C., laid down the law as follows:—"In the case of a dictionary, map, guide-book, or directory, where there are certain common objects of information, which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done; in case of a road book he must count the milestones for himself . . . generally he is not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use he can legitimately make of a previous publication is to verify his own calculations and results when obtained."

This passage must, however, be read as explained by Giffard, L.J., in *Morris v. Wright* (*k*), where, after reading the above passage, he said:—"If this passage goes further than I take it to mean, I cannot doubt it goes beyond what the law authorizes, and beyond the decision of the Lord Chancellor and myself in the late case of *Pike v. Nicholas* (*l*). It does not mean that he may not look into the book for the purpose of ascertaining where a particular person lived and whether it was worth his while to call upon that person or not; but it means that he may not take that particular slip and show that to the person and get his authority as to putting that particular slip in." . . . But where the only use which the plaintiff has made of common sources is to reprint them, as in the case of railway time tables, he will not be able to prevent another person from copying his reprint; though the case will be different where he

(*k*) (1870) L. R. 5 Ch. at p. 285.

(*l*) (1870) L. R. 5 Ch. 251.

Originality.

has done substantial and original work, as in the compilation of circular routes or tours (*m*).

So in *Lewis v. Fullarton* (*n*), in reference to a gazetteer, the Master of the Rolls said:—"Any man is entitled to publish a topographical dictionary, and to avail himself of the labours of all former writers whose works are not subject to copyright, and of all public sources of information; but while all are entitled to resort to public sources of information, none are entitled to save themselves trouble and expense by availing themselves for their own profit of other men's works still subject to copyright and entitled to protection."

The case of *Jarroll v. Houlston* (*o*) furnishes a good application of these principles. There the plaintiff had published a 'Guide to Science' in the form of question and answer dealing with the common phenomena of nature. The defendant published a similar work under a different title. The Court held (*p*) that the plaintiff's work had an original value, and was copyright, as reducing certain common matter to a systematic form of instruction; but that another person might originate another work in the same general form provided he did so from his own resources, and made the work he so originated a work of his own by his own labour bestowed on it. He might, however:—

(1.) Use all common sources of information.

(2.) Use the work of another as a guide to these common sources.

(*m*) *Leslie v. Young* (1894), A. C. 335.

(*n*) (1839) 2 Beav. 6.

(*o*) (1857) 3 K. & J. 708; *cf.* *Ager v. P. & O. Co.* (1884), 26 Ch. D. 637.

(*p*) In this case it was also held that conveying information by way of question and answer was not an original arrangement which could be copyrighted.

- (3.) Use another work to test the completeness of **Originality.**
his own.

There may be copyright in an arrangement or selection of non-copyright matters, as a selection of poems (*q*); or a set of illustrative non-copyright quotations (*r*).

There may also be copyright in a work, every word of which is found in another work, as in two street directories, if each is the result of independent labour and inquiry on the non-copyright material (*s*).

There is copyright in each independent *Translation* of **Translations.** a non-copyright work (*t*), if it appears to have been made from the original by independent labour. So there may be copyright in *compilations*, if independent work gives an original result. In *Sweet v. Benning* (*u*) it was held that there was copyright in certain original parts of a law reporter's work, such as the digested headnotes and abridged speeches of counsel. It is doubtful whether there is copyright in the verbatim reports of the judgments of the Court (*v*).

An author republishing a non-copyright work with **Annotations.** *annotations* and additions, may obtain copyright in his additions, if they are of a substantial nature. Thus, in

(*q*) *Macmillan v. Suresh Chunder Deb* (1890), 17 Indian L. R. (Calcutta) 951.

(*r*) *Moffatt v. Gill and Marshall* (1902), 18 Times L. R. 547; *Black v. Murray* (1870), 9 Sc. Sess. C. 3rd Series, 341.

(*s*) *Cf. Baily v. Taylor* (1829), 3 L. J. O. S. Ch. 66.

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

(*u*) (1855) 16 C. B. 459. See also *Butterworth v. Robinson* (1801), 5 Vesey, 709; *Wheaton v. Peters* (Am.) (1834), 8 Peters, 591; *Gray v. Russell* (1839), 1 Story, 11, 21.

(*v*) The Supreme Court of the United States has held that neither a judge nor the State as his assignee can get copyright in his judgments. *Banks v. Manchester* (1888), 21 Davis, 244. As to the reporter, see *Walter v. Lane* (1900), A. C. 539.

Annotations.

Cary v. Longman (*w*), where the plaintiff had published Paterson's 'Roadbook,' with original additions, Lord Kenyon held it clear that he had a copyright in such additions and alterations, many of which were material and valuable; but that he certainly had no title to that part of the work which he had taken from Mr. Paterson. In an American case (*x*), the plaintiff claimed and obtained copyright in his annotations to Wheaton's 'International Law,' though they consisted largely of compilations from and references to official documents.

New editions.

The question as to the effect of a publication of a *new edition*, with alterations, on the original copyright, arose in the Scotch case of *Black v. Murray* (*y*). There the plaintiffs had reprinted, with notes, illustrative quotations, and alterations in the text, a work the copyright in which had expired, and sued for an infringement of their copyright in the reprint. The Lord President said:—

“A new edition of a work may be a mere reprint of an old edition, and plainly that would not entitle the author to a new term of copyright running from the date of the last edition. On the other hand, the new edition may be so enlarged and improved as to constitute in reality a new work, and that just as clearly will entitle the author to a copyright running from the date of the new edition. The difficulty will be to lay down any general rule as to what amount of addition, or alteration, or new matter will entitle a second or new

(*w*) (1801) 1 East, 358; *Leslie v. Young* (1894), A. C. 335. But compare *Cary v. Faden* (1799), 5 Vesey, 24. See *Gray v. Russell*, v.s.

(*x*) *Lawrence v. Dana* (1869), 2 Am. L. T. R. N. S. 402.

(*y*) (1870) 9 Sc. Sess. Cas., 3rd Ser., 341; cf. *Thomas v. Turner* (1887), 33 Ch. D. 292.

edition of a book to the privilege of copyright, or whether the copyright extends to the book as amended or improved, or is confined only to the additions and improvements themselves, distinguished from the rest of the book.” ^{New editions}

Kindersley, V.-C., dealt with the same question in the English case of *Murray v. Bogue* (z). He said: “Publishing another edition of his work does not affect an author’s copyright in his first edition; but if he prints a second edition, not a mere reprint of the first, but containing material alterations and additions, *quoad* these it is a new work, and to enable him to sue in respect of any infringement of his rights in those portions of the second edition which are new, he must register the edition before suing. The extent, however, of the alterations is immaterial; to whatever extent a new edition is made a new work, the new part cannot be protected by suit until registration; but that effect of the Act has no operation as to the old parts (of the second edition); as to them the copyright is left as it was.”

An author therefore has copyright in the new matter of a second edition for the statutory term from its first publication, in the old matter only from its original publication. This results in obsolete editions becoming common property, while revised ones are still the subject of copyright, but exposed to the competition of former editions to the detriment of the public; and it has been suggested that this should be remedied by continuing the copyright of all scientific and historical works to the lapse of the statutory term of the last edition in which substantial improvements have been made.

The additions must be of some material value to secure copyright. Thus in the Scotch case of *Hedder-*

(z) (1852) 1 Drewry, 353, 365.

New
editions.

wick v. Griffin (a), Scotch publishers issued a complete edition of the works of Dr. Channing, an American divine, with some slight revision by himself: but the Court held that the original matter introduced by the revision was too slight to obtain protection.

In *Thomas v. Turner (b)* the remarks of Cotton, L.J., shew that a new edition without substantial alterations is not an original work, and therefore not a book in which there is copyright or which can be registered. The copyright and the registration are of the preceding edition.

Place of
publica-
tion.

All the members of the House of Lords who decided *Routledge v. Low (c)* were of opinion that publication of a book to secure copyright must take place in the United Kingdom; and Lords Cranworth and Westbury expressly say that such publication must be the first publication. It would seem to follow that if an author publishes a book in the United States and afterwards publishes it in London, he cannot claim copyright, for he has not published in London an original work, but one identical with a publication in which there is admittedly no English copyright.

This, however, was doubted by the Court of Appeal in *Reid v. Maxwell (d)*, in which part of a novel claimed as English copyright had been previously published in America. The Court declined to decide the point, though intimating their opinion that in the special circumstances of that case the English copyright had not been lost by

(a) (1841) 3 Sc. Sess. C. 2nd Ser. 383.

(b) (1887) 33 Ch. D. 292.

(c) (1868) L. R. 3 H. L. 100, *per* Lord Cairns, p. 108; Lord Cranworth, p. 112; Lord Chelmsford, p. 116; Lord Westbury, p. 118. But now see 49 & 50 Vict. c. 33, s. 8.

(d) (1886) 2 Times L. R. 790.

prior publication in America. It is difficult, however, to see what answer could be made to a defendant sued for infringement of copyright and pleading:—"I have not copied the book you registered, but have gone to the same non-copyright source as yourselves, namely, the prior publication in America;" and it is submitted that the point is really decided by *Routledge v. Low* (e). Further, the International Copyright Act (1844) (f), which was not cited to the Court of Appeal, seems conclusive against this view. Sect. 19 provides that the author of any book which should be first published out of Her Majesty's dominions, should have no copyright except under the International Copyright Act. This leaves open the question of the effect of prior publication in Her Majesty's dominions, but out of the United Kingdom; though the Lords in *Routledge v. Low* (e) held that publication in the United Kingdom was necessary. Now, however, the Act of 1886 provides that first publication in the British dominions gives the benefit of the British Copyright Acts (g).

Duration of Right (h).—Forty-two years from first publication, or the author's life and seven years from his death, whichever term shall be the longer (i). In the case of works published after their author's death, copyright dates from publication, and belongs to the proprietor of the author's manuscript from which the book is published, and his assigns.

(e) (1868) L. R. 3 H. L. 100.

(f) 7 & 8 Vict. c. 12, s. 19.

(g) 49 & 50 Vict. c. 33, s. 8.

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

(i) Semble in case of joint authors, the term dates from the last death. Cf. *Murziels v. Gibbons* (1874), L. R. 9 Ch. 518. As to their respective rights, see *Powell v. Head* (1879), 12 Ch. D. 686; *Lauri v. Renal* (1892), 3 Ch. 402.

Persons
who may
acquire
the right.

Extent of Right (j).—Throughout the British dominions (thus extending to the colonies as well as the United Kingdom).

Persons who may acquire the Right.—1. British subjects wherever resident at the time of publication.

2. Alien friends resident in the British dominions at the time of publication.

3. (Possibly) Alien friends wherever resident.

The last two classes rest on the authority of *Routledge v. Low (k)*, which as to the 3rd head is in conflict with *Jefferys v. Boosey (l)*. This last case was decided on the construction of the Copyright Statutes before 1831, the date of publication of the work in which copyright was claimed. The work was assigned in manuscript by an alien friend resident abroad, and first published in England, *the author continuing his foreign residence*; it was decided that neither statute nor common law copyright extended to such a publication.

In *Routledge v. Low (k)*, which was decided on the construction of the Act of 1842, A., a domiciled subject of the United States, before publishing her work went to reside for a short time in Canada, by arrangement with her publishers, Messrs. L., who thereupon published the work in London, the copyright being assigned to them and due registration taking place. Defendants reprinted the book, and Messrs. L. sued them for infringement of copyright. The case was taken to the House of Lords, and was heard before Lords Cairns, Westbury, Cranworth, and Chelmsford, who agreed that publication in the United Kingdom, together with temporary residence

(j) 5 & 6 Vict. c. 45, s. 29.

(k) (1868) L. R. 3 H. L. 100.

(l) (1854) 4 H. L. C. 815.

of the author in Her Majesty's dominions at the time of publication, conferred copyright on a foreigner. Lords Cairns and Westbury further held that residence in Her Majesty's dominions was not a necessary condition, and that publication in the United Kingdom was sufficient; Lords Chelmsford and Cranworth, however, expressed doubt as to this, and the matter must be considered doubtful (*m*). Copyright, however, is personal property, and under the Naturalization Act (*n*) an alien friend may acquire and hold personal property in the same way in all respects as a British subject. Now residence in the British dominions is not a necessary condition of a British subject's acquiring copyright, and from this, as pointed out by the late Mr. Justice Stephen (*o*), it seems probable that the view of the law taken by Lord Cairns is the right one.

Persons
who may
acquire
the right.

The Investitive Facts of Copyright are:—

I. Publication:—(*p*)

Investi-
tive facts.

1. Of a book capable of copyright.

2. In the United Kingdom under the Act of 1842, or in the British Dominions under the Act of 1886 (*q*).

3. By either:—

(a.) A British subject resident anywhere.

(b.) An alien friend resident in British dominions.

(c.) (Probably) by an alien friend resident abroad (*r*).

(*m*) The Law officers of the Crown advised the Government after the passing of the United States Act of 1891 on the lines of the judgments of Lords Cairns and Westbury, and the United States have acted on the faith of this opinion. But see p. 231, *post*.

(*n*) 33 Vict. c. 14, s. 2.

(*o*) C. C. Rep. p. 69, note.

(*p*) As to where a book or paper is published, see *McFurlane v. Hulton* (1899), 1 Ch. 884.

(*q*) 49 & 50 Vict. c. 33, s. 8.

(*r*) *Routledge v. Low* (1868), L. R. 3 H. L. 100.

Investi-
tive facts.

4. Which book has not been previously published (s)—
- (a.) In a foreign country.
 - (b.) In the United Kingdom.
 - (c.) (Probably) in the rest of Her Majesty's dominions (t).

II. Licence to republish granted by the Judicial Committee of the Privy Council acts as a partial investment of copyright in the grantee (u).

III. Registration at Stationers' Hall is not an investitive fact of copyright, but vests the right to sue to protect such copyright (w).

It is probable that the Crown still has special copyright in perpetuity in the authorized version of the Bible, the Book of Common Prayer, and possibly in Acts of Parliament (x). The origin of this has been dealt with elsewhere (y). A statutory copyright might also exist in Government publications, as the 'Report of the Challenger,' though difficulties may arise in enforcing such copyright (z).

Works and
articles
written on
commis-
sion.

The question of copyright in works written on commission, articles in encyclopædias, reviews, magazines,

(s) 7 & 8 Vict. c. 12, s. 19.

(t) *Routledge v. Low* (v.s.); but 7 & 8 Vict. c. 12, s. 19, uses the language, "first published out of Her Majesty's Dominions."

(u) 5 & 6 Vict. c. 45, s. 5.

(w) *Ibid.* s. 24.

(x) *Baskett v. University of Cambridge* (1758), 1 W. Bl. 105; *Stationers' Co. v. Carnan* (1775), 2 W. Bl. 1002.

(y) See above, p. 6. Rights in the authorized version of the Bible are claimed by the King's Printer, and the Universities of Oxford and Cambridge under charters, interpreted by an unreported decision of the House of Lords. See *In re The Red Letter New Testament* (1900), 17 Times L. R. 1.

(z) Cf. *Nicol v. Stockdale* (1785), 3 Swanston, 687. A statutory right in the nature of copyright in the British Pharmacopœia is by 25 & 26 Vict. c. 91, s. 2, granted to the Medical Council.

or newspapers (*a*), is one of some complication, and is dealt with by special clauses of the Act of 1842 (*b*). The rights of the parties may be summarized as follows:

Works and articles written on commission.

1. In absence of any agreement, express or implied, as to copyright, and *a fortiori*, if the right of republication of such article is reserved by the author, the author has the copyright in such work or article (*c*). The author must register his work, the date of publication of the first instalment being the date of first publication, but he need not publish it in a separate form, or apart from its periodical publication (*d*).

2. If a publisher or other person (*e*) has employed any person to compose any work or article;

(1.) On the terms that the copyright therein shall belong to such publisher (*f*);

(2.) And shall have paid for such composition (*g*); he will occupy the following position:—

(*a*) It is now decided that newspapers come under sections 18, 19 of the Act of 1842. *Walter v. Howe* (1881), 17 Ch. D. 708; *Trade Auxiliary Co. v. Middlesborough Association* (1889), 40 Ch. D. 425; above, pp. 110, 111.

(*b*) 5 & 6 Vict. c. 45, ss. 18, 19.

(*c*) Sect. 18, and *cf.* *Hereford v. Griffin* (1848), 16 Sim. 190; *Johnson v. Newnes* (1894), 3 Ch. 663; *Aflalo v. Lawrence and Bullen* (1902), 1 Ch. 264; affirmed C. A., *Times*, Dec. 19, 1902.

(*d*) *Johnson v. Newnes (v.s.)*.

(*e*) Two or more persons may give a joint commission and acquire rights under s. 18. *Trade Auxiliary Co. v. Middlesborough Association* (1889), 40 Ch. D. 425; *Cate v. Devon Newspaper Co.*, *ibid.* p. 500. A. may employ B. to employ C., and A. will have copyright. *Stubbs v. Howard* (1895), 11 Times L. R. 515.

(*f*) *Sweet v. Benning* (1855), 16 C. B. 459; *Hereford v. Griffin* (1848), 16 Sim. 190; *Walter v. Howe* (1881), 17 Ch. D. 708; *Lamb v. Evans* (1893), 1 Ch. 219; *Aflalo v. Lawrence and Bullen* (1902), 1 Ch. 264; affirmed C. A., *Times*, Dec. 19, 1902.

(*g*) *Richardson v. Gilbert* (1851), 1 Sim. N. S. 336 (where it was held that a contract to pay is not sufficient); *Trade Auxiliary Co. v. Jackson* (1887), 4 Times L. R. 130. Proof that the editor of a

Works and
articles
written on
commis-
sion.

He will have copyright in the whole work, encyclopædia, magazine, newspaper, &c., so produced, as if he were the actual author thereof (*h*). In other words, in the absence of express agreement, the publisher has the sole right to reprint the article as part of the work for which it was written for forty-two years from its first publication, or for his life and seven years afterwards, whichever may be the longer. But he may not reprint it in a separate form at any time without the consent of the author (*i*); and the author, in the absence of express agreement, may not reprint it in a separate form without the consent of the publisher, till twenty-eight years from first publication (*j*).

It follows that, in cases where the copyright is in the proprietor, for the first twenty-eight years after publication the work or article may not be reprinted in a separate form without the consent both of proprietor and author.

And the right of the author to republish in a separate form after the lapse of twenty-eight years from first publication is limited to reviews, magazines, and other periodical works of a like nature, and does not apply to

magazine has been paid, without proof that the writer of a particular article has been paid, will not suffice. *Brown v. Cooke* (1846), 16 L. J. Ch. 140. As the proprietor does not acquire copyright till payment, it follows that payment must precede both registration and bringing an action. *Trade Auxiliary Co. v. Middlesborough* (1889), 40 Ch. D. at p. 429.

(*h*) Cf. *Hildesheimer v. Dunn* (1891), 64 L. T. at p. 454.

(*i*) The author's right during this period to prevent such a separate publication by the proprietor is not "copyright," and does not require registration before it can be enforced. *Mayhew v. Maxwell* (1860), 1 J. & H. 312. But the author has no right to prevent separate publication of his article by persons other than the proprietor, till the twenty-eight years have elapsed.

(*j*) 5 & 6 Vict. c. 45, ss. 18, 19.

encyclopædias and works produced entirely by one author on commission (*k*).

Works and articles written on commission.

The two points in this rather complicated provision which have occasioned most litigation are:—(1.) The question under what circumstances an employment on the terms that the copyright shall belong to the employer will be implied; and:—(2.) The question what constitutes “publication in a separate form.”

On the first question, Sir George Jessel, in *Walter v. Howe* (*l*), refused to imply, from evidence that the author of an obituary notice of Lord Beaconsfield was paid by *The Times* newspaper for his article, an agreement that the copyright should belong to the proprietor of *The Times*; and in *Bishop of Hereford v. Griffin* (*m*), Shadwell, V.-C., declined to make a similar implication, where the Bishop had written an article for an encyclopædia for payment, nothing being said about copyright; a custom of trade was however alleged that it should belong to the proprietor. Kay, J., in *Trade Auxiliary Co. v. Jackson* (*n*), would not imply any such terms in the case of persons employed to abstract bills of sale. On the other hand, in *Sweet v. Benning* (*o*), in 1855, the full Court of Common Pleas unhesitatingly implied such a condition from evidence that barristers were paid to report legal decisions for *The Jurist* newspaper,

(*k*) This exception rests on the omissions in the proviso in sect. 18. Cf. *Hereford v. Griffin* (1848), 16 Simons at p. 194. As to works produced on commission, cf. *Hazlitt v. Templeman* (1866), 13 L. T. N. S. 593.

(*l*) (1881) 17 Ch. D. 708.

(*m*) (1848) 16 Simons, 190. Cf. *Aflalo v. Lawrence and Bullen* (1902), 1 Ch. 264; affirmed C. A., *Times*, Dec. 19, 1902.

(*n*) (1887) 4 Times L. R. 130. The plaintiffs supplied their omission by express evidence in the *Middlesborough Case* (1889), 40 Ch. D. 425.

(*o*) (1855) 16 C. B. 459.

Works and
articles
written on
commis-
sion.

nothing being said about the copyright; and from the language used in the argument would have inferred similar terms in the case of *The Times*. *Sweet v. Benning* was not cited to Jessel, M.R., in *Walter v. Howe* (p), and the question must be one of inference from facts in each case; but *Sweet v. Benning* certainly shows that it is not essential to the copyright of the employer that it should have been expressly conferred on him; in other words, such an agreement may be implied from the relation of the parties. This view was also taken by the Court of Appeal in *Lamb v. Evans* (q).

On the question of "publication in separate form," in *Mayhew v. Maxwell* (r), the proprietor of the 'Welcome Guest' journal (price one penny) published a 'Christmas number of the Welcome Guest' (price twopence), containing six stories, one by the plaintiff. Two years later the publisher proposed to issue the six stories and one other, price two shillings. He argued that he was merely reprinting the Christmas number with another story. Page Wood, V.-C., held that there was not a mere reprint of the Christmas number, which would be legitimate, and accordingly restrained the publication. In *Smith v. Johnson* (s), the proprietor of the 'London Journal' had published therein three tales by the plaintiff, and began to publish a "supplementary number of the 'London Journal,'" in which selected tales from the 'London Journal,' including the plaintiff's, were reprinted, and this was also restrained by injunction. "Publication in a separate form" means, therefore, not published separate from all other matter; but publication

(p) (1881) 17 Ch. D. 708.

(q) (1893) 1 Ch. at pp. 224, 227, 233.

(r) (1860) 1 J. & H. 312.

(s) (1863) 4 Giff. 632.

in a different form and with a different context from the original issue.

The Rights of the proprietor of Copyright are (t) :—

1. Solely and exclusively by himself or his assigns or persons thereto in writing authorized by him, to print or otherwise multiply (u) copies of his book in the British dominions (v).

Rights of proprietor of copy right.

2. Solely and exclusively by himself or his assigns or persons thereto in writing authorized by him, to sell, publish, or expose to sale or hire, copies of his book in the British dominions (w).

3. Solely and exclusively by himself or his assigns or persons thereto in writing authorized by him, to import for sale or hire copies of his book printed abroad into the British dominions (x).

Infringements of Copyright have been well and shortly summarized by James, L.J., in *Dicks v. Yates* (y), as follows :—

Infringements of copyright.

“Literary property can be invaded in three ways, and in three ways only :—

(t) 5 & 6 Vict. c. 45, ss. 2, 3, 15.

(u) Thus reproduction by lithography : *Novello v. Sullow* (1852), 12 C. B. 177 ; or in shorthand : *Nicols v. Pitman* (1881), 26 Ch. D. 374 ; manuscript or type-written copies : *Warne v. Seebohm* (1888), 39 Ch. D. 73, will be infringements. *Semble*, also, that a copy or copies imprinted on a phonograph or printed in the blind raised alphabet would be a “multiplication.”

(v) Sects. 2, 29. As to the offence of “causing to be printed,” see *Kelly's Directories v. Gavin and Lloyds* (1902), 1 Ch. 631.

(w) Sects. 2, 15, 29.

(x) Sects. 2, 15. In an unreported appeal from a County Court, a Divisional Court held that importation must be proved to be “for sale or hire” to constitute an offence under this provision. *Quare*, whether this decision was not wrong, the importer having “otherwise multiplied” under section 2. *Cf. Novello v. Sullow* (1852), 12 C. B. 177.

(y) (1881) 18 Ch. D. 76, 90.

Infringe-
ments of
copyright.

1. Where a publisher in this country publishes an unauthorized edition of a work in which copyright exists, or where a man introduces for sale a foreign reprint of such a work, that is open *Piracy*.

2. Where a man pretending to be the author of a book illegitimately appropriates the fruits of a previous author's literary labour, that is *Literary Larceny*.

Those are the only two modes of invasion against which the Copyright Acts have protected an author.

3. There is another mode which, to my mind, is wholly irrespective of any copyright legislation, and that is where a man sells a work under the name and title of another man or another man's work. That is not an invasion of copyright; it is *common law fraud*, and can be redressed by common law remedies" (z).

Literary
piracy.

I. As to open *Piracy* of the whole of a work, there is very little to say; it generally occurs, as in *Routledge v. Low* (a), where there is some doubt as to the legal right; the case of *Walter v. Howe* (b) was a case of successful moral piracy not forbidden by the law. Partial piracy however is more common, as in the case of extracts from an acknowledged source. In *Sweet v. Benning* (c), a case of verbatim extracts from law reports, Jervis, C.J., spoke of "the fair right of extract which the law allows for the purpose of comment, criticism, or illustration," but said that in the case before him there was no thought or skill brought to bear on the matter complained of; it was "a mere mechanical stringing together of marginal or side-notes which the labour of

(z) See above, pp. 55-59.

(a) (1868) L. R. 3 H. L. 100.

(b) (1881) 17 Ch. D. 708.

(c) (1855) 16 C. B. 459, 481.

the author had fashioned ready to the compiler's hands." ^{Literary piracy.}
 In *Campbell v. Scott* (d) the defendant had published a volume of 790 pages, thirty-four of which were taken up with a critical essay on English poetry, and the remaining 756 were filled with complete pieces and extracts as illustrative specimens. Six poems and extracts, 733 lines in all, were taken from copyright works of the plaintiff; and he obtained an injunction against their publication, on the ground that no sufficient critical labour or original work on the defendant's part was shown to justify his selection. So in *Roworth v. Wilkes* (e), where seventy-five out of 118 pages, composing a work on fencing, had been inserted in a large encyclopædia, the extract forming a material part of the plaintiff's work, he obtained a verdict.

Honest and *bonâ fide* extraction, with no intention to steal, will not necessarily protect the taker; thus in *Scott v. Stanford* (f), A. was in the habit of collecting and publishing, at a cost of three guineas, a statistical return of London imports of coal; B., *bonâ fide*, and with a full acknowledgment of his indebtedness to A., published these returns as part of a work on the mineral statistics of the United Kingdom. The extracted matter formed a third of defendant's work. Page Wood, V.-C., granted an injunction, saying, "if in effect a large and vital portion of the plaintiff's work and labour had been appropriated and published in a form that will materially injure his copyright, mere honest intention on the part of the appropriator will not suffice, as the Court can only look at the result, and not at the intention; the appropriator must be presumed to intend all that the publication of

(d) (1842) 11 Simons, 31.

(e) (1807) 1 Campbell, 94.

(f) (1867) L. R. 3 Eq. 718.

Literary
piracy.

his work effects. . . . No man is entitled to avail himself of the (copyright) labours of another for the purpose of conveying to the public the same information, although he may append additional information to that already published."

This shows that the *animus furandi* is not essential to piracy, though some previous cases lay stress on its importance. If however there are signs of its presence, attempts to conceal indebtedness, colourable alterations, or servile imitations, such as the copying of mistakes, a smaller amount of appropriation will suffice to make the offence. If the part taken is substantial in merit, its mere physical smallness will not protect the infringer, especially if it is used, not for critical purposes, but so as to compete with the original publication (*g*).

Abridg-
ments.

The absence of recent cases on the subject in the English law renders the position of *Abridgments* a little uncertain. It has been decided however that there are fair abridgments which are not infringements of copyright, and unfair abridgments which are, but the line between them is not very distinct. In *Gyles v. Wilcox* (*h*), in 1740, the first reported case on the subject, where the original consisted of 275 sheets, and the abridgment of thirty-five, Lord Hardwicke said: "Where books are colourably shortened only, they are a mere evasion of the statute, and cannot be called abridgments. But this must not be carried so far as to restrain persons from making a real and fair abridgment, for an abridgment may, with great propriety, be called a new book, because

(*g*) Cf. *Leslie v. Young* (1894), A. C. 335; *Cooper v. Stephens* (1895), 1 Ch. 567; *Marshall v. Bull* (1901), 85 L. T. 77; *Moffatt v. Gill* (1902), 18 Times L. R. 547; *Bradbury v. Hotten* (1872), L. R. 8 Ex. 1.

(*h*) (1740) 2 Atkyns, 141.

not only of the paper and print, but the invention, learning, and judgment of the author are shown in them, and in many cases are extremely useful." One of the chief early cases on the subject is that of *Dodsley v. Kinnersley* (i) in 1761, relating to the celebrated abridgment of 'Rasselas,' in which the compiler "left out all the moral reflections." The Court held that no certain line could be drawn to distinguish a fair abridgment, and seemed to hint that the quantity printed, and the possible injury to the book abridged, were the points to be considered. In an *Anonymous Case* (k) in 1774, where Newbery abridged Hawkesworth's *Voyages*, Apsley, L.C., having consulted with Mr. Justice Blackstone, expressed his views at some length. He held that, "to constitute a true and proper abridgment of a work the whole must be preserved in its sense, and then the act of abridgment is an act of understanding employed in carrying a larger work into a smaller compass, and rendering it less expensive and more convenient, both to the time and use of the reader, which made an abridgment in the nature of a new and meritorious work. That this had been done by Mr. Newbery, whose edition might be read in a fourth part of the time, and all the substance preserved and conveyed in language as good or better than the original and in a more agreeable and useful manner. That he and Mr. Justice Blackstone were agreed that an abridgment where the understanding is employed in retrenching unnecessary and uninteresting circumstances which rather deaden the narration (!), is not an act of plagiarism upon the original work, nor against any property of the author in it; but an allowable and meritorious work."

Later cases, however, have not taken quite so favourable

(i) (1761) Amb. 403. Cf. *Bell v. Walker* (1785), 1 Bro. C. C. 451.

(k) (1774) Loffit, 775.

Abridg-
ments.

a view of the merits of the abridger. In *D'Almaine v. Boosey* (l), a musical case, Lord Lyndhurst, speaking on the general question, said:—"An abridgment is in its nature original, the compiler intends to make of it a new use, not that which the author proposed to make. *An abridgment must be bonâ fide, because if it contains many chapters of the original work or such as made that work most saleable, the maker of the abridgment commits a piracy.*" And in *Dickens v. Lee* (m), Knight Bruce, V.-C., expressed himself with great doubt. He said:—"I am not aware that a man has the right to abridge the work of another: on the other hand, I do not mean to say that there may not be an abridgment which may be lawful, which may be protected; but to say that one man has the right to abridge, and so publish in an abridged form, the work of another without more is going much beyond my notion of what the law of this country is;" but again, "there may be such an use of another man's publications as, involving the exercise of a new mental operation, may fairly and legitimately involve it."

Law as to
abridg-
ments not
clear.

These cases do not easily yield a clear rule; the later ones materially narrow the former, and it is doubtful what decision one of the higher Courts might come to in the absence of any recent authority. A mere mechanical abridgment, or one containing the most saleable part of the author's work, will not apparently be allowed; but it seems that there may be an abridgment which by the amount of intellectual work expended on it will be protected, possibly if it is of such a different size and character as in no way to compete with the original author's work (n). This however is all that can be said,

(l) (1835) 1 Younge & Collyer, Exch. 288, 301.

(m) (1844) 8 Jurist, 183.

(n) In the Fine Arts however abridgments or reductions have been

and the Copyright Commission have recognized the unsatisfactory state of the law by recommending that no copyright work be abridged without the author's consent. ^{Abridgments.}

The law of the *United States* is practically the same. ^{United States.} The Courts, following the English cases, have reluctantly held, "contrary to principle," that a fair abridgment is not piracy. In *Gray v. Russell* (o) however the question was fairly put: "Will the abridgment in its present form prejudice or supersede the original work?" And in another case (p) McLean, J., said with justice: "An abridgment, if fairly made, contains the principle of the original work, and this constitutes its value." But the decisions have followed the English cases. In *Folsom v. Marsh* (q), Story, J., explained the nature of a fair and *bonâ fide* abridgment as follows: "It is clear that a mere selection or different arrangement of parts of the original work, so as to bring the whole into a smaller compass, will not be held to be such an abridgment. There must be real substantial condensation of the materials, and intellectual labour and judgment bestowed thereon, and not merely the facile use of the scissors, or extracts of the essential parts constituting the chief value of the work." And this perhaps expresses satisfactorily the present position of the English law.

The question of *Translations*, as infringements of copy-right, naturally will rarely arise in England apart from the International question. There is no market in ^{Translations.}

prevented. In *Gambart v. Ball* (1863) (14 C. B. N. S. 306), the sale of a *reduced* photograph of a painting was forbidden; and in *Bradbury v. Hotten* (1872) (L. R. 8 Ex. 1), *reduced* copies of cartoons in *Punch* met the same fate.

(o) (1839) 1 Story, 11.

(p) (1847) *Story's Exors. v. Holcombe*, 4 McLean, 306.

(q) (1841) 2 Story, 100.

Translations.

England for the translation into a foreign tongue of an English work. The questions might however arise in the case of a translation from English into Welsh or Gaelic, or into one of the Indian vernacular tongues. On principle however such a translation would seem to be an infringement of copyright in the original, but it may be that the Courts would draw a distinction between translations of poetry or prose, having a literary merit and style, and translations merely mechanical, as of educational or scientific works. The question arose indirectly in *Burnett v. Chetwood* (r) in 1720, where the author of a Latin work applied to restrain the publication of an English translation, and the Lord Chancellor decided the case on the curious ground that the book was not fit to be published in English, but said that "a translation might not be the same with the representing the original, on account that the translator has bestowed his care and pains on it, and so not within the prohibition of the Act." In *Murray v. Bogue* (s) however the Court said that if A. had published an English book, B. in Germany had translated it into German, and C. in England had retranslated B.'s translation into English, the law would protect A.'s book from C.'s retranslation. As a matter of inference it would also be protected from B.'s translation if published in England. The Indian Courts have held that a translation of a mathematical work into one of the Indian tongues is not an infringement of copyright (t). It is curious that no question as to a translation from English into Welsh has ever arisen.

United States.

The Courts of the *United States*, before the Revised

(r) (1720) 2 Merivale, 441.

(s) (1752) 1 Drewry, 353, 368.

(t) *Macmillan v. Shamsal* (1895) 19 Indian L. R. Bombay, 557.

Statutes of 1870 and 1874, had decided very positively ^{Translations.} against the author's claim to protection. In *Stowe v. Thomas* (*u*) in 1853, A. wrote and copyrighted a work in English; she also had a German translation made, and copyrighted it. B. also translated the original work into German, and the Court refused to restrain him from publishing what Grier, J., declared to be "a transcript or copy of her thoughts or conceptions, but in no correct sense capable of being called a copy of her book" (!) He continued: "The author's exclusive property in the creations of his mind cannot be vested in him as abstractions, but only in the concrete form which he has given them and the language in which he has clothed them. When he has sold his book, the only property which he reserves to himself, or which the law gives him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eye of another the ideas intended to be conveyed." It need hardly be pointed out that this extraordinary doctrine would protect all piracy which did not consist in literal extracts; it would prohibit the literary plagiarist from compilations by scissors and paste, but allow him to construct his piracy by aid of a dictionary of synonyms.

The Revised Statutes of the *United States* (*w*) however allow the author to reserve the rights of translation, and, if he does so, protect him against unauthorized translations.

II. *Literary Larceny*, where parts of the work are ^{Literary larceny.} stolen verbatim, or under colourable disguise, to form part of another work. The test applied by English law

(*u*) (1853) 2 Am. Law Reg. 210.

(*w*) Sect. 4952.

Literary
larceny.

is generally that laid down by Lord Eldon (x), that if there is "a legitimate use of a publication in the fair exercise of a mental operation deserving the character of an original work," there is no piracy. The English law lays too much stress on new matter added, too little on old matter taken. If lack of originality is raised as a defence by an alleged copier, the matter added is of importance; but in a question of piracy raised by previous writers, the matter taken is the point to be considered.

The English view of the matter received a good illustration in the case of *Spiers v. Brown* (y). The defendant admitted that he had made considerable use of the plaintiff's dictionary in the compilation of his own, but alleged that he had corrected errors, compared it with other dictionaries, and really used independent labour in his compilation. Page Wood, V.-C., said that where a work of an entirely original character was concerned, questions of copyright were very simple; but that there was a class of cases where the work related to a subject common to all mankind, and where the modes of expression and language were necessarily common. Then, applying Lord Eldon's test, he came to the conclusion that "though a good deal had been taken from the plaintiff, a good deal of labour had been bestowed on what was taken; and therefore there was no infringement of copyright."

Piracy from original works is usually, as said by Lord Hatherley, easy to detect; the difficulty lies in the cases where there are common materials, and the question is

(x) *Wilkins v. Aikin* (1810), 17 Vesey, 422. See also *Longman v. Winchester* (1809), 16 Vesey, 269; *Matthewson v. Stockdale* (1806), 12 Vesey, 270.

(y) (1858) 6 W. R. 352: commonly known as "the French dictionary case."

whether one worker on them has availed himself unfairly of the results of his fellow-worker's labour. *Where the work is of a nature such that its sources are common to all, so that independent work for a similar purpose must end in similar results, each worker has copyright in the result of his independent labour and research; and his work is not an infringement of the results obtained by another, unless he has simply copied those results instead of going to the original sources of information.*

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These principles are illustrated by the case of *Pike v. Nicholas* (z). The plaintiff had written a work in competition for a prize at the Eisteddfod, on the origin of the English people, which had obtained honourable mention and was published; the defendant had written a work on the same subject for a similar competition. He referred to plaintiff's work as an authority, and admitted that he had used it as a guide to older authorities. James, V.-C., held his work to be an infringement of the plaintiff's right, but on appeal the Lords Justices held that common features of structure were inevitable and allowable when two men wrote upon a common subject; that an author who has been led by a former writer to refer to older works may without piracy quote passages from them, to which he has been referred by their quotation in his predecessor's work, and that on the whole there was not sufficient evidence of unfair use to constitute an infringement.

A similar illustration is found in the "directory case" of *Morris v. Wright* (a), where it was held that the compiler of a new directory was not justified in using slips

(z) (1869) L. R. 5 Ch. 251; cf. ante, pp. 120-123.

(a) (1870) L. R. 5 Ch. 279. Cf. *Ager v. P. & O. Co.* (1884), 26 Ch. D. 637, piracy from a telegraph code; *Leslie v. Young* (1894), A. C. 335, piracy from railway time tables.

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cut out from one previously published, for the purpose of deriving information from them for his own work without any original inquiry, but that he might use them for the purpose of directing him to the parties from whom such information was to be obtained.

The question of piracy or no piracy must depend on a number of differing considerations of detail in each particular case, and principles laid down can be but vague. To Lord Eldon's test (*b*) however may be added the *dictum* in *Bramwell v. Halcomb* (*c*), that in questions of piracy "it is not only quantity but value that is always looked to," which is well expanded in the American case of *Folsom v. Marsh* (*d*) as follows: "It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or substance. If so much is taken that the value of the original is sensibly diminished, or the labours of the original author are substantially to an injurious extent appropriated by another, that is sufficient in point of law to constitute a piracy *pro tanto*. It is no defence that one has appropriated part and not the whole of the property. Neither does it necessarily depend on the quantity taken, but on other considerations, the value of the materials taken, and their importance to the sale of the original work. . . . *We must look then to the nature and object of the selections made, the quantity and value of the materials used, and the degree to which the use may prejudice the sale, or diminish the profits, or supersede the object of the original work.*" Lord Herschell, in *Leslie v. Young* (*e*), required "a substantial

(*b*) *Wilkins v. Aikin* (1810), 17 Vesey, 422; see above, p. 144.

(*c*) (1836) 3 My. & Cr. 737.

(*d*) (1841) 2 Story, 100, 115; *cf.* *Cooper v. Stephens* (1895), 1 Ch. at p. 572; *Marshall v. Bull* (1901), 85 L. T. 77.

(*e*) (1895) A. C. at p. 341.

appropriation by the one party of the independent labour of the other." And the whole question is neatly summed-up in the American case of *Emerson v. Davies* (*f*) as follows:—

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"The clear result of the authorities in cases of this nature is, that the true test of piracy or not is to ascertain whether the defendant has in fact used the plan, arrangement, and illustrations of the plaintiff as the model of his own book, with colourable alterations and variations only to conceal the use thereof; or whether his work is the result of his own labour, skill, and use of common materials open to all men, and the resemblances are either accidental, or arising from the nature of the subject."

It may be added that the unauthorized reproduction of copies need not be for sale, or for the benefit of the reproducer. It is sufficient if it tends to injure the plaintiff. In *Novello v. Sudlow* (*g*) gratuitous distribution was held an infringement of copyright. Neither is knowledge necessary to constitute a breach of copyright except in the case of sale, etc. of books unlawfully imported or printed by another (*h*).

Duties of Author.

1. To register his book in the form required by the Act (*i*) at Stationers' Hall, as a condition precedent to suing to protect his copyright (*k*). The copyright commences on publication, but cannot be enforced till after

Registration.

(*f*) (1845) 3 Story, 768, 793.

(*g*) (1852) 12 C. B. 177. See also *Duck v. Bates* (1884), 13 Q. B. D. *per* Esher, M.R., at pp. 846, 847; Fry, L.J., p. 852.

(*h*) 5 & 6 Vict. c. 45, s. 15; and *cf.* *Cooper v. Whittingham* (1880), 15 Ch. D. 501.

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

(*k*) *Ibid.*, s. 24.

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registration (*l*). The registration need not precede the infringement complained of (*m*). As there is no copyright till publication, registration cannot precede publication (*n*).

The entry at Stationers' Hall must state correctly the following particulars (*o*):—

(1.) The title of the book.

Thus where a catalogue of shop fittings was registered under the title, "Illustrated Book of Shop Fittings," and those words did not appear in the catalogue, but "Illustrated Catalogue and Price List" did, the registration was held bad (*p*). It seems that if a "book" had no title, a description would suffice.

(2.) The time of the first publication thereof.

Under this head must be entered the day, month, and year of first publication (*q*). Where the work registered is substantially a reprint of earlier editions, the date of publication of the first edition must be entered (*r*); but if there is a substantial amount of new matter in the

(*l*) Registration on the same day as, but before, the issue of the writ will suffice: *Warne v. Lawrence* (1886), 54 L. T. 371.

(*m*) *Goubaud v. Wallace* (1877), 36 L. T. 704.

(*n*) *Correspondent Co. v. Saunders* (1865), 12 L. T. N. S. 510; *Maxwell v. Hogg* (1867), L. R. 2 Ch. at p. 317; *Henderson v. Maxwell* (1877), 5 Ch. D. 892. Registration before publication has no effect in protecting the title selected for a forthcoming book. (See above, p. 118.)

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

(*p*) *Harris v. Smart* (1889), 5 Times L. R. 594: *cf. Collingridge v. Emmott* (1887), 57 L. T. 864.

(*q*) *Mathieson v. Harrod* (1868), L. R. 7 Eq. 270; *Page v. Wisden* (1869), 20 L. T. 435; *Collingridge v. Emmott* (1887), 57 L. T. 864; *cf. Low v. Routledge* (1864), 10 L. T. N. S. 838; *Wood v. Boosey* (1867), L. R. 2 Q. B. 340; *sed cf. Boosey v. Davidson* (1849), 4 D. & L. 147. In publication in serial form, followed by publication as a book, the serial date of publication of the first serial part should be given. *Cf. Johnson v. Newnes* (1894), 3 Ch. 663.

(*r*) *Thomas v. Turner* (1886), 33 Ch. D. 292.

edition registered, the date of publication of that edition will be a good entry as to the new matter (*s*). Registration.

(3.) The name and place of abode of the publisher.

The "first publisher" is to be registered (*t*), and the trade name of his firm will suffice (*u*). The place of abode may be the place of business (*x*). It is intended to provide an address at which the person named may be communicated with (*y*).

(4.) The name and place of abode (*z*) of the proprietor of the copyright.

The present proprietor is to be registered. It is unnecessary to give the name of the first proprietor, and trace title from him (*a*).

The proprietor of the copyright in a newspaper, magazine, periodical work, or encyclopædia, must register (*b*):—

(1.) The title.

(2.) The date of publication of the first number or part (*c*).

(*s*) *Hayward v. Ialy* (1886), 56 L. T. 418.

(*t*) *Weldon v. Dicks* (1878), 10 Ch. D. 247; *Cooté v. Judd* (1883), 23 Ch. D. 727.

(*u*) *Weldon v. Dicks, v.s.*

(*x*) *Nottage v. Jackson* (1883), 49 L. T. at p. 340.

(*y*) *Per Crosswell, J., Lover v. Davidson* (1856), 1 C. B. N. S. at p. 186.

(*z*) See head (3) above.

(*a*) *Weldon v. Dicks, v.s.* Cf. *Hildesheimer v. Dunn* (1891), 64 L. T. 452. *Liverpool Brokers' Association v. Commercial Press* (1897), 2 Q. B. 1. The registration of an agent or nominee of, not a trustee for, the proprietor is bad. *Petty v. Taylor* (1897), 1 Ch. 465.

(*b*) 5 & 6 Vict. c. 45, s. 19. This registration of the first number will also be applicable to a story or series of stories published in parts, the first part being registered; cf. *Johnson v. Newnes* (1894), 3 Ch. 663.

(*c*). If the work was first published before July 1, 1842, it is sufficient to register the date of publication of the first number published after that date. The day of publication must be given. (Above, p. 148.)

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(3.) The name and place of abode of the proprietor.

(4.) The name and place of abode of the first publisher, if he is not the proprietor.

This registration protects each subsequent number as it is published; but not numbers yet unpublished. An injunction cannot therefore be granted restraining copying from future numbers, the copyright in which only arises on publication (*d*). Similarly the particular article for which protection is claimed must be shown to be capable of copyright (*e*). It seems that though rival papers may go straight to the original sources of information, or may copy opinions expressed by other papers (*f*), they are not at liberty to copy the telegrams of special correspondents, or special scientific or literary articles on the plea that news is common to all (*e*).

Certified copies of the entry in the register, supplied by the Stationers' Company on payment of five shillings, are to be received in evidence in all Courts, and are *prima facie* proof of the proprietorship or assignment of copyright therein expressed (*g*), subject to be rebutted by other evidence. The defendant in any proceedings for infringement of copyright in books must give the plaintiff a notice in writing of any objections on which he means to rely at the trial, and if he alleges a different author, first publisher, or proprietor than the entry, or another date of first publication, he must state in his notice whom he alleges to be such author, first publisher

(*d*) See per North, J., *Cute v. Devon Newspaper Co.* (1889), 40 Ch. D. at p. 507: See also *Platt v. Walter* (1867), 17 L. T. N. S. 157. See *cf.* Kekewich, J., in *Bradbury v. Sharp* (1891), W. N. 143, where future numbers of *Punch* were protected.

(*e*) *Walter v. Steinkopf* (1895), 3 Ch. 489.

(*f*) *Chilton v. Progress Printing Co.* (1895), 2 Ch. 29, where the Court refused to prevent the copying of a sporting prophet's selections.

(*g*) 5 & 6 Vict. c. 45 s. 11.

or proprietor, or what date he alleges for first publication and the title of the book then published, and he will not be allowed to take any other objection than that named in the notice (*h*). It will probably be sufficient in the present state of pleading to embody the objections in the defence (*i*). Registration.

Authorities differ as to whether it is open to the defendant to take an objection to the plaintiff's registration arising on the plaintiff's own evidence, though he has given no notice of such objection as required by the statute. In several cases this has not been allowed (*k*), in others the defendant has been heard (*l*). It will always be safer to take every objection to registration in the defence, and in view of the words of the Act, which are "no other objection shall be allowed to be made on behalf of such defendant than the objection stated in such notice," it would seem that though the point arises on the plaintiff's evidence, the defendant is precluded by statute from taking it unless he has given notice of his objection beforehand (*m*).

If any particular in the registration of copyright or of any assignment thereof is proved to be inaccurate and misleading (*n*), the plaintiff will fail in this particular

(*h*) See the clause itself, which is very complicated: 5 & 6 Vict. c. 45, s. 16.

(*i*) *Cf. Finnegan v. James* (1874), L. R. 19 Eq. 72; notice of the objection in an affidavit in the cause will not do: *Hayward v. Lely* (1886), 56 L. T. 418.

(*k*) *Collette v. Goode* (1878), 7 Ch. D. 842, *per* Fry, J.; *Leader v. Purday* (1849), 7 C. B. 4, where the case hardly comes up to the head-note; *Hole v. Bradbury* (1879), *per* Fry, J., 12 Ch. D. 887.

(*l*) *Cooté v. Judd* (1883), 23 Ch. D. 727, *per* Bacon, V.-C.; *Hayward v. Lely* (1886), 56 L. T. 418 (*per* Kay, J., *on terms*); *cf. Lucas v. Cooke* (1880), 13 Ch. D. 872, *per* Fry, J.

(*m*) On the form of the notice of objection, see *Boosey v. Davidson* (1846), 4 D. & L. 147; *Boosey v. Purday* (1846), 10 Jur. 1038.

(*n*) It seems that superfluous entries may be registered: *Fairlie v. Boosey* (1879), 4 App. C. 711; but not if they are misleading.

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action, though he may make a new registration and succeed in a fresh action. But inaccurate or unfounded entries can be dealt with in a more summary way. If made wilfully, the person making a false entry is guilty of an indictable misdemeanour (o); while under any circumstances any person who deems himself aggrieved by any entry may apply to the King's Bench Division by motion for an order that such entry may be expunged or varied (p).

A definition of "a person aggrieved" was furnished by Hannen, J., in *Graves' Case* (q): "A person to be aggrieved within the meaning of the section must show that the entry is inconsistent with some right that he sets up in himself or in some other person, or that the entry would really interfere with some intended action on the part of the person making the application." The judgment of Blackburn, J., in the same case, suggests that the applicant must have some substantial objection, and one going to the merits of the registered proprietor's title, and that merely technical flaws in the registration will not suffice to support an application.

It does not seem necessary that the applicant should have any right in the nature of copyright in the work registered; to hold this would render the section inapplicable to persons registering works which really were not the copyright of any one, and which other persons had been selling for years. This view is supported by the remarks of Parke, B., in *Chappell v. Purday* (r): "The legislature has not stated what

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

(p) *Ibid.* s. 14: as to whether there is any appeal from such order see *The Young Duchess* (1891), 8 T. L. R. 41.

(q) (1869) L. R. 4 Q. B. at p. 724.

(r) (1843) 12 M. & W. at p. 307; cf. *ex parte Hutchins and Romer* (1878), 4 Q. B. D. 90, 483.

persons are to be considered as 'aggrieved' by the entry, but I think that term applies to those only whose title conflicts with the plaintiff's. Any person wishing to publish a work may deny another's claim of monopoly in that work, and may on that account be considered as a party aggrieved." Registration.

The relief must be specifically asked for by motion, and cannot be granted as an auxiliary remedy in an action for infringement, unless specifically claimed in the pleadings (s). It can be made on the motion of the person who has made the entry (t). The order will not usually be made on affidavit, except in a clear case, but an issue will be directed to ascertain the facts. Sometimes the party who has registered has consented not to use the entries on the trial of the action or issue (u); and in one case (x), the Court of Queen's Bench made an order without his consent that he should not use these entries at the trial of the issue, but this view was immediately dissented from by the Court of Common Pleas (y), and was also contrary to the view of the Court of Exchequer (z).

It appears to be the duty of the Registrar of the Stationers' Company under the Act to register all entries, correct in form, which are tendered to him, leaving parties aggrieved to their remedy under the Statute. A practice has however grown up of lodging notices of injunctions relating to particular books with the Registrar; and where executors desire to register, the Registrar requires the production of probate. It is doubtful

(s) *Hole v. Bradbury* (1879), 12 Ch. D. 886 at p. 899.

(t) *Ex parte Poulton* (1884), 53 L. J. Q. B. 320.

(u) As in *Chappell v. Purday* (1843), 12 M. & W. 303.

(x) *Ex parte Davidson* (1853), 2 E. & B. 577.

(y) *Ex parte Davidson* (1856), 18 C. B. 297.

(z) *Chappell v. Purday* (1843), 12 M. & W. 303.

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however whether the Registrar can with advantage assume the judicial functions which these practices imply, and a mandamus would probably issue against him if he refused to register.

Presenta-
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copies.

A second duty of the Author, through his publisher, is to present a certain number of copies of his book of a certain quality to certain libraries specified in the Act (*a*).

Transves-
titive
facts.

Copyright can be assigned, but the assignment must be in writing (*b*). To allow the assignee to sue, he must be registered. He can be registered either simply as proprietor, in which case his predecessors need not be registered, and the assignment itself need not be registered. Or he can be registered as assignee, in which case the registration is the assignment, the original proprietor, who must himself be registered, entering the assignment, and the name and place of abode of the assignee in the register (*c*). A defect in either entry will prevent the assignee from suing (*d*).

A right to publish need not confer any interest in the copyright (*e*), and difficult questions may then arise whether it depends on a revocable license (*f*), and if so,

(*a*) *i.e.* A copy of the best class of every book and new edition to the British Museum, within a month of first publication. A copy of the class of which the largest number are printed for sale, within one month after demand in writing, to the following libraries: Bodleian at Oxford, University at Cambridge; Advocates' Library, Edinburgh; Trinity College, Dublin: 5 & 6 Vict. c. 45, ss. 6-9.

(*b*) *Leyland v. Stewart* (1876), 4 Ch. D. 419.

(*c*) The above passage, from the words "To allow," was approved by Kennedy, J., as a correct statement of the law in *Liverpool Brokers' Association v. Commercial Press* (1897), 2 Q. B., at p. 4, and a *dictum* of Cockburn, C.J., to the contrary in *Wood v. Boosey* (1867), L. R. 2 Q. B., at p. 352, was disapproved.

(*d*) *Low v. Routledge* (1864), 10 L. T. N. S. 838.

(*e*) *Reade v. Bentley* (1858), 4 K. & J. 656; *Heap v. Hartley* (1889), 42 Ch. D. 461.

(*f*) Cf. *Wood v. Ledbitter* (1845), 13 M. & W. 838.