

an American, and had first represented his piece in this country, he would have been entitled to the benefit of the provisions of the Dramatic Copyright Act. Then an Act is passed extending to any nation with which the Queen may, through her Privy Council, enter into arrangements for that purpose pursuant to the Act, the privileges which are accorded to all people who first publish their works in this country. If the plaintiff had this sort of double right, it was just that which the 7 & 8 Vict. c. 12, s. 19, was intended to extinguish. That Act says that no one shall have this double right. It says, in other words, that this Act having been passed, if any person, British subject or not, chooses to deprive this country of the advantage of the first representation of his work, then he may get the benefit of copyright if he can under the arrangement which may have been come to pursuant to 7 & 8 Vict. c. 12, between this country and the country which he so favours with his representation; but if he chooses to publish his performance in a country which has not entered into any treaty or made any such arrangement with regard to copyright, then this country has nothing more to say to him; he must be taken to have elected under which of the two statutes with regard to copyright he wishes to come, by performing his work in one country instead of the other, and he is thereby excluded from all advantage of publishing in the other. I cannot see anything to justify me in restricting the provision or to enable me to say that it applies to foreigners and does not apply to British subjects. The object of the Legislature seems to have been in these cases to secure in this country the benefit of the first publication, and if it extended to any other country the same benefit, it was only to be on certain conditions, namely, that reciprocity should be afforded and that the representation should take place for the first time in England. I am bound therefore to hold that Mr. Boucicault's right fails."

Sect. 6 renders the observance of certain requisites as to registry and deposit of copies necessary to entitle foreign authors, engravers, &c., to the copyright in their works. It enacts "that no author of any book, dramatic piece or musical composition, or his executors, administrators, or assigns, and no inventor, designer, or engraver of any print, or maker of any article of sculpture, or other work of art, his executors, administrators, or assigns, shall be entitled to the benefit of this Act, or of any Order in Council to be issued in pursuance thereof, unless, within a time or times to be in that behalf prescribed in each such Order in Council, such book, dramatic piece, musical composition,

Particulars to be observed as to registry and delivery of copies.

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Registration of
books, dramatic
and musical
compositions

print, article of sculpture, or other work of art, shall have been so registered, and such copy thereof shall have been so delivered as hereinafter is mentioned."

Of books, dramatic and musical compositions (in the event of the same having been printed), it is necessary to register at Stationers' Hall "the title to the copy thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor of the copyright thereof, the time and place of the first publication, representation, or performance thereof, as the case may be, in the foreign country named in the Order in Council under which the benefits of this Act shall be claimed."

Registration of
pianoforte
arrangement
of operatic
score.

An arrangement for the pianoforte of the score of an opera is an independent work, and must be registered in the name of the arranger as composer, and not in that of the composer of the original opera, although, if published during the existence of copyright in the original opera, it would have been an infringement of the copyright therein. (a)

Therefore, in a clear case of infringement by the defendant of the plaintiff's property, in a pianoforte arrangement of the score of Nicolai's opera, "Die Lustigen Weiber von Windsor," made by F. F. Brissler of Berlin, for the representatives of Nicolai, and by them assigned to the plaintiff, the plaintiff was held not entitled to maintain an action against the defendant, because Nicolai, and not Brissler, was registered as the "author or composer" of the pianoforte arrangement. Though the melodies and the harmonies all came from the original composer, and nothing was, in one sense, *invented* by the arranger of the pianoforte score; still, as the arrangement of such a score requires skill and judgment, it was held to be a distinct and independent work, of which the arranger, and not the original composer of the opera, should have been registered as the "author or composer." (b)

Mode of registration where
book is published
anonymously.

If a book is published anonymously it is provided by sect. 7 that "it shall be sufficient to insert in the entry thereof in such register book the name and place of abode of the first publisher thereof, instead of the name and place of abode of the author thereof, together with a declaration that such entry is made either on behalf of the author, or on behalf of such first publisher, as the case may require."

Registration of
dramatic and
musical com-
positions in
manuscript.

Of dramatic and musical compositions in manuscript it is necessary to register at Stationers' Hall "the title to the same, the name and place of abode of the author or composer

(a) *Wood v. Boosey* (7 B. & S. 869; L. Rep. 2 Q. B. 340; 15 L. T. N. S. 530; affirmed by the Exchequer Chamber, 9 B. & S. 175; L. Rep. 3 Q. B. 223; 37 L. J. 84, Q. B.; 18 L. T. N. S. 105). (b) *Ib.*

thereof, the name and place of abode of the proprietor of the right of representing or performing the same, and the time and place of the first representation or performance thereof in the country named in the Order in Council under which the benefit of the Act shall be claimed.”(a)

Of prints, it is necessary to register at Stationers’ Hall “the title thereof, the name and place of abode of the inventor, designer, or engraver thereof, the name of the proprietor of the copyright therein, and the time and place of the first publication thereof in the foreign country named in the Order in Council under which the benefits of the Act shall be claimed.”(b)

Registration of prints.

Of articles of sculpture, and other such works of art, it is necessary to register at Stationers’ Hall “a descriptive title thereof, the name and place of abode of the maker thereof, the name of the proprietor of the copyright therein, and the time and place of its first publication in the foreign country named in the Order in Council, under which the benefit of this Act shall be claimed.”(c)

Registration of articles of sculpture and other works of art.

As to deposit, the enactment is that “One printed copy of the whole of such book and of such dramatic piece or musical composition, in the event of the same having been printed, and of every volume thereof, upon the best paper upon which the largest number or impression of the book, dramatic piece, or musical composition shall have been printed for sale, together with all maps and prints relating thereto, shall be delivered to the officer of the Company of Stationers, at the Hall of the said Company.”(d)

Deposit of copies.

It is not stated within what time the deposit should be made.

As to editions after the first, sect. 12 provides, “that it shall not be requisite to deliver to the said officer of the said Stationers’ Company any printed copy of the second or of any subsequent edition of any book or books so delivered as aforesaid, unless the same shall contain additions or alterations.”

Deposit in case of subsequent editions of books.

As to deposit of prints, the enactment is that “a copy upon the best paper upon which the largest number or impressions of the print shall have been printed for sale shall be delivered to the officer of the Company of Stationers, at the Hall of the said Company.”(e) It is not stated within what time the deposit should be made.

The officer of the Stationers’ Company to whom the delivery of a copy is made, is to give a receipt in writing for the same, and such delivery is to be to all intents and purposes a sufficient delivery under the provisions of this Act.(f)

(a) Sect. 6. (b) *Ib.* (c) *Ib.* (d) *Ib.* (e) *Ib.* (f) *Ib.*

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Deposit in
British Museum.

As to books,
same law in
general to apply
as if published
here.

Sect. 11 enacts "that the officer of the Stationers' Company shall, within one calendar month after receiving such book, volume, or print as aforesaid, deposit the same in the library of the British Museum."

Whatever provisions are in force at any time with respect to copyright in books published here are to apply equally to the copyright secured by this Act to foreign authors or their assigns, unless specially excepted by the Order in Council. But delivery of copies to the British Museum or other libraries is not necessary.

Sect. 3 enacts "that in case any such order shall apply to books, all and singular the enactments of the said Copyright Amendment Act [5 & 6 Vict. c. 45], and of any other Act for the time being in force with relation to the copyright in books first published in this country, shall, from and after the time so to be specified in that behalf in such order, and subject to such limitation as to the duration of the copyright as shall be therein contained, apply to and be in force in respect of the books to which such order shall extend, and which shall have been registered as hereinafter is provided, in such and the same manner as if such books were first published in the United Kingdom, save and except such of the said enactments, or such parts thereof, as shall be excepted in such order, and save and except such of the said enactments as relate to the delivery of copies of books at the British Museum, and to or for the use of the other libraries mentioned in the said Copyright Amendment Act."

Translations.

Sect. 18 added a proviso as to translations which has since been altered. The proviso enacted that nothing in the Act contained should be construed to prevent "the printing, publication, or sale of any translation of any book the author whereof and his assigns might be entitled to the benefit of the Act." But this has been repealed by sect. 1 of 15 Vict. c. 12, so far as it is inconsistent with the provisions of that Act. And sect. 2 of 15 Vict. c. 12, empowers Her Majesty by Order in Council to confer on foreign authors and their assignees the right to prevent the publication in the British Dominions of unauthorised translations of works published abroad, for a period not exceeding five years from the first publication of an authorised translation.

The words of sect. 2 are as follow: "Her Majesty may, by Order in Council, direct that the authors of books which are, after a future time, to be specified in such order, published in any foreign country, to be named in such order, their executors, administrators, and assigns, shall, subject to the provisions hereinafter contained or referred to, be empowered

to prevent the publication in the British Dominions of any translations of such books not authorised by them, for such time as may be specified in such order, not extending beyond the expiration of five years from the time at which the authorised translations of such books hereinafter mentioned are respectively first published, and, in the case of books published in parts, not extending as to each part beyond the expiration of five years from the time at which the authorised translation of such part is first published."

The right is to be protected by all the laws in force with reference to copyright in books published here. Sect. 3 enacts that, "subject to any provisions or qualifications contained in such order, and to the provisions herein contained or referred to, the laws and enactments for the time being in force for the purpose of preventing the infringement of copyright in books published in the British dominions shall be applied for the purpose of preventing the publication of translations of the books to which such order extends which are not sanctioned by the authors of such books, except only such parts of the said enactments as relate to the delivery of copies of books for the use of the British Museum, and for the use of the other libraries therein referred to."

An exception is made by sect. 7 in the case of articles of a political nature published in foreign newspapers or periodicals, which may be reproduced or translated here if the source from which they are taken is acknowledged. And articles on any other subject similarly published may be similarly reproduced or translated with an acknowledgment of the source whence derived, unless the author has reserved the copyright and stated so in a conspicuous part of the periodical in which it was first published. If the author has so reserved the copyright, he is to enjoy the protection secured to the copyright in books, without observing the formalities required by the 8th section of the Act (a) in the case of books and dramatic pieces.

Exceptions in
the case of
translations.

The words of the enactment are, "Notwithstanding anything in the said International Copyright Act [7 Vict. c. 12] or in this Act contained, any article of political discussion which has been published in any newspaper or periodical in a foreign country may, if the source from which the same is taken be acknowledged, be republished or translated in any newspaper or periodical in this country; and any article relating to any other subject which has been so published as aforesaid may, if the source from which the same is taken be acknowledged,

(a) See *post*, pp. 140, 141.

be republished or translated in like manner, unless the author has signified his intention of preserving the copyright therein, and the right of translating the same, in some conspicuous part of the newspaper or periodical in which the same was first published, in which case the same shall, without the formalities required by the next following section, receive the same protection as is by virtue of the International Copyright Act or this Act extended to books."

According to the interpretation of this section by Lord Hatherley (when Sir W. Page Wood, V.C.),^(a) the necessity of observing all formalities is not dispensed with in the case of the proprietor of newspaper articles, but only those formalities enumerated in sect. 8 of 15 & 16 Vict. c. 12. The proprietor is to have the same protection as is given by the International Copyright Act of 7 & 8 Vict. c. 12, but subject to all the provisions of that Act, one of which (the 3rd section) declares that under an Order in Council a foreign author is to be subject to all the provisions of the General Copyright Acts, unless it shall be otherwise specified in the order.

International
copyright in
prints, articles of
sculpture, &c.

Foreign prints, articles of sculpture, and other works of art are to have the protection of all Acts relating to those first published in this country, unless the Order in Council otherwise directs. Sect. 4 of 7 Vict. c. 12, provides, "that in case any such order shall apply to prints, articles of sculpture, or to any such other works of art as aforesaid, all and singular the enactments of the said Engraving Copyright Acts and the said Sculpture Copyright Acts,^(b) or of any other Act for the time being in force with relation to the copyright in prints or articles of sculpture first published in this country, and of any Act for the time being in force with relation to the copyright in any similar works of art first published in this country, shall, from and after the time so to be specified in that behalf in such order, and subject to such limitation as to the duration of the copyright as shall be therein contained respectively, apply to and be in force in respect of the prints, articles of sculpture, and other works of art to which such order shall extend, and which shall have been registered as hereinafter is provided, in such and the same manner as if such articles and other works of art were first published in the United Kingdom, save and except such of the said enactments or such parts thereof as shall be excepted in such order."

It has been held, on the construction of this section, that the proprietor of a foreign print cannot claim copyright in

(a) *Cassell v. Stiff* (2 K. & J. 285).

(b) *Vide ante*, the chapter on "Sculpture, Models, and Busts."

it under the International Copyright Act, unless the date of publication and the name of the proprietor are engraved on the plate and printed on the print, in accordance with the provisions of 8 Geo. 2, c. 13.(a)

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The sole right of representing here dramatic and musical pieces first publicly performed abroad may also be conferred by Order in Council for any period not exceeding (it may be less than) the time during which composers of pieces first performed at home enjoy a similar right, and subject to all the same statutory provisions that are or may be in force with respect to pieces first performed here.

Right of representing dramatic and musical pieces.

By sect. 5 of 7 Vict. c. 12, it is enacted "that it shall be lawful for Her Majesty, by any Order of Her Majesty in Council, to direct that the authors of dramatic pieces and musical compositions which shall after a future time, to be specified in such order, be first publicly represented or performed in any foreign country to be named in such order, shall have the sole liberty of representing or performing in any part of the British dominions such dramatic pieces or musical compositions during such period as shall be defined in such order, not exceeding the period during which authors of dramatic pieces and musical compositions first publicly represented or performed in the United Kingdom may for the time be entitled by law to the sole liberty of representing and performing the same; and from and after the time so specified in any such last-mentioned order the enactments of the said Dramatic Literary Property Act and of the said Copyright Amendment Act, and of any other Act for the time being in force with relation to the liberty of publicly representing and performing dramatic pieces or musical compositions, shall, subject to such limitation as to the duration of the right conferred by any such Order as shall be therein contained, apply to and be in force in respect of the dramatic pieces and musical compositions to which such order shall extend, and which shall have been registered as hereinafter is provided, in such and the same manner as if such dramatic pieces and musical compositions had been first publicly represented and performed in the British dominions, save and except such of the said enactments or such parts thereof as shall be excepted in such order."

The Act of 15 Vict. c. 12, enables Her Majesty, by Order in Council, to confer a further right on the authors of dramatic pieces first represented in a foreign country—namely, the right to prevent the representation of any unauthorised translation of such dramatic pieces for a period not exceed-

Unauthorised translations of dramatic pieces.

(a) *Avanzo v. Mulic* (10 Exch. 203).

ing five years, from the first publication or representation of an authorised translation.

Sect. 4 of that Act provides that "Her Majesty may, by Order in Council, direct that authors of dramatic pieces which are, after a future time, to be specified in such order, first publicly represented in any foreign country, to be named in such order, their executors, administrators, and assigns, shall, subject to the provisions hereinafter mentioned or referred to, be empowered to prevent the representation in the British dominions of any translation of such dramatic pieces not authorised by them, for such time as may be specified in such order, not extending beyond the expiration of five years from the time at which the authorised translations of such dramatic pieces hereinafter mentioned are first published or publicly represented."

This right is to be protected by all the enactments applying to dramatic pieces first represented here. According to sect. 5 of the Act last referred to, "subject to any provisions or qualifications contained in such last-mentioned order, and to the provisions hereinafter contained or referred to, the laws and enactments for the time being in force for ensuring to the author of any dramatic piece first publicly represented in the British dominions the sole liberty of representing the same shall be applied for the purpose of preventing the representation of any translations of the dramatic pieces to which such last-mentioned order extends, which are not sanctioned by the authors thereof."

Adaptations, &c.,
to English stage
not prevented.

But it is provided by sect. 6 that "nothing herein contained shall be so construed as to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country."

Requisites to be
complied with
in order to
prevent trans-
lation.

Certain requisites must be observed to entitle the author of foreign books or dramatic pieces to prevent their translation. They are enumerated in the 8th section. It enacts that "no author, or his executors, administrators, or assigns, shall be entitled to the benefit of this Act, or of any Order in Council issued in pursuance thereof, in respect of the translation of any book or dramatic piece, if the following requisitions are not complied with; (that is to say): 1. The original work from which the translation is to be made must be registered, and a copy thereof deposited in the United Kingdom in the manner required for original works by the said International Copyright Act,^(a) within three calendar months of its first publication in the foreign country: 2. The author must notify on the title page of the original

(a) *Vide ante*, pp. 133-135.

work, or if it is published in parts, on the title page of the first part, or if there is no title page, on some conspicuous part of the work, that it is his intention to reserve the right of translating it: 3. The translation sanctioned by the author, or a part thereof, must be published either in the country mentioned in the Order in Council by virtue of which it is to be protected or in the British dominions, not later than one year after the registration and deposit in the United Kingdom of the original work, and the whole of such translation must be published within three years of such registration and deposit: 4. Such translation must be registered and a copy thereof deposited in the United Kingdom within a time to be mentioned in that behalf in the order by which it is protected, and in the manner provided by the said International Copyright Act for the registration and deposit of original works: 5. In the case of books published in parts, each part of the original work must be registered and deposited in this country in the manner required by the said International Copyright within three months after the first publication thereof in the foreign country: 6. In the case of dramatic pieces the translation sanctioned by the author must be published within three calendar months of the registration of the original work.

The above requisitions are to apply to articles originally published in newspapers or periodicals if the same be afterwards published in a separate form, but not to such articles as originally published. (a)

This enactment contemplates and requires that the whole of the foreign work shall be translated; and it would not be a compliance with it for the author or his assignee to translate a portion only of it, and claim protection for that as the authorised translation. (b)

What the Act requires is that a translation should be made accessible to the English people in order that they may have the opportunity of knowing the foreign work as accurately as it is possible to know it by the medium of a version in English. (c)

Where the original work was a French comedy called "Frou-frou," and the version sanctioned by the foreign authors and published in England was entitled "Like to Like," the names of the characters and the scenery being changed from French to English, English manners being in some instances substituted for French, and considerable

(a) Sect. 8.

(b) *Per James, V. C., Wood v. Chart* (L. Rep. 10 Eq. 204; 22 L. T. N. S. 432; 39 L. J. 641, Ch.)

(c) *Ib.*

omissions and alterations of passages being made, it was held that this version was not a translation within the meaning of the Act such as to entitle the foreign authors and their assignees to the benefit of the Act. (a)

“It appears to me,” said James, V.C., “that the plaintiff in this case has gone out of his course to dig a pitfall for himself, for what he says he has done is, the original thing being called ‘Frou-frou,’ he has published in England a comedy called “‘Like to Like,’ a comedy in five acts, being an English version of MM. Meilhac and Halévy’s ‘Frou-frou,’ written by H. Sutherland Edwards.” Then he has introduced English characters; he has transferred the scene to England; he has made the alterations necessary for making it an English comedy, and he has left out a great number of speeches and passages, especially in the first act, which would seem to me to imply that at first he was really making an imitation or adaptation, and afterwards was minded more completely to make a translation. The first two acts seem to me particularly to be what is referred to in the Act itself as an imitation or adaptation. Whether it is a fair imitation or adaptation is another question; but if one wanted to have an example of what is an imitation or adaptation to the English stage, one would have said this is exactly the thing which is meant. It is an imitation and adaptation to the English stage; that is, you have transferred the characters to England; you make them English characters; you introduce English manners, and you leave out things which you say would not be suitable for representation on the English stage. Now, that is not, in my view of the case, what the Act requires, for some sufficient purpose as I have said before, when it requires that a translation should be made accessible to the English people. . . . Having come to the conclusion that this is not a translation, I have also come to the conclusion that the plaintiff has failed in complying with the conditions precedent which the Act has imposed upon him in order to entitle him to sustain this suit. It is said that one ought to give a liberal interpretation to the statute, and that one ought not to strain the meaning of a ‘translation,’ or any other word, for the purpose of depriving a foreign author of the benefit of the Act. Of course not. One ought to take a liberal view, and one ought not to strain the words; but one must apply and give a natural meaning to the words. According to my view of the case, there would not have been the slightest difficulty whatever in the

(a) *Wood v. Chart* (L. Rep. 10 Eq. 204; 22 L. T. N. S. 432; 39 L. J. 641, Ch.

plaintiff obtaining the full benefit of his assignment, and of putting himself in a position to prevent any representation of the French play, or of any English translation of it, if he had simply employed Mr. Sutherland Edwards to do what Mr. Edwards could very well have done, namely, to make a translation; that is to say, if he had said, 'now make a translation of this; do not be thinking of adaptation or imitation for the English stage, but make a translation of it.' Mr. Edwards could well have made such a translation, and it could have been published in this country; and if it had been published in this country, then it would have been quite open to the author, or the person claiming under the author, to have represented that translation with any abbreviation, with any excision, with any alteration, with any adaptation which he might have thought fit for the purpose of making it more suitable to the English stage. I have no doubt, whatever, if he had first published a translation, that he could then have acted the piece which Mr. Sutherland Edwards has called a 'version,' and that nobody else could have acted anything like that—anything approaching to that—because, although I say this is not a translation, but in my view is rather an imitation or adaptation to the English stage, I have no hesitation whatever in saying that, if the author had complied with the condition required by the Act of Parliament, or any other person claiming under the author had complied with that condition, I should at once have restrained the acting of such a piece as this by any one else as not being a fair imitation or adaptation, but as being a piratical translation of the original work. That would have been the proper thing for me to have done in that case; but the plaintiff having brought his suit, not having a title, must fail; and must fail, of course, with the usual consequences of the experiment which he has tried, and must pay the costs."

All the provisions of 5 & 6 Vict. c. 45, relating to the subject of registration are to apply to entries under this Act. Sect. 8 of 7 Vict. c. 12, provides, "that the several enactments in the said Copyright Amendment Act contained with relation to keeping the said register book, and the inspection thereof, the searches therein, and the delivery of certified and stamped copies thereof, the reception of such copies in evidence, the making of false entries in the said book, and the production in evidence of papers falsely purporting to be copies of entries in the said book, the applications to the courts and judges by persons aggrieved by entries in the said book, and the expunging and varying such entries,

Keeping,
inspecting, &c.,
register.

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shall apply to the books, dramatic pieces, and musical compositions, prints, articles of sculpture, and other works of art, to which any Order in Council issued in pursuance of this Act shall extend, and to the entries and assignments of copyright and proprietorship therein, in such and the same manner as if such enactments were here expressly enacted in relation thereto, save and except that the forms of entry prescribed by the said Copyright Amendment Act may be varied to meet the circumstances of the case, and that the sum to be demanded by the officer of the said Company of Stationers for making any entry required by this Act shall be one shilling only."

Entry grounded
on wrongful first
publication.

If an entry be made grounded on a wrongful first publication, the remedy for such entry is stated in the 9th section. It enacts "that every entry made in pursuance of this Act of a first publication shall be *prima facie* proof of a rightful first publication; but if there be a wrongful first publication, and any party have availed himself thereof to obtain an entry of a spurious work, no order for expunging or varying such entry shall be made unless it be proved to the satisfaction of the court or of the judge taking cognizance of the application for expunging or varying such entry, first, with respect to a wrongful publication in a country to which the author or first publisher does not belong, and in regard to which there does not subsist with this country any treaty of international copyright, that the party making the application was the author or first publisher, as the case requires; second, with respect to a wrongful first publication either in the country where a rightful first publication has taken place, or in regard to which there subsists with this country a treaty of international copyright, that a court of competent jurisdiction in any such country where such wrongful first publication has taken place has given judgment in favour of the right of the party claiming to be the author or first publisher."

Importation of
pirated copies
prohibited

The international copyright given by the preceding enactments is secured by prohibiting the importation of books in which it exists, printed or reprinted elsewhere than in the country where they were first published, and subjecting their importation to the customs laws for preventing the importation of other goods; and also by subjecting to a special action on the case at the suit of the proprietor of the copyright (a) all who import such prohibited or unlawfully

(a) This action is "to be brought and prosecuted in the same courts, and in the same manner, and with the like restrictions upon the proceedings of the defendant, as are respectively prescribed in the Copy-

printed copies, or who, knowing that they have been illegally imported or unlawfully printed, sell, publish, or expose to sale or hire, or have in their possession for that purpose, any such copies of them. (a)

Copies may, however, be imported "by or with the consent of the registered proprietor of the copyright thereof, or his agent authorised in writing." (b)

These provisions are, by 15 Vict. c. 12, extended to the importation of any work of literature or art in which copyright subsists, and of unauthorised translations of books or dramatic pieces, except by or with the consent of the registered proprietor of the copyright in such work, or of such book or piece, or his agent authorised in writing. And the same Act extends the provisions of 5 & 6 Vict. c. 45, as to the forfeiture, &c., of imported copies, printed abroad, of British copyright books, to those works prohibited to be imported by the Act.

Extension of prohibition to works of art, and unauthorised translations.

Sect. 9 of 15 Vict. c. 12, enacts that "all copies of any works of literature or art wherein there is any subsisting copyright by virtue of the International Copyright Act and this Act, or of any Order in Council made in pursuance of such Acts or either of them, and which are printed, reprinted, or made in any foreign country except that in which such work shall be first published, and all unauthorised translations of any book or dramatic piece the publication or public representation in the British dominions of translations whereof not authorised as in this Act mentioned shall for the time being be prevented under any Order in Council made in pursuance of this Act, are hereby absolutely prohibited to be imported into any part of the British dominions, except by or with the consent of the registered proprietor of the copyright of such work or of such book or piece, or his agent authorised in writing; and the provision of the Act of the sixth year of Her Majesty 'to amend the law of copyright,' for the forfeiture, seizure, and destruction of any printed book first published in the United Kingdom wherein there shall be copyright, and reprinted in any country out of the British dominions, and imported into any part of the British dominions by any person not being the proprietor of the copyright, or a person authorised by such proprietor, shall extend and be applicable to all copies of any works of literature and art, and to all translations the importation whereof

right Amendment Act (5 & 6 Vict. c. 45) with relation to actions thereby authorised to be brought by proprietors of copyright against persons importing or selling books unlawfully printed in the British dominions:" (Sect. 10). (a) Sect. 10. (b) *Ib.*

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 French works.

into any part of the British dominions is prohibited under this Act."

In pursuance of the powers conferred on the Sovereign by the Act 7 & 8 Vict. c. 12, a convention for an international copyright between this country and the French Republic was signed at Paris on the 3rd November, 1851, and presented to both Houses of Parliament in 1852. An Order in Council was made on the 10th January, 1852. After reciting that the convention had been made, the Order proceeds: "Her Majesty, by and with the advice and consent of her Privy Council, and by virtue of the authority committed to her by an Act passed in the session of Parliament holden in the seventh and eighth years of her reign, intituled 'an Act to amend the Law relating to International Copyright,' doth order, and it is hereby ordered, that from and after the 17th day of January, 1852, the authors, inventors, designers, engravers, and makers of any of the following works (that is to say), books, prints, articles of sculpture, dramatic works, musical compositions, and any other works of literature and the fine arts, in which the laws of Great Britain give to British subjects the privilege of copyright, and the executors, administrators, and assigns of such authors, inventors, designers, engravers, and makers respectively, shall, as respects works first published within the dominions of France, after the said 17th day of January, 1852, have the privilege of copyright therein for a period equal to the term of copyright which authors, inventors, designers, engravers, and makers of the like works respectively first published in the United Kingdom are by law entitled to, provided such books, dramatic pieces, musical compositions, prints, articles of sculpture, or other works of art, have been registered, and copies thereof have been delivered according to the requirements of the said recited Act, (a) within three months after the first publication thereof in any part of the French dominions; or if such work be published in parts, then within three months after the publication of the last part thereof.

Subjects of
copyright.

Duration.

Conditions.

Right of repre-
sentation or
performance.

"And it is hereby further ordered that the authors of dramatic pieces and musical compositions which shall after the said 17th day of January, 1852, be first publicly represented or performed within the dominions of France, or their assignees, shall have the sole liberty of representing or performing in any part of the British dominions such dramatic pieces or musical compositions during a period equal to the period during which authors of dramatic pieces and musical

(a) *Vide ante*, p. 133-135.

compositions first publicly represented or performed in the United Kingdom, or their assignees, are entitled by law to the sole liberty of representing or performing the same, provided such dramatic pieces or musical compositions have been registered, and copies thereof have been delivered, according to the requirements of the said recited Act, within three months after the time of their being first represented or performed in any part of the French dominions.”

By the terms of the Convention of 3rd November, 1851, to secure a copyright in France for works first published in the British dominions, every such work must be registered at the Bureau de la Librairie of the Ministry of the Interior at Paris; the charge for registration not to exceed one franc and twenty-five centimes; the charge for a certificate of such registration not to exceed six francs and twenty-five centimes, and a copy of the best edition, or in the best state, is to be given for deposit at the National Library at Paris.

French copy-
right for English
works.

The provision in the preceding Order in Council as to works published in parts, which gives a copyright in them if registered within three months after the publication of the last part, must, according to Sir W. Page Wood, V.C. (now Lord Hatherley, C.), (a) be interpreted as referring to publications which are to be completed in a specified number of parts, and not to those which are to be continued for an indefinite period as newspapers. The effect of the other construction would be that at any period the publisher of such a work might register it, and carry back his copyright to the earliest period in 1852, when French authors first had a copyright in this country—a result which could not have been intended by the Order in Council.

Work published
in parts.

In the case of a newspaper the first number must be registered within three months after publication, in order to bring it within the provisions of the International Copyright Act; and where it was not proved in evidence that the first number of a newspaper had not been so registered, an injunction to restrain its infringement was refused. (b)

Besides the convention made with France, conventions to secure international copyright have also been made with the following countries:—Prussia, Saxony, Saxe-Weimar, Saxe-Meiningen, Saxe-Altenburg, Saxe-Coburg-Gotha, Brunswick, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen, Reuss (all in 1846), registration and delivery of copies being required within twelve months after the first

Conventions
with other
countries.

(a) *Cassell v. Stiff* (2 K. & J. 286).

(b) *Ib.*

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CHAPTER XIV.

publication of the work in any of those dominions; Thuringia (1847) same time for registration and delivery; Hanover (1847) same time for registration and delivery; Oldenburg (1847) same time for registration and delivery; Anhalt (1853) same time for registration and delivery; Hamburgh (1853) registration and delivery being required within three months after publication; Belgium (1855) same time for registration and delivery; Spain (1857) same time for registration and delivery; Sardinia, same time for registration and delivery; Hesse Darmstadt (1862) registration and delivery to be made within twelve months.

An Act of the 9 & 10 Vict. c. 58, enables Her Majesty by Order in Council to reduce the duties on books and prints published in and imported from any foreign country, such Order in Council to be twice published in the *Gazette* within fourteen days after the issuing thereof, and to be laid before Parliament within six weeks after the issuing of it, if Parliament be then sitting, or, if not, within six weeks after the commencement of the next session.

CHAPTER XV.

TRANSFER OF COPYRIGHT.

DEVOLUTION OF COPYRIGHT.

Copyright is
personal pro-
perty.

OF the two kinds of property recognised by our law, real—which descends in cases of intestacy on the heir-at-law—and personal—which devolves on the personal representative of the owner—copyright belongs to the latter class, that of personal property. Sect. 25 of 5 & 6 Vict. c. 45, enacts, as to works of a literary, dramatic, or musical character, “that all copyright shall be deemed personal property, and shall be transmissible by bequest, or, in case of intestacy, shall be subject to the same law of distribution as other personal property, and in Scotland shall be deemed to be personal and moveable estate.”

The words “personal representative,” with reference to the provisions of this Act, are defined in the interpretation clause to mean and include “every executor, administrator, and next of kin, entitled to administration.”

Sect. 3 of 25 & 26 Vict. c. 68, has a similar enactment as to the nature of the property in paintings, drawings, and photographs.

Where, then, the owner of copyright in any published or unpublished production dies intestate, the copyright in such production devolves, by operation of law, upon his executor or administrator, who, as such, possesses all the rights that the original owner enjoyed.

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Intestacy.

Even before the above enactment copyright, like all other personal property, might be left by the proprietor by will; as a patentee might bequeath his interest in a patent.

Bequest.

In the event of the marriage of a female proprietor of copyright, her copyright, as well as her other personalty, would become the property of her husband by operation of law.^(a)

Marriage.

Whether the right of publishing an *unpublished* work of an author passes to his assignees in case of bankruptcy, or may be made available by his creditors on an execution is doubtful, never having been the subject of express decision.^(b)

Execution and bankruptcy.

It has been held by the Supreme Court of the United States,^(c) that copyright in a published print is the subject of seizure or sale by execution, although it may be reached by a creditor's bill, and applied to the payment of the debts of the author. In that case the copperplate engraving of a map, in which the plaintiff had secured a copyright, was seized and sold under an execution; but the purchaser was restrained from striking off and selling copies of the map. "The copperplate engraving," said the Court, "like any other tangible personal property, is the subject of seizure and sale, on execution, and the title passes to the purchaser, the same as if made at a private sale. But the incorporeal right, secured by the statute to the author, to multiply copies of the map by the use of the plate, being intangible and resting altogether in grant, is not the subject of seizure or sale by means of this process—certainly not at common law. No doubt the property may be reached by a creditor's bill, and be applied to the payment of the debts of the author, the same as stock of the debtor is reached and applied, the Court compelling a transfer and sale of the stock for the benefit of the creditors. But in case of such remedy, we suppose, it would be necessary for the Court to compel a transfer to the purchaser, in conformity with the requirements of the Copyright Act, in order to invest him with a complete title to the property."^(d)

(a) 18 Scotch Ses. Cas. 911.

(b) See 4 Burr. 2311; Amb. 695; *Acherley v. Vernon* (10 Mod. 518).

(c) *Stevens v. Cady* (14 How. 528).

(d) See also *Stevens v. Gladding* (17 How. 447).

The property in a newspaper passes to the assignees of the proprietor on his bankruptcy(a). The right of publishing it is "goods or chattels" within the meaning of sect. 125 of the Bankruptcy Act, 1849(b) which provides for goods and chattels of which the bankrupt is reputed owner passing to the assignees.(c)

ASSIGNMENT OF COPYRIGHT.

Definition of
"assigns."

The word "assigns" with reference to copyright is defined by sect. 2 of 5 & 6 Vict. c. 45, to mean and include "every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law or otherwise."

Unpublished
works.

In the case of unpublished productions of a literary nature, and of unpublished engravings, there is no statutory enactment as to the assignment of the copyright.

We have already seen that a foreign author residing abroad cannot by assigning the copyright which he possesses in his work in the foreign country enable his assignee to acquire a copyright in this country.(d)

Copyright—how
far divisible.

The copyright of an author being the sole privilege of printing and publishing copies in the United Kingdom or any part of the British Dominions, the question has arisen whether a valid assignment can be made of the right to print and publish in some particular part only of the British Dominions—whether the enjoyment of the right can be limited as to locality?

Sect. 13 of 5 & 6 Vict. c. 45, provides for the entry in the registry book at Stationers' Hall of the title of the book, time of first publication, name and address of the publisher and of the proprietor "of the copyright of the said book or of any portion of such copyright;" and it enacts that it shall be lawful for every such registered proprietor to assign "his interest or any portion of his interest therein" by entry in the book. This shows that a partial assignment is valid, but it is not clear from the language of the enactment whether an assignment may be limited as to time only or as to locality likewise.

Not divisible as
to locality.

The point has not been expressly decided in any case, but the opinions of several eminent judges are in favour of the

(a) *Longman v. Tripp* (2 Bos. & P. N. S. 67).

(b) See sect. 15 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71).

(c) *Re Baldwin* (2 De G. & J. 230).

(d) *Jacobs v. Boosey* (4 H. L. Cas. 815; *ante*, pp. 25-30).

view that copyright is *not* divisible as to locality. In *Jeffreys v. Boosey*, (a) in which there had been assignment to the defendant of an opera for publication in the United Kingdom only, Lord St. Leonards, Pollock, C.B., and Parke, B., were strongly of opinion that copyright is indivisible and consequently incapable of being partially assigned. The case was not, however, decided on that ground. Parke, B., in giving his opinion to the House of Lords said, (b) "I am of opinion that this is an indivisible right, and the owner cannot assign a part of the right, as to print in a particular county or place, or do anything less than assign the whole right given by the English law. It seems to me analogous to an exclusive right by patent, which cannot, I apprehend, be parcelled out, though licences under it may." And Lord St. Leonards (c) still more strongly, "If there is one thing which I should be inclined to represent to your lordships as being more clear than any other, in this case, it is that copyright is one and indivisible. I am not speaking of the right to license; but copyright is one and indivisible; or is a right which may be transferred, but which cannot be divided. Nothing could be more absurd or inconvenient than that this abstract right should be divided, as if it were real property, into lots, and that one lot should be sold to one man, and another lot to a different man. It is impossible to tell what the inconvenience would be. You might have a separate transfer of the right of publication in every county in the kingdom." (d) The assignment in this case took place before the passing of the Act 5 & 6 Vict. c. 45, but this Act has made no change as to the extent of copyright. And Maule, J., in *Davidson v. Bohn* (e) observes, with reference to the language of the section above quoted, "The author or proprietor may assign the right to *less than the full term*. It never could have been intended to introduce the complicated sort of copyright suggested."

It is clear from the language of sect. 13 of 5 & 6 Vict. c. 45, even apart from the interpretation put upon it by Maule, J., in the case just referred to, that an author or proprietor may assign the property in his published work for any limited portion of the *time* that his copyright therein endures. Divisible as to time.

A valid assignment *inter vivos* of the copyright in published books may be made in either of two ways; first, by writing, which need not, it seems, be under seal; or, secondly, by making entry in the book of registry at Stationers' Hall of Copyright may be assigned in two ways.

(a) 4 H. L. Cas. 815.

(b) *Ib.* 933.(c) *Ib.* 992.(d) See also *per* Pollock, C. B. (*Ib.* 940).

(e) 6 C. B. 458.

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By writing.

the assignment, and of the name and place of abode of the assignee in the form given in a schedule to the Act 5 & 6 Vict. c. 45.(a)

Writing is indispensable to a valid assignment; a parol assignment is not sufficient. This was decided by the Court of King's Bench in *Power v. Walker*.(b) It was contended in that case that copyright was a mere personal chattel, not included within the statute of frauds, and, consequently, capable at common law, like other personalty, of passing by oral transfer; and that the stat. 8 Anne, c. 19, did not make a writing necessary. The court, however, was of a contrary opinion, considering that as the statute of Anne required a written consent from the proprietor to authorise the printing or reprinting of any book by any other person, the conclusion was almost irresistible that the assignment must also be in writing; an assignment, being in the nature of a perpetual licence, was greater than a license, and if the licence, which is the lesser thing, must be in writing, *à fortiori*, the assignment, which is the greater thing, must be so also. This case was followed in *Clementi v. Walker*.(c) and by the Court of Common Pleas in *Davidson v. Bohn*;(d) and, though disapproved in other cases, its binding authority has been recognised.(e)

Where the assignees of the copyright in a comedy sought the aid of a court of equity, but did not state in their bill that the assignment to them was in writing, Lord Eldon refused to grant an injunction till that fact should be proved. The plaintiffs, who were unable to state whether the assignment from the author was in writing, afterwards produced an affidavit stating that all the manuscripts of dramatic compositions belonging to the Haymarket Theatre, including the comedy in question, had been assigned to them by three several indentures in writing, dated in the years 1805, 1808, and 1819. Lord Eldon said he would assume the plaintiffs' title to be regular till the contrary were shown, and granted the injunction prayed for.(f)

Tindal, C.J., in *De Pinna v. Polhill* (g), incidentally expressed an opinion that a deed was necessary to a valid assignment; and this view would seem supported by the words in which sect. 14 of 5 & 6 Vict. c. 45, speaks of the efficacy of the second mode of assignment—that by entry in the book of registry—of which it enacts that “such

(a) *Vide post*, p. 156.

(b) 3 M. & Sel. 7; 4 Camp. 8.

(c) 2 Bar. & Cres. 861.

(d) 6 C. B. 456.

(e) See *per* Branwell and Chamell, BB., in *Cumberland v. Copeland* (7 H. & N. 118).

(f) *Morris v. Kelly* (1 J. & W. 481).

(g) 8 Car. & P. 79.

Writing need
not be under
seal.

assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and shall be of the same force and effect as if such assignment had been *made by deed*." However, Wightman, J., in giving his opinion to the House of Lords in the case of *Jeffreys v. Boosey*, (a) says, "there is nothing in the terms used in the statute of 8 Anne, c. 19, which requires the assignment to be either by deed or attested by witnesses; and at all events, since the statute of 54 Geo. 3, c. 156, it appears to me that an assignment by writing only is valid." And the ruling of the House of Lords in the Scotch case of *Kyle v. Jeffreys* (b) seems to be decisive of the question. In that case Jeffreys claimed copyright, by assignment from the authoress, in the words of a song written by Miss Eliza Cook, and sought to restrain the publication of the song by Kyle. Jeffreys had registered himself as proprietor at Stationers' Hall, and a certified copy of the registry, which is by statute *prima facie* proof of proprietorship, was produced at the trial; but his title being impeached by Kyle, other evidence was offered, consisting of a receipt by Miss Cook for a sum of money paid her by Jeffreys, "for copyright of words of a song written by me, entitled 'The Old Arm Chair,'" and also the testimony of a person to whom Miss Cook had stated that she had parted with the copyright in the song to Jeffreys. The reception of this evidence of title was objected to on the part of Kyle; and it was urged that no evidence, written or parol, was admissible to prove the asserted proprietorship without the production of a formal deed of assignment attested by two witnesses. The presiding judge overruled the objection, and admitted the evidence, holding that where the *prima facie* evidence afforded by the certificate of registration was rebutted, the claimant might still support his title without production of a formal instrument of assignment. The Court of Session upheld this ruling, and the House of Lords, on appeal, decided that it was correct as a general rule. As the evidence of title admitted on the trial in this case was not a writing under seal, the approval by the House of Lords of the judge's ruling, though the objection to it maintained the necessity of attestation as well as sealing, decides that a deed is not necessary to a valid assignment of copyright.

It seems now to be finally determined that an assignment need not be attested by witnesses.

Attestation is not necessary.

(a) 4 H. L. Cas. 891.

(b) 21 Scotch Sess. Cas. N. S. 8; 18 Scotch Sess. Cas. N. S. 906.

This question was long in an unsettled state, owing to the words in the statute of Anne, and the construction put upon them by the Court of King's Bench in the case of *Power v. Walker*.^(a) The statute of Anne imposes a penalty on any person printing or publishing a book without the proprietor's consent "first had and obtained in writing, signed in the presence of two or more credible witnesses," but says nothing as to the mode of assigning copyright. *Power v. Walker* decided that as a licence to print or publish was required to be in writing, *à fortiori* an assignment, which was greater than a licence, must be so too; and the same reasoning would apply to the necessity of attestation by two witnesses. Then came the Act of 54 Geo. 3, c. 156, extending the duration of the copyright conferred by the statute of Anne, and inflicting a penalty on every person printing, reprinting, &c., any book or books "without the consent of the author or authors, or other proprietor or proprietors of the copyright of, and in such book or books, first had and obtained *in writing*," without making any mention of attestation. As this enactment made unattested licences valid, the inference drawn in *Power v. Walker* from their previous necessity should seem to have lost its force; for the reason of requiring an assignment to be attested was that the Act of Anne required the licence to be attested; and as a licence in writing without attestation is sufficient under the Act of Geo. 3, it should follow that an assignment in writing without attestation is also sufficient. However, in the case of *Davidson v. Bohn*,^(b) decided subsequently to the Act of Geo. 3, it was laid down that for the purpose of transferring copyright there must be an instrument in writing attested by two witnesses; but the case appears to have been considered as if it had arisen before the 54 Geo. 3, c. 156, as that statute was not mentioned in the arguments or judgment. In *Jeffreys v. Boosey*^(c), also, Lord St. Leonards, Parke, B., and Alderson, B., were of opinion that the provisions of the Acts of Anne and Geo. 3, as to licence and assignment, might well stand together, and therefore that the latter Act did not by intendment repeal the former. But of these judges, Alderson, B., appears to have considered himself bound^(d) by the decision in *Davidson v. Bohn*, and Parke, B., afterwards changed his opinion.^(e)

^(a) 3 M. & Sel. 7.^(b) 6 C. B. 456.^(c) 4 H. L. Cas. 815.^(d) See p. 915.^(e) See the judgment of Lord Wensleydale in *Kyle v. Jeffreys* (3 Macq. 611).

The question was again distinctly raised in 1861 in the case of *Cumberland v. Copeland*.^(a) The Court of Exchequer in that case held that the construction put upon the statute of Anne in *Power v. Walker* was binding on them still, notwithstanding the Act of 54 Geo. 3, c. 156, and, consequently, that an assignment of copyright, to be valid, must be in writing, attested by two witnesses. This decision was appealed against, and was reversed by the unanimous decision of the Court of Exchequer Chamber (consisting of Erle, C.J., Crompton, Willes, Blackburn, Keating, and Mellor, JJ.), holding that an assignment of copyright made after the passing of 54 Geo. 3, c. 156, requires no attestation.^(b) Erle, C.J., said, "An express enactment that a consent in writing should be valid is, to my mind, by implication, an enactment that a consent in writing may be valid without being attested by two witnesses. The former statute [that of Anne] required a consent in writing attested by two witnesses; the latter [54 Geo. 3, c. 156] requires a consent in writing only. It is clear to my mind, after the Act of 54 Geo. 3, c. 156, the plaintiff could not, without infringing the express words of that statute, say a consent in writing was not valid without two witnesses, because there was an enactment to that effect in the statute of Anne. The two statutes are inconsistent. After that time, if a consent in writing is valid without two witnesses, it seems to me, as a matter of reasoning, to follow that an unattested assignment is also valid; for if, as it was argued prior to the statute, because a consent in writing is not valid without two witnesses, so neither is an assignment: as a consent is now valid without two witnesses, so also is an assignment valid without two witnesses.^(c) . . . By the 54 Geo. 3, c. 156, the Legislature seem to have taken the view that I have mentioned, and, while still enacting that the contract must be in writing, left out purposely, as it seems to me, the necessity of having two witnesses. In the case of wills it may well be that greater formality and ceremony should be required, in order to avoid all doubt as to the acts of dead men; but no such safeguards are required in an ordinary instrument of commerce. I therefore think the Legislature did wisely in the 54 Geo. 3, c. 156."

(a) 7 H. & N. 118.

(b) 31 L. J. 353, Ex.; 7 L. T. N. S. 334; 10 W. R. 581.

(c) The inference, however, was stronger in the former case, as it was an *à fortiori* argument from the necessity of attestation in the case of a mere licence to its necessity in the case of the greater and more important assignment. The absence of the necessity of attestation in the former case does not furnish an equally strong reason for its non-necessity in the latter case.

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Assignment by
entry in registry
at Stationers'
Hall.

The second mode of assigning copyright is by entry in the book of registry kept at Stationers' Hall.

Sect. 13 of 5 & 6 Vict. c. 45, after providing for registration by the author or proprietor, enacts "that it shall be lawful for every such registered proprietor to assign his interest, or any portion of his interest therein, by making entry in the said book of registry of such assignment, and of the name and place of abode of the assignee thereof, in the form given in the schedule annexed to the Act, on payment of the sum of five shillings; and such assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and shall be of the same force and effect as if such assignment had been made by deed."

The form of concurrence of the party assigning the copyright in any book already registered, given in the schedule to the Act is as follows:—

I *A. B.* of _____ being the assigner of the copyright of the book hereunder described, do hereby require you to make entry of the assignment of the copyright therein.

Title of Book.	Assigner of the Copyright.	Assignee of Copyright.
<i>Y.Z.</i>	<i>A.B.</i>	<i>C.D.</i>

Dated this _____ day of _____ 18____
(Signed) *A.B.*

The form of entry of assignment given in the schedule to the act is as follows:—

Date of entry.	Title of book.	Assigner of the copyright.	Assignee of copyright.
	[Set out the title of the book, and refer to the page of the registry book in which the original entry of the copyright thereof is made.]	<i>A.B.</i>	<i>C.D.</i>

It is a curious discrepancy that while sect. 13 requires

the entry of "the name and place of abode of the assignee" in the form given in the schedule, in the form itself which is given in the schedule there is no reference whatever to the place of abode of the assignee. Would, then, an entry following strictly the form given in the schedule, and omitting the place of abode of the assignee, be a valid assignment? This question was raised but not determined in *Wood v. Boosey*,^(a) the judgment of the court proceeding on other grounds. The safer course is, to add the place of the assignee's abode.

Another point discussed in the case last referred to, was whether an assignee of copyright is a "proprietor" within the meaning of that term in sect. 24 of 5 & 6 Vict. c. 45, which prevents any proprietor of copyright in books from maintaining any action or suit at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, &c., have caused an entry to be made in the book of registry pursuant to the Act. The court did not decide this question either, but Cockburn, C.J., leaned to the opinion that an assignee was not a proprietor within the application of sect. 24. Lush, J., entertained considerable doubt on the subject, and the other two judges, Blackburn and Mellor, JJ., declined to express any opinion on so doubtful a point. Cockburn, C.J., said "The result of the discussion has been to cause me very strongly to incline to the opinion that sect. 24 of 5 & 6 Vict. c. 45, which requires that the proprietor shall be registered before he shall be entitled to bring an action for the infringement of his copyright, does not apply to the case of an assignee to whom the proprietorship is assigned. The moment the copyright is established in the original proprietor, there is nothing to prevent him from assigning it by any mode by which property of that description can be assigned in law, the statute only affording one mode of making the assignment more convenient and less expensive than the ordinary mode of conveyance by deed.^(b) If the assignment is made under the statute, then, no doubt, its terms must be complied with. . . . But taking this not to be a statutory assignment, is it necessary that the assignee should cause an entry of proprietorship to be made under sect. 24 before he can sue? Now, I observe that there is a distinction in the earlier sections between 'proprietor' as applied to the person by whom the work is originally published, and in whom the property originally

Must an assignee register before he can sue?

(a) L. Rep. 2 Q. B. 340; 36 L. J. 103, Q. B.; 15 L. T. N. S. 530.

(b) See as to the necessity of a deed, *ante*, pp. 152, 153.

vested, and any person who takes by assignment from him; nor do I anywhere in the Act find that the assignee has any right to insist upon having his name entered as the new proprietor: the only case in which the change of the name of the proprietor is to be made being where the statutory form of assignment is resorted to; and even in that case, it is not the assignee but only the assignor who can insist on the change being made in the register. Therefore, to hold that the assignee must make an entry under sect. 24 of his proprietorship, before he can sue for the infringement of the copyright transferred to him, he having no power under the statute, either through the means of this court, or any other means that I can see, to enforce the registration of an entry by way of assignment under sect. 13, and to apply the term proprietor to him would, I think, work considerable inconvenience, if not considerable injustice. However, although I make these observations in passing, to show the matter has not been overlooked, I do not desire to be understood as resting my present judgment on that point." Blackburn, J., observed, "With regard to the objection that there is no entry of the plaintiff as proprietor of the copyright under sect. 24 of 5 & 6 Vict. c. 45, at first I thought the objection fatal to the plaintiff's case, but after hearing the argument my opinion is much shaken, and I would not support the nonsuit on that ground without further time for consideration."

In this state of the law it would obviously be very unsafe for an assignee of copyright to commence any proceeding for infringement of his right without having previously registered at Stationers' Hall.

Unless there is some stipulation to the contrary in the conditions of sale, the person who sells his copyright to another may print any number of copies up to the time of the sale, and retain and sell such copies after disposing of the copyright; though, of course, he commits piracy by printing any copies after the sale.^(a)

Courts of equity have given relief and enforced contracts in many cases where there was no remedy at law. Amongst other maxims which they act on is one—that Equity looks upon that as done which ought to have been done. The most common cases of the application of the rule are under agreements, all such being considered as performed which are made for a valuable consideration, in favour of persons entitled to insist on their performance. Hence a man has in many cases a title recognised and enforced by

(a) *Taylor v. Pillow* (L. Rep. 7 Eq. 418).

Sale of copies
printed before
assignment.

Equitable
assignment.

Equity where he has no title at law. Thus an agreement to assign is treated by Equity as a valid assignment, and infringements of literary property have been restrained where the claimant of the aid of Chancery had only an equitable title to relief, and possessed no title recognised at law.

Lord Mansfield, indeed, was of opinion that relief would not be given in such a case, and said, in *Millar v. Taylor*,^(a) that unless a court of equity saw a law right existing in the author it would not interfere. Such also was the opinion of Lord Eldon, in *Rundell v. Murray*.^(b) But Lord Lyndhurst, in *Chappell v. Purday*,^(c) referring to this expression of opinion, observed, "If by this it was meant to be said that a court of equity would only interfere when the legal right was in the party applying for its interference, I will not go so far; because I think that a court of equity will assist any party having an equitable right, where the legal right intervenes to prevent his obtaining justice; otherwise great fraud would ensue."

In *Sweet v. Shaw*,^(d) the plaintiffs, who sought to restrain the infringement of their property in certain reports of cases, furnished to them for publication by two barristers, asserted only an equitable title to the copyright under an agreement with the barristers who reported the cases. The Vice-Chancellor, Sir Launcelot Shadwell, was distinctly of opinion that the plaintiffs had made out only an equitable right, but that, nevertheless, they had stated quite a sufficient case to support their bill; and he continued the injunction restraining the defendants from infringing the copyright of the plaintiffs. With reference to the nature of the agreement, the Vice-Chancellor said: "What the plaintiffs state is that they have agreed with A. and B. that A. and B. shall report cases for them; and accordingly A. and B. do take notes of cases, which are printed by Sweet and others, the plaintiffs, and they publish them, and then the plaintiffs aver that they have a copyright in the cases published. Now I think that they have in equity, but I cannot understand how they have got the copyright at law; because I cannot see how, at law, the agreement that persons shall prepare a work for the plaintiffs gives the plaintiffs a copyright at law, for nothing can pass at law except that which actually exists; and it is true, not only with respect to an assignment, but also with respect to a release, as

^(a) 4 Burr. 2400.

^(b) Jac. 315. But see the order made by the same judge in *Mawman v. Tegg* (2 Russ. 385).

^(c) 4 Y. & Col.

^(d) 3 Jur. 217.

Littleton points out, that there cannot be a release of a future right, and consequently there cannot be an assignment of anything that does not now exist.”(a) The same judge elsewhere (b) says, “This court always takes notice of the equitable interest; and if the equitable right to the copyright is complete, this court will take care that the real question shall be tried, notwithstanding there may be a defect in respect of the legal property.” And Lord Eldon, in a case of equitable title, where he thought it advisable that an action should be tried at law before he granted an injunction, ordered the defendants to admit the legal title of the plaintiff in the trial of the action.(c)

An agreement in writing between an author and a bookseller by which, after reciting that the author had prepared a new edition of one of his works which the publisher was desirous of purchasing, it was agreed that 2500 copies of the work should be printed at the expense of the bookseller, who was to pay the author by instalments a sum named for the said edition, was held to constitute the publisher, not merely the purchaser of 2500 copies of the work, but an assignee in equity of the copyright to the extent of being alone entitled to publish the whole edition, consisting of 2500 copies, and to prevent the piracy of that edition by any other person.(d)

On the other hand a written agreement between an author and a publishing firm that the latter “should print, reprint, and publish a work of the author’s, at their own risk, on the terms of dividing equally with him any profits that there might be after payment of all expenses; and that if all the copies should be sold and another edition should be required, the author should make all necessary alterations and additions, and the publishers should print and publish a second and subsequent editions on the same terms, and that if all the copies of any edition should not be sold in five years from the time of publication, the publishers might sell the remaining copies by auction or otherwise, in order to close the account,” was held by the Lords Justices, affirming the decision of Wood, V.C., not to be a contract for the assignment of the author’s copyright but a mere personal contract on both sides not assignable by either party.(e) The firm with whom the agreement was made

(a) See also *Sweet v. Maugham* (4 Jur. 456).

(b) *Bohn v. Bogue* (10 Jur. 421).

(c) *Mawman v. Tegg* (2 Russ. 402).

(d) *Sweet v. Cater* (11 Sim. 573).

(e) *Stevens v. Benning* (6 D. M. & G. 223; 1 Kay & J. 168).

having been changed, and their interest having been assigned to a new firm, the latter firm was held not entitled to restrain the publication of a new edition by another publisher with the author's concurrence.

A similar case was *Reade v. Bentley*,^(a) where an agreement was entered into between the plaintiff and defendant that the latter should "publish at his own expense and risk a book written by the plaintiff, and after deducting from the produce of the sale thereof the charges for printing, paper, advertisements, embellishments, and other incidental expenses, including the allowance of 10% per cent. on the gross amount of the sale for commission and risk of bad debts, the profits remaining of every edition that should be printed, to be divided equally between the plaintiff and defendant; the books sold to be accounted for at the trade sale price, reckoning twenty-five copies as twenty-four, unless it should be thought advisable to dispose of any copies, or of the remainder at a lower price, which was left to the judgment and discretion of the defendant." The Vice-Chancellor (Wood) was clearly of opinion that this agreement was not, and was never intended by either party to be, a contract for the sale or purchase of the copyright. The Vice-Chancellor said, "It is unfortunate that publishers and authors should frame their agreements with so little precision, as from the case of *Stevens v. Benning* and this case it appears they are in the habit of doing. At the same time, from what I see in this case, I feel more confident than I did in *Stevens v. Benning* that there was no intention to dispose of the copyright by this agreement, because I cannot suppose that authors or publishers are so unaware of the importance and value of that right, as not clearly to express their intention when they mean the copyright to pass."

When the case of *Reade v. Bentley* came a second time before the court, the counsel for the defendant did not contend that the agreement amounted to a sale of the copyright, but insisted that the plaintiff had thereby granted to the defendant an irrevocable licence to print and publish. The Vice-Chancellor did not, however, adopt this construction of the agreement. He said:^(b) "If the defendant's construction be correct, it follows that so long as he lives and is willing to continue publishing fresh editions of the work, so long, according to the doctrine in *Sweet v. Oater*, the plaintiff will be precluded from asserting a right to publish any competing edition. The defendant could compel the

(a) 3 K. & J. 271.

(b) 4 K. & J. 664.

plaintiff to abstain from publishing a single copy of the work, so long as he expressed his readiness to continue publishing. But the plaintiff has no reciprocal power. He could never compel the defendant to publish more than a single edition of the work. His powers are limited to what the contract gives him; and according to the contract, when the defendant has published a second edition the contract on his part is fulfilled. This is a position of considerable hardship for an author, and one which ought to be clearly shown upon the face of a contract, to have been contemplated by the parties who entered into it. . . . It cannot be contended that the agreement on the author's part is like a grant, in which the *onus* is upon the grantor, of showing that he has not parted with all which the grant appears to comprise. The *onus* is here with the party who contends that this agreement amounts to a licence, which upon the face of it, it does not. It certainly is not an assignment of the copyright. It does not appear to me to create more than a joint adventure; and if licence there be at all, it is only a licence so far as may be necessary for carrying out that joint adventure, and an implied licence for that purpose. That being so, the *onus* is upon the defendant of showing that the contrary construction is necessary; and that not being shown, a construction which would leave the author fast bound, and the publisher entirely free, after the publication of one edition, is not a reasonable construction to adopt in considering the effect of an agreement of this character?" His Honour showed his disapprobation of the loose manner in which the agreement had been framed, by giving no costs, considering each party equally in fault for having entered into an agreement so difficult of interpretation.

Where a writer agreed with a publisher to edit a translation of Montaigne's works, adding notes and a biographical sketch of the author, for a particular sum, to be increased by certain other sums as further editions should be published, all the copies published to be printed by the publisher, the intention being that he should have the copyright; and the work was published before the stat. 5 & 6 Vict. c. 45; the question was raised, but it was not necessary to decide it, whether the writer was the author and owner of the copyright in the work. "I do not wish to express a decided opinion," said Blackburn, J., "but my present impression is that he would have been the author, and that the copyright would have been in him, although a court of equity might have called on him to transfer the copyright" to the publisher. Mellor, J., was of a similar

opinion.(a) After the death of the publisher in this case, his widow, with the writer's knowledge and assent, registered the copyright in her own name, under 5 & 6 Vict. c. 45; and it was held that the *prima facie* evidence of her title afforded by the register was not rebutted by the absence of proof of a formal assignment in writing.(b)

In the case of photographs, paintings, and drawings, there can be no equitable title by a parol agreement to assign, as sect. 3 of 25 and 26 Vict. c. 68, expressly provides, with respect to them, that "every assignment and every licence to use or copy, by any means or process, the design or work which shall be the subject of such copyright shall be made by some note or memorandum in writing, to be signed by the proprietor of the copyright, or by his agent appointed for that purpose in writing."(c)

Paintings,
drawings, and
photographs.

A valid assignment of the copyright in dramatic and musical compositions, regarded simply as literary productions, and not carrying with them the right of representation, may be made either, first, by an instrument in writing which need not be under seal or attested by witnesses,(d) or, secondly, by entry in the book of registry at Stationer's Hall in the form above given (p. 156) for the assignment of books.

Dramatic and
musical com-
positions.

The necessity of writing to confer a title by assignment, valid at law, is apparent from the cases already cited with reference to the assignment of copyright in books, as by the interpretation clause (sect. 2) of 5 & 6 Vict. c. 45, the word "book" is used to include "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, &c."

The right of representing or causing to be represented a dramatic or musical piece is distinct from the copyright in the book containing such dramatic or musical piece, and the assignment of the latter does not carry with it a title to the former. Sect. 22 of 5 & 6 Vict. c. 45, enacts "that no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right shall pass by such assignment."

Right of repre-
sentation or per-
formance.

This section was in all probability passed to obviate the effect of the decision in *Cumberland v. Planché*,(e) that when

(a) *Hazlitt v. Templeman* (13 L. T. N. S. 593).(b) *Ib.*(c) *Strahan v. Graham* (16 L. T. N. S. 87).(d) See the cases quoted *ante*, p. 152-155.

(e) 1 A. & E. 580.

an author simply assigned the copyright, he also parted with the right of representation.^(a)

Writing is necessary to the assignment of the right to represent, or cause to be represented, a dramatic or musical piece. This has been held to follow by inference from sect. 2 of 3 & 4 Will. 4, c. 15 (the Act which gave the authors of dramatic pieces the sole right of causing them to be represented), which imposes a penalty on any person performing dramatic pieces "without the consent *in writing* of the author or other proprietor first had and obtained." As this section renders a consent in writing necessary to justify a single representation, it has been decided by the Court of Common Pleas in *Shepherd v. Conquest*^(b) that an assignment conveying the exclusive right to represent throughout Her Majesty's dominions, or (if that be possible) in some definite part of them, must, in order to be valid, be in writing also. In that case the plaintiffs had engaged by word of mouth one Courtney to visit Paris for the purpose of adapting a piece there in vogue for representation upon the English stage, the terms being that the plaintiffs should give him a weekly salary and pay his expenses, and should have the sole right of representing the piece in London, Courtney to retain the right of representation in the provinces. In pursuance of the agreement Courtney proceeded to Paris, and adapted a piece, which was represented by the plaintiffs at their theatre. Courtney afterwards assigned the copyright in the piece to the defendant, who caused it to be represented at his theatre, whereupon the plaintiffs, claiming the sole right of representation, brought an action to recover the penalties imposed by sect. 2 of 3 & 4 Will. 4, c. 15. It was held that there had been no valid assignment to the plaintiff, either of the copyright in the piece, or of the sole right of representation, and consequently that they must fail in their action.

Assignment
of right of
representation
separately.

Sect. 22 of 5 & 6 Vict. c. 45, in cases where it is intended to assign the right of representation as well as the copyright of a dramatic or musical piece, renders necessary an entry in the book of registry of the assignment, expressing an intention to convey the right of representation. The language of the enactment refers only to cases where it is intended to convey both copyright and the right of representation; nothing is said as to the mode of assigning the

^(a) *Per Cur.* in *Lacy v. Rhys* (4 B. & S. 873; 33 L. J. 157, Q. B. 9 I. T. N. S. 607; 12 W. R. 309).

^(b) 17 C. B. 427; 25 L. J. 127, C. P. See 17 C. B. 442.

right of representation separately. We have just seen that it must be assigned by writing, and there does not seem to be any other requisite to a valid assignment.

Sect. 22 has no application to the case of a simple assignment of the exclusive right of representation, and an instrument assigning that right does not require to be registered, even though it likewise convey the copyright. (a) Where a deed assigned "both copyright and acting right" in a dramatic piece, it was held by the Court of Queen's Bench that registration was not required to entitle the assignee to bring an action for infringement of his right—that sect. 22 does not apply to a case in which there is, in terms, an assignment of the right of representation itself. (b)

Where A. wrote a letter to B., agreeing to "let B. have" a drama belonging to A., in discharge of a particular sum which A. owed to B., this was held by Byles, J., at *Nisi Prius*, to be a complete assignment to B. of A.'s whole property in the drama. (c)

The consent of the author or proprietor of a dramatic piece, to its representation, need not be under the hand of the author or proprietor himself, but may be given by an agent. (d)

It is a curious omission in the Acts of Parliament relating to copyright, that none of them mentions the assignee of an engraver, or expressly confers a copyright on such assignee. But sect. 2 of 8 Geo. 2, c. 13, the Act which first gave a copyright in prints, and imposed penalties for infringement of it, provides, "that it shall and may be lawful for any person or persons who shall hereafter purchase any plate or plates for printing, from the original proprietors thereof, to print and reprint from the said plates without incurring any of the penalties in this Act mentioned." This section, says Buller, J., in *Thompson v. Symonds*, (e) takes it for granted that the proprietor may assign. And Grose, J., in the same case added, "When the print was originally published the requisites of the statute were complied with. Then the exclusive right was vested in the engraver; and the instant he assigned to the

(a) *Lacy v. Rhys* (4 Best & S. 873; 33 L. J. 157, Q. B.; 9 L. T. N. S. 607; 12 W. R. 607). *Marsh v. Conquest* (17 C. B. N. S. 418; 33 L. J. 319, C. P.; 10 L. T. N. S. 717; 12 W. R. 309).

(b) *ib.*

(c) *Lacy v. Toole* (15 L. T. N. S. 512). The *semble* in that case, that an assignment of the right to represent need not be in writing, is incorrect, as the case of *Shepherd v. Conquest*, referred to *supra*, shows.

(d) *Moreton v. Copeland* (16 C. B. 517).

(e) 5 T. R. 46.

plaintiff, the latter had every right that the engraver had before."

The assignee may maintain an action for penalties in his own name. It was argued in *Thompson v. Symonds* that the effect of the 1st and 2nd sections of 8 Geo. 2, c. 13, taken together, was that the purchaser from the original engraver is merely exempt from the penalties of the statute, but that if any other person copy the plate the action must be brought by the original proprietor, who, perhaps, may be considered as a trustee for the assignee, as to any damages that he may recover. But this reasoning did not prevail, and the assignee was held entitled to maintain the action in his own name.

An assignment of the copyright in engravings, it would seem, must be in writing, signed by the proprietor with his own hand, in the presence of, and attested by, two or more credible witnesses. None of the Acts contains any provision as to the mode of assigning the copyright, but 17 Geo. 3, c. 57, gives to the proprietor a remedy by special action on the case against any one who prints, reprints, imports for sale, publishes, sells, or otherwise disposes of, any copies of any print, engraved, etched, drawn, or designed in Great Britain "without the express consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of, and attested by, two or more credible witnesses." As a licence requires the observance of these formalities, it should seem that their observance is also necessary in case of an assignment of the copyright. A deed does not appear to be necessary.

Drawings,
paintings, or
photographs.

The Act which first conferred a copyright in paintings, drawings, and photographs, 25 & 26 Vict. c. 68, has a special provision (sect. 3) as to the mode of assigning the copyright, or of giving permission to copy, or use in any other way, the subject of the copyright. In the case of every such assignment, or licence, a writing is necessary signed by the proprietor of the copyright, or his agent appointed for the purpose by writing. Furthermore (by sect. 4) the protection of the Act is withheld from, and no action for penalties is maintainable by, an assignee, unless an entry is made in "The Register of Proprietors of Copyright in Paintings, Drawings, and Photographs," kept at Stationers' Hall, of the assignment, stating the date of the assignment, the names of the parties, the name and place of abode of the assignee and of the author of the work, and a short description of the nature and subject of the work.

Sect. 3 of that Act provides that "all copyright under the Act shall be deemed personal or movable estate, and shall be assignable at law, and every assignment thereof, and every licence to use or copy by any means or process the design or work which shall be the subject of such copyright, shall be made by some note or memorandum in writing, to be signed by the proprietor of the copyright, or by his agent appointed for that purpose in writing.

Sect. 4, after providing for the keeping at the Hall of the Stationers' Company a book or books entitled "The Register or Proprietors of Copyright in Paintings, Drawings, and Photographs" enacts that therein "shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and also of every subsequent assignment of any such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto, and of the name and place of abode of the person in whom such copyright shall be vested by virtue thereof, and of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description of the nature and subject of such work, and, in addition thereto, if the person registering shall so desire, a sketch, outline, or photograph of the said work, and no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration."

This enactment, although it prevents an assignee from suing for penalties before the assignment to him has been registered, does not render it necessary in order to entitle him to sue, that all, or any previous assignments should also be registered, or that the copyright of the original author should be registered. (a)

In the case of paintings, drawings, and photographs, as already stated, no equitable title can be acquired by a parol agreement to assign. (b)

Copyright in works of sculpture may be assigned to purchasers by deed signed by the proprietor or proprietors, in the presence of, and attested by, two or more witnesses. (c)

Sculpture
models and
busts.

Sect. 8 of the International Copyright Act, 7 Vict. c. 12, provides that all the enactments contained in the Copyright

International
copyright.

(a) *Graves's case* (L. Rep. 4 Q. B. 715; 20 L. T. N. S. 877)

(b) *Strahan v. Graham* (16 L. T. N. S. 87),

(c) See 54 Geo. 3, c. 156, s. 4. Appendix, *post*.

PART I.
 CHAPTER XV.

Amendment Act of 5 & 6 Vict. c. 45, as to entries and assignments of copyright and proprietorship, shall apply to the books, dramatic pieces, and musical compositions, prints, articles of sculpture, and other works of art to which any Order in Council issued in pursuance of the International Copyright Act shall extend; except that the forms of entry prescribed by the 5 & 6 Vict. c. 45, may be varied to meet the circumstances of the case, and that the sum to be demanded by the officer of the Stationers' Company for making any entry required by the International Copyright Act shall be one shilling only. The subsequent Act, 15 Vict. c. 12, to extend and explain the International Copyright Acts, incorporates 7 Vict. c. 12, with which it is to be read and construed as one Act. (a) All the provisions, then, of 5 & 6 Vict. c. 45, with respect to the mode of assignment, apply to assignments of the foreign copyright conferred by the International Copyright Acts.

Foreign copyright, under the International Copyright Acts, may, therefore, be assigned either, first, by writing, which need not be under seal; or, secondly, by making entry in the book of registry at Stationers' Hall of such assignment, and of the name and place of abode of the assignee thereof.

CHAPTER XVI.

PIRACY.

Piracy in
 general.

PIRACY is the infringement of copyright. It would not be easy, perhaps, to give any other definition of piracy which would apply to the infringements of property in all the different subjects in which our law now confers a copyright; but the leading and distinguishing feature of piracy is, that it reproduces the pirated work in such a manner as to interfere with the profit and enjoyment which the proprietor derives from it. (b) Yet everything that does this by

(a) Sect. 10 of 15 Vict. c. 12.

(b) "It is enough that the publication complained of is in substance a copy, whereby a work vested in another is prejudiced:" (Lord Ellenborough in *Roworth v. Wilks*, 1 Camp. 98.) "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*:" (Story, J., in *Folsom v. Marsh*, 2 St. Rep. 115.) "The inquiry is, what effect must the extracts have upon the original work. If they render it less valuable by superseding its use in any degree the right of

no means lays the author of the interference open to the charge of piracy. For example, a *bonâ fide* abridgment of a book may seriously impair the profit which the proprietor of the larger work derives from it, at the same time that it subjects the author of the abridgment to none of the penalties which the law attaches to piracy. Nevertheless, where the act done is not one of those which are in express terms prohibited by statute, no finer test of piracy has been applied in the various cases on record than that of the degree in which one work interferes, by reproduction, with the benefits derivable from another work in which copyright exists. It may well be supposed that a test of this character has afforded scope for variance of opinion, and that many litigated cases have arisen with respect to its application. It will be well to treat the subject separately as to each class of productions in which piracy may be committed.

BOOKS.

As piracy is the infringement of copyright, and copyright is defined by 5 & 6 Vict. c. 45, to mean "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject" to which the word is applied in the Act, it follows that piracy can be committed in no other manner than by the multiplication of copies. (a)

Only by multi-
plication of
copies.

So long ago as 1793 (b) it was held that the public recitation from memory of any production in which copyright existed was not a piratical publication. In that case (an action for infringement of copyright in a dramatic piece) which was decided under the Act of Anne, Buller, J., observed: "Reporting anything from memory can never be a publication within the statute. Some instances of strength of memory are very surprising, but the mere act of repeating such a performance cannot be left as evidence to the jury that the defendant had pirated the work itself." The law did not at that time give the author of a dramatic piece the sole right of representing it, and the decision goes simply to the extent of showing that public recitation from memory is not a publication of a literary work. In the similar case of *Murray v. Elliston* (c) in 1822, the Court of King's

the author is infringed: it can be of no importance to know with what intent this was done:" (M'Lean, J., in *Story's Executors v. Holcombe*, 4 M'Lean, 310.)

(a) A translation may be called a transcript or copy of the author's thought or conception, but in no correct sense can be it called a copy of his book: (*Stowe v. Thomas*, 2 Amer. Law Reg. 231).

(b) *Coleman v. Wathen* (5 T. R. 245).

(c) 5 B. & Ald. 657.

Bench was of opinion that such a mode of publication gave no right of action.

The law remains the same under the more recent Act of 5 & 6 Vict. c. 45, as the case of *Reade v. Conquest*(a) shows. In that case, a novel written by the plaintiff had been dramatised by the defendant and performed at his theatre. This was treated by the plaintiff as an infringement of the copyright in his book, and he brought an action to recover the penalty imposed by 5 & 6 Vict. c. 45, for such alleged infringement. But the Court of Common Pleas, following the decision in *Coleman v. Wathen*,(b) held that the defendant had not infringed the plaintiff's copyright in his book by dramatising it and publicly performing it at his theatre.

Even if the public recitation of a book in which copyright exists is not made from memory, but takes the form of a public reading out, from the work itself, of the whole or portions of it, this would not amount to an infringement of the author's copyright.(c)

But, although the whole work might be read out or dramatised, copies of the work so read out or dramatised cannot, without infringing the copyright, be distributed and sold to the audience, though for the mere purpose of assisting them to follow the representation or reading.(d)

A multiplication of copies for the purpose of gratuitous distribution is as much an infringement of the proprietor's copyright as if the multiplication had been made for purposes of pecuniary profit. Thus, where a member of a Philharmonic Society desiring to have a particular piece of published music performed at a concert of the society to which, besides the members, other persons were admitted for money, caused a number of copies of the piece of music to be lithographed and distributed amongst the members of the choir without the consent of the proprietor of the copyright, this was held to be an illegal multiplication of copies, and a violation of the proprietor's right.(e)

The same view has been taken by the Scotch Court of Session in a case of gratuitous circulation.(f)

Where an original catalogue of old and curious books in the possession of a bookseller, intended merely as an advertisement of the books, was in great part copied and published as his own by a rival bookseller, who had a similar

(a) 9 C. B. N. S. 755; 30 L. J. 209, C. P. (b) 5 T. R. 245.

(c) *Per Wood, V.C.*, in *Tinsley v. Lacy* (1 H. & M. 747; 32 L. J. 535, Ch.; 11 W. R. 877).

(e) *Novello v. Sullow* (12 C. B. 177).

(f) *Alexander v. Mackenzie* (9 Scotch Sess. Cas. 2 Ser. 748).

stock of old books to dispose of, this was held to be an infringement of the copyright in the original catalogue, though the second catalogue was not offered for sale, but merely used to promote the sale of the books mentioned in it. (a)

Anything like absolute originality in the composition of a work nowadays seems to be almost an impossibility. The range of human ideas on any subject is limited, and the productions of the busy brains and pens of preceding thinkers are so numerous, that, if books are to be written, the writers must be, to some extent at least, beholden for their materials to those who have written before. If no copyright exist in a work, of course subsequent writers may make of it what use they like, and reproduce it to any extent they please. But if a copyright does exist in it, then the important and somewhat difficult question arises, in what manner and to what extent may subsequent authors make use of the materials contained in it without an infringement of the copyright. In other words, how far may one writer avail himself of the product of another's labour in which copyright exists, without subjecting himself to the charge of piracy?

To what extent
an author may
use another's
work.

The answers to the question, what amounts to piracy? given by different judges, have been variously expressed; but they all point to the conclusion that the question must be treated as one of fact, to be determined with reference to the peculiar circumstances of each individual case; and this question of fact may be determined differently by judges who are at one as to the principle. (b) A summary of the principal tests of piracy which have been given by the most eminent judges will furnish, perhaps, the clearest idea of the nature of the offence, and, consequently, of the degree of liberty allowed to an author in the use of the copyright works of his predecessors.

Tests of piracy.

Lord Eldon stated the test to be—whether the one publication is “a legitimate use of the other in the fair exercise of a mental operation deserving the character of an original work.” (c)

According to Vice-Chancellor Kindersley, an illegitimate or unfair use of another's work is that which amounts to “such

(a) *Hotten v. Arthur* (1 H. & M. 603; 9 L. T. N. S. 199; 32 L. J. 771, Ch.; 11 W. R. 934).

(b) See *Pike v. Nicholas*, 20 L. T. N. S. 906; 38 L. J. 529, Ch.; L. Rep. 5 Ch. App. 251; where Vice-Chancellor James thought that the defendant had pirated the work of the plaintiff, whereas the Lords Justices of Appeal considered that the use made of the plaintiff's work did not amount to a piracy of it.

(c) *Wilkins v. Aikin* (17 Ves. 426).

an extraction from it as comes up to an extraction of the vital part.”(a)

Lord Ellenborough expressed the criterion thus: “Was the matter so taken [by the writer of one book from a preceding book for the promotion of science, and the benefit of the public] used fairly with that view, and without what I may term the *animus furandi*.”(b) Wood, V.C., refers to this rule thus: “Whether you find on the part of the defendant an *animus furandi*—an intention to take for the purpose of saving himself labour.”(c)

Lord Jeffrey, in the Scotch case of *Alexander v. Mackenzie*,(d) in somewhat figurative language, states the test to be, in cases where the subject is *in medio*, or open to everybody to write upon it: “Is there reasonable evidence that the two works are identical, and that the last author did not mount upon the back, and walk on the crutches of, his predecessor, but actually used his own muscular exertions in traversing the field in which he made his observations? Did he, on the whole, do so fairly and honestly for himself, although he may occasionally have followed in the *vestigia* left by his precursor? Or is there evidence that the second writer’s not going over the ground for himself is not the very cause why he has arrived at almost identical conclusions with his predecessors?”

Wood, V.C. (now Lord Hatherley, C.), in dealing with a work in the form of question and answer on a variety of scientific subjects, thus lays down the rule: (e) “I take the illegitimate use, as opposed to the legitimate use of another man’s work on subject matters of this description to be this: If, knowing that a person whose work is protected by copyright has, with considerable labour, compiled from various sources a work in itself not original, but which he has digested and arranged, you being minded to compile a work of a like description, instead of taking the pains of searching into all the common sources and obtaining your subject matter from them, avail yourself of the labour of your predecessor, adopt his arrangements, adopt moreover the very questions he has asked, or adopt them with but a slight degree of colourable variation, and thus save yourself pains and labour by availing yourself of the pains and labour which he has employed, that I take to be an illegitimate use.”

(a) *Murray v. Boyue* (1 Drew. 369).

(b) *Cary v. Kearsley* (4 Esp. 169). As to the necessity of an *animus furandi*, see *post*, pp. 181-183. (c) *Jarrold v. Houlston* (3 K. & J. 716).

(d) 9 Scotch Ses. Cas. 2nd Ser. 758. (e) *Jarrold v. Houlston* (*ubi supra*).

An American judge (Story, J.) says: (a) "I think it may be laid down as the clear result of the authorities in cases of this nature, (b) that the true test of piracy or not, is to ascertain whether the defendant has, in fact, used the plan, arrangements, and illustrations of the plaintiff, as the model of his own book, with colourable alterations and variations only to disguise the use thereof; or whether his work is the result of his own labour, skill, and use of common materials and common sources of knowledge, open to all men, and the resemblances are either accidental or arising from the nature of the subject. In other words, whether the defendant's book is, *quoad hoc*, a servile or evasive imitation of the plaintiff's work, or a *bonâ fide* original compilation from other common or independent sources."

The *quantity* of one work introduced into another is a very vague test of piracy, according to Lord Cottenham, (c) "One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to."

In *Pike v. Nicholas*, (d) a case of piracy of a book on the origin of the English nation, James, V.C., said: "There is no monopoly in the main theory of the plaintiff, nor in the theories and speculations by which he has supported it, nor even in the use of the published results of his own observations. But the plaintiff has a right to say this, that no one is to be permitted, whether with or without acknowledgment, to take a material and substantial portion of his work, his argument, his illustrations, his authorities, for the purpose of making or improving a rival publication." (e)

In all cases where the sources from which materials for composition are to be derived are of a common or general nature, or, as it is otherwise expressed, where the materials are *in medio*, it is open to anyone to gain a copyright in any arrange-

Where materials are common.

(a) *Emerson v. Davies* (3 St. Rep. 793).

(b) The book of which the copyright was alleged to be infringed in this case was a treatise on arithmetic.

(c) *Bramwell v. Halcomb* (3 My. & Cr. 738). Similarly Story, J. (1 St. Rep. 20), "In many cases the question may naturally turn upon the point not so much of the quantity as of the value of the selected materials. As was significantly said on another occasion,—'Non numerantur, ponderantur.'"

(d) 20 L. T. N. S. 909; 38 L. J. 529, Ch.

(e) The decision of the Vice-Chancellor in this case was reversed on appeal, but only as to the question of degree in which the defendant had in fact made use of the plaintiff's work: (L. Rep. 5 Ch. App. 251.) See also *Stowe v. Thomas* (2 Amer. Law Reg. 229).

ment of them which he chooses to make. "In all cases," says Lord Jeffrey, (a) "although the materials are expressly *in medio*, and open to everybody, when a particular degree of judgment in the selection of those materials has been used, and where the subject *in medio*, so open to the world at large, has been, to a certain extent, snatched at and appropriated, such selection is in itself recognised as a certain degree of mental effort, which is entitled to the benefit of copyright."

But though any person may thus acquire a copyright in his own arrangement of common materials, the materials themselves are equally open to everyone else who chooses to have recourse to them, and different copyrights may be acquired in different arrangements of the same common materials.

The different arrangements of common materials must, however, be independent. A later arrangement must not be a servile imitation or reproduction of an earlier one; otherwise it subjects its author to the charge of piracy.

Compilation of
directory.

The case of *Kelly v. Morris*, (b) is a forcible illustration of this doctrine. In that case an application was made for an injunction to restrain the publication of "The Imperial Directory of London, 1866," on the ground that it was a mere piracy of a work belonging to the plaintiff, entitled "Post-office London Directory." The defendant's affidavit set up, as grounds of defence, that from 1862 to 1864 he had published a work called "The Business Directory," in which appeared the names of about 100,000 persons in trade or business, which had been obtained by a large number of canvassers, whom he had employed for the purpose; that, wishing to extend his operations, and bring out "The Imperial Directory," which should comprise street, conveyance, postal, and other sections, he acted on a similar principle to that which had guided him in taking the names of persons in business whom his canvassers were unable to see, viz., he took such information from any source "where the persons had made it public at their own expense for their own benefit;" he considered that the name of a private resident belonged to the public when that resident had "gratuitously given it to the public through some recognised medium of publicity," and that the publisher merely "held it in trust for a purpose, receiving for his trouble any benefit he could make of the information, but that the right of using that information belonged to the public as soon as the informa-

(a) *Alexander v. Mackenzie* (9 Scotch Sess. Cas. 2nd Ser. 758); see also *Blum v. Patten* (2 Paine, 395); *Emerson v. Davies* (3 Story, 781).

(b) L. Rep. 1 Eq. 697; 35 L. J. 423, Ch.; 14 L. T. N. S. 222.

tion was made public," and that any person might go round with a list of names already published and ask permission to render the work of publication more complete by reproducing it, and if any error had been made in the first publication, it rested with the original owners of the names to point out the error, when submitted to them for permission to reproduce, which opportunity was afforded the residents by means of circulars sent round to them through the defendant's canvassers, asking the residents to fill up a form with their name and address for publication in "The Imperial Directory." It was admitted that one of defendant's canvassers, afterwards discharged by him, had not taken the trouble to make the necessary inquiries, from house to house, so that most of the errors in the defendant's directory identical with those in the plaintiff's would be thus accounted for. On the other hand, several instances were adduced of corrections and large supplementary additions to the plaintiff's work contained in the defendant's, and the manuscript of the latter work was produced. The present Lord Chancellor (then Sir W. Page Wood, V. C.) granted the injunction prayed for, and laid down the law on the subject in very stringent terms.

His Lordship said: "The defendant has been most completely mistaken in what he assumes to be his right to deal with the labour and property of others. 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. In the case put of a newly-discovered island, he must go through the whole process of triangulation, just as if he had never seen any former map, and generally, he is not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained. So, in the present case, the defendant could not take a single line of the plaintiff's directory for the purpose of saving himself labour and trouble in getting his information. The defendant, from the description of the way in which he had in the first instance compiled his 'Business Directory,' seems to have known exactly what he might do. . . . The defendant goes on in his affidavit to propound a most extraordinary doctrine as to the right of

publicity in the names of private residents, who had, as he expressed it, 'given their names for public use.' What he has done has been just to copy the plaintiff's book, and then to send out canvassers to see if the information so copied was correct. If the canvassers did not find the occupier of the house at home, or could get no answer from him, then the information copied from the plaintiff's book was reprinted bodily, as if it was a question for the occupier of the house merely, and not for the compiler of the previous directory. Further than this, the defendant tells us that he had a number of new agents, and that one of them had performed his part of the work carelessly, thus at once showing how easy it would be, on the system adopted by the defendant, for any negligent agent to send back his list all ticked as if correct, without having taken the trouble to make a single inquiry. . . . The work of the defendant has clearly not been compiled by the legitimate application of independent personal labour, and there must be an injunction to restrain the publication of any copy of the defendant's work containing the portions called the 'Street' and 'Court' Directories, with liberty for the defendant to apply, when he shall have expunged from such portions all matter copied from the plaintiff's work." (a)

Lord Eldon had previously said, with reference to a "Road Book," "It is certainly competent to any other man to publish a book of roads, and if the same skill, intelligence, and diligence are applied in the second instance, the public would receive nearly the same information from both works; but there is no doubt that this court would interpose to prevent a mere republication of a work which the labour and skill of another person had supplied to the world." (b)

The fact that the publisher of a business directory receives payment from some of the persons whose names are contained in it, for printing their names in larger letters, or with lines of additional description, does not make those names, when so inserted, common property, so as to justify the compiler of a rival directory in reprinting them from slips cut from the former. (c)

Neither does the fact that the persons whose names were so printed had been applied to by the compiler of the second directory to verify the information contained in the first,

(a) See also *Matthewson v. Stockdale* (12 Ves. 275); *Cornish v. Upton* (4 L. T. N. S. 862); and *Morris v. Ashbee* (L. Rep. 7 Eq. 34; 19 L. T. N. S. 550).

(b) Judgment in *Longman v. Winchester* (16 Ves. 271).

(c) *Morris v. Ashbee* (L. Rep. 7 Eq. 34; 19 L. T. N. S. 550).

and had not only authorised, but actually paid for the insertion of their names in the second with capital letters and added lines, prevent the publication being a piracy of the first directory. (a)

How far the compiler of a directory may make use of a previous directory of the same kind without being guilty of piracy, was considered by Lord Justice Giffard in the recent case of *Morris v. Wright*, (b) where the two last cited cases were considered and explained, and the rule derivable from them was thus stated by the Lord Justice: "The compiler may not cut out slips from the former work and go and see whether they are accurate, and if accurate, copy them bodily into his own work, as was done in both the cases referred to; but he is quite justified in referring to the former book 'in order to guide himself to the persons on whom it would be worth his while to call.'" After referring to the passage from the judgment in *Kelly v. Morris*, (c) above cited, where it was said that the defendant could not take a single line of the plaintiff's directory for the purpose of saving himself trouble in getting his information, the Lord Justice said, "If this passage goes further than what I take it to mean, I cannot doubt that it goes beyond what the law authorises, and beyond the decision of the Lord Chancellor and myself, in the late case of *Pike v. Nicholas*. (d) It does not mean that he may not look into the book for the purpose of ascertaining 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. . . . I understand that judgment to rest entirely upon the facts, and I am quite satisfied, from what the Lord Chancellor said in *Pike v. Nicholas*, that it was never his intention to say a person may not look at the directory for the purpose of directing him where to call; but what he meant was, that he must not take the passage of the directory and go and see whether it happens to be accurate, and if it is accurate, bodily copy the passage into his directory."

In *Morris v. Wright* the plaintiff, who was the proprietor of a publication called "The Business Directory of London," filed a bill against the defendant who was preparing for publication a new mercantile directory bearing the name of "The Handbook; or, Manufacturers' and Exporters' Directory of Great Britain," charging him with pirating the

(a) *Morris v. Ashbee* (L. Rep. 7 Eq. 34; 19 L. T. N. S. 550).

(b) L. Rep. 5 Ch. App. 279; 22 L. T. N. S. 78.

(c) *Ubi supra*.

(d) *Ante*, p. 173, note (e).

PART I.
CHAPTER XVI.

former work, and an interlocutory injunction to restrain the publication was moved for. The defendant admitted having at first provided his canvassers with cuttings from the plaintiff's directory, but stated that he had discontinued its use after the decision in *Morris v. Ashbee*, (a) and denied that he had copied, or intended to copy, any part of the plaintiff's directory. James, V.C., dissolved the injunction which had been granted, and his decision was upheld on appeal by Gifford, L.J., who said, "If the fact be that Mr. Wright (the defendant) used the plaintiff's work in order to guide himself to the persons on whom it would be worth his while to call, and for no other purpose, he made a perfectly legitimate use of the plaintiff's book. I do not wish to say anything whatever to prejudice the ultimate decision of this case, supposing the plaintiff makes out such a case as he alleges by his bill; but I think that in the present state of circumstances, the Vice-Chancellor did that which was right between the parties."

In *Pike v. Nicholas* (b) it was laid down by the Lords Justices of Appeal in Chancery, that an author may, without committing piracy, use the same passages in older writers which have been used by a previous author, although he has been led to refer to those writers by that author. He must not, however, simply copy the passages from the previous author, but, being put on the track by him, he must have recourse for himself to the original writer, and then may make use of every passage used by the other author.

In the case of "lists of hounds" published in newspapers, the information must, according to Vice-Chancellor Malins, be got at the expense of each proprietor, and as the result of his own labour: he is not entitled to the results of the labours undergone by others; (c) but it is doubtful whether a Court of Chancery would interfere in such a case. The Vice-Chancellor refused an interlocutory injunction to restrain such a piracy, on the ground that the list was liable to frequent changes, and a correct list was so easily obtained.

The same rule applies to tables of figures, dictionaries, calendars, court guides, and other works of that description, as to directories. The difficulty as to this class of cases is that they not only relate to a subject common to all mankind,

(a) L. Rep. 7 Eq. 34; 19 L. T. N. S. 550.

(b) L. Rep. 5 Ch. App. 251; 38 L. J. 529, Ch.

(c) *Cox v. Land and Water Journal Company* (L. Rep. 9 Eq. 324). See, as to the soundness of this decision, the remarks on the case contained in the chapter on "Newspapers," *post*.

Lists of hounds
published in
newspapers.

Dictionaries,
calendars, &c.

but the mode of expression and language is necessarily so common that two persons must, to a very great extent, express themselves in identical terms in conveying the instruction or information to society which they are anxious to communicate. (a)

As to dictionaries, Vice-Chancellor Wood, after remark-
ing that in this country, labour having been employed upon
any subjects, however humble, gave a copyright which no
one had a right to interfere with, observed that, "as to
dictionaries, the matter stood in a somewhat different posi-
tion. There might be a certain degree of skill exhibited as
to order and arrangement, and there might be a good deal
of ingenuity exhibited in the selection of phrases and illus-
trations which were the best exponents of the sense in which
the word was to be used; there might also be great labour
in the logical deduction and arrangement of the word in its
different senses, when the sense of the word departed from
its primary signification; on the other hand, there was
always this to be said, that as to a large mass of the words,
they admitted of only one acceptation, and could be trans-
lated in one way only, and the large mass of dictionaries
were composed of words of this description: numerous
dictionaries had necessarily been published from time to
time, and the new dictionary maker must, of necessity, use
much of the information and of the results of his prede-
cessors. . . . Of course there could be no copyright in
much of the information contained in the numerous dictio-
naries published, each necessarily having a large number of
words identically similar." In the case before him the
Vice-Chancellor applied the test "whether there was a
legitimate use of the plaintiff's publication in the fair exer-
cise of a mental operation deserving the character of an
original work," and the result, after an elaborate comparison
of the two dictionaries, was an opinion that though the defen-
dant had taken a good deal from the plaintiff's work, yet a
good deal of labour had been bestowed upon what had been
taken, and, on the whole, it could not be said that the defen-
dant had gone beyond what the court would allow; having
produced that which, in the result, was in fact a different
work from that of the plaintiff. The bill praying for an
injunction was dismissed, but, on account of the doubtful-
ness of the case, without costs. (b)

Where the works are of such a nature that the informa-
tion contained in them must of necessity, if it be correct,

(a) *Per Wood, V.C., in Spiers v. Brown* (6 W. R. 352).

(b) *Ib.*

be exactly the same in both, the test frequently applied by the courts, to determine whether the second is a mere unlaborious reproduction of the first, or has been compiled by original effort from common sources, is this—to examine the inaccuracies which appear in both works, and see whether they are identical. If so, the inference of piracy is almost invariably drawn. This test satisfied the mind of Lord Eldon in *Longman v. Winchester*,^(a) a case of pirating a “Court Calendar.” “The question before me,” he said, “is whether it is not perfectly clear that in a vast proportion of the work of these defendants no other labour has been applied than copying the plaintiff’s work. From the identity of the inaccuracies it is impossible to deny that the one was copied from the other *verbatim et literatim*. To the extent, therefore, that the defendants’ publication has been supplied from the other work, the injunction must go.” And Vice-Chancellor Wood says of the whole class of works, embracing tables of figures, directories, calendars, Court guides, and other such, that “the only mode of arriving at the amount of labour bestowed was by the common test resorted to of discovering the copy of errors and misprints indicating a servile copying.”^(b)

Translations.

Translations into English of works published in other languages stand on a somewhat similar footing to the preceding. If the foreign work is not protected by international copyright it is open to anyone to translate it; but a translation already existing is the product of the translator’s mental labour, and his property in it must not be infringed. Independent recourse must be had by subsequent translators to the common original source. A “man,” says Justice Story,^(c) has a right to a copyright in a translation upon which he has bestowed his time and labour. To be sure, another man has an equal right to translate the original work, and to publish his translation; but then it must be his own translation, by his own skill and labour; and not the mere use and publication of the translation already made by another.”

In *Wyatt v. Barnard*^(d) Lord Eldon restrained the defendant from publishing in his magazine translations from the French and German languages which had already appeared in a periodical belonging to the plaintiff. His lordship said, “With respect to the translations, if original, whether

(a) 16 Ves. 271, 272.

(b) *Spiers v. Brown* (6 W. R. 352). Cf. *Cox v. Land and Water Journal Company* (L. Rep. 9 Eq. 324).

(c) *Emerson v. Davies* (3 St. Rep. 780).

(d) 3 Ves. & B. 77.

made by the plaintiff or given to him, they could not be distinguished from other works: the injunction therefore must go."

Even though the book in a foreign or dead language be published here, and an English copyright subsist in it, an original translation will, it seems, be no infringement of the English copyright; but, it is presumed, will itself be entitled to copyright protection. In *Burnett v. Ohetwood*, (a) where it was sought to make the defendant liable for an infringement of the copyright in Burnett's *Archæologia Sacra*, on account of his having published a translation of it, the Lord Chancellor was of opinion that a translation was not the same as reprinting the original, and so not within the prohibition of the Act "on account that the translator has bestowed his care and pains upon it," though he granted an injunction to restrain the publication on other grounds which the Court of Chancery would not now act upon. (b)

If a foreigner translates an English copyright work, and then an Englishman re-translates that foreign work into English, that would be an infringement of the original copyright. And it would be no defence that the re-translator was not aware that the work he translated was itself a translation from an English work. (c) Re-translation.

See now, on the subject of translations, the provisions of the International Copyright Act (15 & 16 Vict. c. 12). (d)

Lord Ellenborough has been considered to have laid down the rule, in *Cary v. Kearsley*, (e) that the existence of an *animus furandi* is essential to piracy. What Lord Ellenborough did in that case was to point out that from the nature of the two books before him (Road Books) the one must, if correct, be to some extent a transcript of the other; and, laying it down that the defendant might fairly own that he had taken a great part of his book from the plaintiff's, he left this question to the jury—whether what was taken or supposed to be derived from the plaintiff's book was fairly done with a view of compiling a useful book for the benefit of the public, or taken colourably, merely with a view to steal the copyright of the plaintiff. That does not mean that in every case where invasion of copyright is charged, it is necessary to prove an *animus furandi*. (f) *Animus furandi.*

(a) See note to *Southey v. Sherwood* (2 Meriv. 441).

(b) See also the opinions of Aston, J., in *Millar v. Taylor* (4 Burr. 2348), and of Knight-Bruce, V.C., in *Prince Albert v. Strange* (2 De G. & Sm. 693).

(c) *Murray v. Bogue* (1 Drew. 353; 22 L. J. 457, Ch.

(d) *Vide ante*, p. 74. (e) 4 Esp. 169.

(f) See *per Wood*, V.C.; in *Reade v. Lucy* (1 J. & H. 527).

An *animus furandi*, if essential to piracy, must certainly not be understood to mean a deliberate design to steal the product of another's labour and surreptitiously appropriate it to one's own use and credit. The offence of piracy may be committed *bonâ fide*, with no dishonest intention, and without any idea on the part of him who commits it that he is infringing a copyright.

"The intention to pirate," says Lord Ellenborough,^(a) "is not necessary in an action of this sort; it is enough that the publication complained of is in substance a copy, whereby a work vested in another is prejudiced." And, says Sir L. Shadwell, V.C., in *Campbell v. Scott*,^(b) with reference to a book of avowed extracts from the poetical writings of others, "If A. takes the property of B. the *animus furandi* is inferred from the act."^(c) Thus in *Scott v. Stanford*^(d) the defendant, in a book of "Mineral Statistics of the United Kingdom of Great Britain and Ireland for the year 1865" published by him, had inserted, in a different arrangement, the whole of certain statements (amounting to about one-third of the work) of the quantity of coal, &c., brought into London, which the plaintiff as clerk and registrar of the city coal market had compiled, published, and registered. There was no concealment in the defendant's book of the source from which the information was obtained, it being distinctly stated at the head of the statistics that they were "compiled from the returns published by authority of the Corporation of London, by James R. Scott, Esq., clerk and registrar of the Coal Market." Nevertheless the defendant was held to have infringed the copyright of the plaintiff, and an injunction was granted to restrain the publication of such portions of the defendant's work as contained the statistics compiled by the plaintiff. The Vice-Chancellor (Wood) observed, "It had been said that there had been no *animus furandi* on the part of Mr. Hunt [the writer of the book published by the defendant], that he had taken these statistics in perfect good faith, without any notion that he was pirating the plaintiff's work, and that he acknowledged in the fullest manner the source from which they were derived. But the term *animus furandi* could not be defined in so restricted a sense as to allow a man who had an honest intention of benefiting the public, and no idea that he was infringing a copyright, to take, and without any labour, a very large

(a) 1 Camp. 98.

(b) 11 Sim. 38. See *Millett v. Snowden* (1 West. Law Jour. 240).

(c) See also *Clement v. Maddick* (1 Giff. 98).

(d) 16 L. T. N. S. 51 L. Rep. 3 Eq. 718.

portion of the work of another and materially injure the sale of it. It was as impossible to define the internal act of a man as to measure it. It was only the result of the internal act that could be measured. A man must be presumed in point of law to intend all that the publication of his work effects."

According to the same learned judge in *Reade v. Lacy*, (a) the cases to which the *animus furandi* test properly applies is that difficult class relating to dictionaries, road books, and the like, where a certain amount of common material is used by different persons, and the matter in issue is "piracy or no piracy." But copyright is like patent right in this respect, that if it is infringed, ignorance will not avail as a defence in the one case any more than in the other.

In *Reade v. Lacy* the plaintiff had written a drama called "Gold," and afterwards published a novel founded upon it called "Never too Late to Mend," into which were introduced many scenes and passages from the play. The defendant afterwards published a drama called "Never too Late to Mend," founded on the plaintiff's novel, and containing scenes and passages substantially identical with scenes and passages common both to the plaintiff's novel and his play of "Gold." On a motion for an injunction to restrain the publication of the defendant's drama as an infringement of the plaintiff's copyright in his play of "Gold," evidence was given that the defendant's play was a *bonâ fide* adaptation of the novel, written without any reference to the play of "Gold" and without any knowledge of the published play. The Vice-Chancellor granted the injunction prayed for. He said: "The plaintiff has a copyright in the printed book called 'Gold,' and no one has a right to reprint it without his consent. It so happens that, after having acquired this right, he himself extracted a large portion of this drama, and republished it in the form of a novel. The defendant alleges, and I assume in his favour that he knew nothing about the drama, and that his play was compiled from the novel alone. I also assume for the purpose of the argument and this only, that the defendant had a right to dramatise the plaintiff's novel, (b) and that, as far as the novel is concerned what was done was a fair adaptation of a complicated novel, so as to produce a short drama. This point I shall leave to be decided by a court of law; but even supposing it to be determined in the defendant's favour, still that will not

(a) 1 J. & H. 527.

(b) See *Coleman v. Wathen*; ante, p. 170.

justify the reprinting of scenes and passages identical with those in 'Gold' merely because the novel also happens to contain them, and the defendant took them from that source. The plaintiff did not by transferring these passages into his novel, lose any part of the copyright which he had in his drama; nor can ignorance of the existence of the drama on the part of the defendant be urged as a valid defence. . . . To admit such a defence would be to open a door to fraud and perjury. There is a manifest invasion of the plaintiff's copyright in the drama; and it is no answer to say that this is not an invasion, because it would not have been so if the matter appropriated had appeared only in its later form as a novel." (a)

Piracy by quotation

"That part of the work of one author is found in another is not of itself piracy, or sufficient to support an action," says Lord Ellenborough, in *Cary v. Kearsley*. But the extracts may be too many, or contain too large or important a portion of the work from which they are made, and then they will amount to piracy, even though they are published in the form of quotations, and the source from which they are taken is expressly declared. (b)

"Quotation," says Lord Eldon, (c) "is necessary for the purpose of reviewing; and quotation for such a purpose is not to have the appellation of piracy affixed to it; but quotation may be carried to the extent of manifesting piratical intention." To the same effect Lord Ellenborough, in *Roworth v. Wilkes*, (d) "A review will not in general serve as a substitute for the book reviewed; and even there, if so much is extracted that it communicates the same knowledge with the original work, it is an actionable violation of literary property. The intention to pirate is not necessary in an action of this sort. It is enough that the publication complained of is in substance a copy whereby a work vested in another is prejudiced. A compilation of this kind [a large encyclopædia] may differ from a treatise published by itself, but there must be certain limits fixed to its transcripts; it must not be allowed to sweep up all modern works, or an encyclopædia would be a *recipe* for completely breaking down literary property."

Lord Ellenborough, in the case last referred to, said the question was, whether the defendant's publication would

(a) See further, on the same subject, *Lee v. Simpson* (3 C. B. 871, 883), *Webb v. Powers* (2 Wood and Min. 512), and *Story's Executors v. Holcombe* (4 M'Clean, 310).

(b) See the judgment in *Bohn v. Boque* (10 Jur. 420), and *Scott v. Stanford* (L. Rep. 3 Eq. 718; 16 L. T. N. S. 51).

(c) *Mawman v. Tegg* (2 Rus. 393). (d) 1 Camp. 97.

serve as "a substitute" for the plaintiff's. Sir L. Shadwell, V.C., referring to this remark, quoted by the defendant's counsel in *Sweet v. Shaw*,^(a) says, "That does not mean a substitute for the whole work. From what you state, suppose a book to contain a hundred articles, and ninety-nine were taken, still it would not be a substitute;" and again, in *Bohn v. Bogue*,^(b) the same judge observes: "With respect to that expression of Lord Ellenborough, 'substitute,' his Lordship must be taken to have used that word with reference to the particular case before him; and it is perfectly clear to my mind that never can be the criterion." His Honour put the case of a publication of "Liddell and Scott's Lexicon," omitting three or four words at the end of each letter of the alphabet. This could not be taken as a substitute. "But can it be doubted," he asks, "that it might have a very material effect in diminishing the price of the first book; for though nobody would take it as a substitute, many people might not care about so much, and might take it cheaply for what it really did contain, which might be more than ninety-nine hundredths of the whole, and yet it would in no manner be a 'substitute'? And, therefore, the language is not generally correct, so as to be capable of application to every case."^(c)

"No one can doubt," says Justice Story,^(d) "that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear that if he thus cites the most important parts of the work with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy. A wide interval might, of course, exist between these two extremes, calling for great caution, and involving great difficulty, where the court is approaching the dividing middle line which separates the one from the other."

In *Whittingham v. Wooler*^(e) an attempt was made to establish a charge of piracy against the publisher of *The Stage*, a theatrical periodical in the nature of a review and magazine, for publishing about six or seven pages of a dramatic piece, about forty pages in length. In dismissing the bill with costs, Sir Thomas Plumer, M.R., said: "It may, perhaps, be fair enough to say that if the defendant had inserted in one number a criticism and in a following

(a) 3 Jur. 218; 8 L. J. Ch. 216.

(b) 10 Jur. 421.

(c) See further, on the subject of extracts, *Sweet v. Cater* (11 Sim. 580).

(d) *Folsom v. Marsh* (2 St. Rep. 106).

(e) 2 Swanst. 428.

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number mere specimens, that would be the case of an un-protected plagiarism; but here the defendant has given no entire act or scene, but only broken and detached fragments of the piece in question."

In *Dodsley v. Kinnersley* (a) the plaintiffs were assignees of Johnson's "Prince of Abyssinia," and had already published an abstract of that work in the *London Chronicle*. The defendant printed part of the narrative in the *Grand Magazine of Magazines*, leaving out all the reflections. Sir Thomas Clarke, M.R., dismissed the plaintiffs' bill for an injunction, referring to the custom of annual registers, magazines, &c., to give an abstract or analysis of authors, which custom in general tended to the advantage of the author, if the composition was good. "What I materially rely on," said the Master of the Rolls, "is, that it could not tend to prejudice the plaintiffs when they had before published an abstract of the work in the *London Chronicle*." (b)

Bonâ fide notes.

It would seem that the work or part of the work of another may be made the foundation of *bonâ fide* notes and observations, and may be published with such notes or observations without infringing the copyright in the original work. "Any person," says Sir L. Shadwell, V.C., in *Martin v. Wright*, (c) "may copy and publish the whole of a literary composition, provided he writes notes upon it, so as to present it to the public connected with matter of his own."

In *Cary v. Kearsley* (d) the question was put in argument to Lord Ellenborough whether, if a man took "Paley's Philosophy" and copied a whole essay with observations and notes, or additions at the end of it, such a proceeding would amount to piracy. Lord Ellenborough replied, "That would depend on the facts of whether the publication of that essay was to convey to the public the notes and observations fairly, or only to colour the publication of the original essay, and make that a pretext for pirating it; if the latter it could not be sustained."

In the case of legal works it has been the practice to publish in a separate form, with notes annexed, reports of cases extracted from books of reports in which copyright exists, but it has never been judicially determined whether such a practice does or does not amount to piracy of the original reports. The question was raised but not settled in the case of *Saunders v. Smith*, (e) the decision in that case against the proprietor of the original reports proceeding on the ground of his acquiescence in the labours of the

(a) Amb. 402.

(b) *Ib.* 405.

(c) 6 Sim. 298.

(d) 4 Esp. 169.

(e) 3 M. & Cr. 711.

defendant. Lord Cottenham said: (a) "In this case, I find the publication complained of to be of a character which, whether it be or be not an infringement of the copyright of the plaintiffs, is a course of proceeding which has been pretty largely admitted, and pretty generally adopted. Several cases occurred to me, and several were mentioned to me at the bar, in which a gentleman at the bar, desirous of publishing a work upon a particular subject, has collected the cases upon that subject, and has taken those cases, generally speaking, *verbatim* from reports which are covered by copyright. No instance has been represented to me in which those entitled to the copyright have interfered; no judgment, therefore, has been pronounced upon that subject. I am not stating whether the owner of the copyright is entitled to interfere in such a case, or whether that use of published reports is or is not to be permitted. That is a question of legal right, upon which I find, at present, no reason for coming to an adjudication. But in considering whether I am to exercise an equitable jurisdiction in such a case, before the legal right has been established, it is very important to observe that for many years such a course as I have stated has been pretty generally adopted; more particularly when I find that these plaintiffs have themselves acquiesced in a similar course of proceeding."

If the Courts of Common Law apply to such a case as this the test laid down by Lord Ellenborough in *Oary v. Kearsley*, (b) there is little doubt that it would be held to be no piracy of the original work. The leading case certainly does not bear a relation of greater importance to the notes annexed to it, which embody the decisions in a vast number of subsequent cases, than an essay of Paley would to the body of notes which anyone could appropriately append to it. It is like a motto or text for a long discourse, and is frequently of little value as an exposition of the actual state of the law on the subject, owing to the modifications and limitations which the doctrines contained in it have undergone from subsequent decisions or Acts of Parliament.

The quantity as well as the character of the critical notes added to the work of another is an important element in determining the question of *bona fides*. Thus, where a book of selections of poetry contained 790 pages, of which thirty-four were taken up with a general disquisition upon the nature of the poetry of the nineteenth century, and all the rest consisted of extracts, without any notes appended, from the works of different poets, some of their poems being

(a) *Ib.* 728.(b) *Ante*, p. 186.

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given entire, Vice-Chancellor Shadwell considered that the book could in no sense be said to be a book of criticism; and an injunction was granted to restrain its publication at the suit of Mr. Campbell, one of the poets from whose writings large extracts had been made. (a) "If," said the Vice-Chancellor, "there were critical notes appended to each separate passage, or to several of the passages in succession, which might illustrate them and show from whence Mr. Campbell had borrowed an idea, or what idea he had communicated to others, I could understand that to be a fair criticism. But there is first of all a general essay, then there follows a mass of pirated matter, which in fact constitutes the value of the volume." A similar doctrine was laid down in the prior case of *Tonson v. Walker*. (b)

Addition of
plates.

The addition of plates to the copyright letter-press of another would not, according to Sir L. Kenyon, M.R., (c) constitute a defence to a charge of pirating the letter-press; the mere act of embellishing could not divest the right of the owner in the text.

Abridgments.

The writers of abridgments have in general been favourably regarded by the courts of law and equity. (d)

(a) *Campbell v. Scott* (11 Sim. 31).

(b) 3 Swanst. 672.

(c) *Carnan v. Bowles* (2 Dr. C. C. 85).

(d) The present Lord Chancellor is an exception. In *Tinsley v. Lavy* (11 W. R. 877; 1 H. & M. 747) he said "He must confess that he did not agree in the reasons for upholding such a work given by some learned judges, viz.: that an abridger was a benefactor. He should have himself regarded him rather as a sort of jackall to the public, to point out the beauties of authors." An American judge (Leavitt, J.) has also expressed himself unfavourably to the rights of an abridger, thinking the same rule of decision should be applied to a copyright as to a patent for a machine. "The construction," he says, "of any other machine which acts upon the same principle, however its structure may be varied, is an infringement on the patent. The second machine may be recommended by its simplicity and cheapness; still, if it act upon the same principle of the one first patented, the patent is violated. Now an abridgment, if fairly made, contains the principle of the original work, and this constitutes its value. Why, then, in reason and justice, should not the same principle be applied in a case of copyright as in that of a patented machine? With the assent of the patentee, a machine acting upon the same principle, but of less expensive structure than the one patented, may be built; and so a book may be abridged by the author, or with his consent, should a cheaper work be wanted by the public. This, in my judgment, is the ground on which the rights of the author should be considered. But a contrary doctrine has been long established in England under the statute of Anne, which in this respect is similar to our own statute; and in this country the same doctrine has prevailed. I am therefore bound by precedent; and I yield to it in this instance more as a principle of law than a rule of reason or justice." (*Story's Executors v. Holcombe*, 4 M'Clean, 308, 309.) And see some strong observations to the same effect in Mr. Curtis's treatise on Copyright, pp. 272, 273.

“Abridgments,” said Lord Hardwicke, (a) “may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shown in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of an author.” And, said the same judge in the case of *Tonson v. Walker*, (b) “A fair abridgment would be entitled to protection, but this is a mere evasion.”

In a case with respect to an abridgment by a Mr. Newbery of Dr. Hawkesworth's *Voyages*, Lord Chancellor Apsley, assisted by Mr. Justice Blackstone, was of opinion 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 the understanding, employed in carrying a large 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. 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 in the original, and in a more agreeable and useful manner.” His lordship said that he and Mr. Justice Blackstone, after consulting together for some hours, were agreed “that an abridgment, when 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.” The bill praying for an injunction in that case was dismissed. (c)

But though a *bonâ fide* abridgment of another work is no infringement of the copyright in that work, a merely colourable abridgment is. “Where books are colourably shortened only,” said Lord Hardwicke, “they are undoubtedly within the meaning of the Act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgment.” (d) In the case in which this dictum is expressed his lordship considered a book published by the defendant entitled “*Modern Crown Law*” not to be a *bonâ fide* but a mere colourable abridgment of Sir Matthew Hale's “*Pleas of the Crown*,” with the omission of some repealed statutes, and a translation of the Latin and French quotations.

(a) *Gyles v. Wilcox* (2 Atk. 143).

(b) 3 Swanst. 681. See also *Bell v. Walker* (1 Br. C. C. 451).

(c) *Lofft's Rep.* 775.

(d) *Gyles v. Wilcox* (2 Atk. 142).

A mere selection or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not, says Justice Story, be held to be a *bonâ fide* 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 original work." (a)

According to another American judge, (Leavitt, J.), the abridgment must not only contain the arrangement of the book abridged; the ideas must also be taken from its pages: it must be in good faith an abridgment, not a treatise interlarded with citations: to copy certain passages from a book, omitting others, is in no just sense an abridgment: the judgment is not exercised in condensing the views of the author; the language is copied, not condensed. (b) "Between a compilation and an abridgment," said this learned judge, "there is a clear distinction; and yet it does not seem to have been drawn in any opinion cited. A compilation consists of selected extracts from different authors: an abridgment is a condensation of the views of the author. The former cannot be extended so as to convey the same knowledge as the original work: the latter contains an epitome of the work abridged, and consequently conveys substantially the same knowledge. The former cannot adopt the arrangement of the works cited; the latter must adopt the arrangement of the work abridged. The former infringes the copyright, if matter transcribed, when published, shall impair the value of the original book: a fair abridgment, though it may injure the original, is lawful." (c)

The case in which the preceding opinion was expressed was one in which the plaintiff's complained of an infringement of the copyright in Judge Story's "Commentaries on Equity Jurisprudence," the defence being that the work complained of (an "Introduction to Equity") was a *bonâ fide* abridgment of the Commentaries. It appeared that the chapters and the subjects were the same in both books; the former book contained 1856 octavo pages, including notes, the latter 348 octavo pages, including notes; a page in the latter contained a little more than one in the former: reduced to the same sized page, the ratio in the amount of matter in the latter book to that in the former was about two to nine. In

(a) *Folsom v. Marsh* (2 St. Rep. 107).

(b) *Story's Executors v. Holcombe* (4 M'Clean, 311).

(c) *Ib.* 314.

the entire work of Story there were 226 pages, constituting nearly an eighth part, on which there was some matter which had been extracted in the same language, or very nearly so, into the defendant's book, this matter comprising 879 lines, or about twenty-four pages of his book, and thirty pages of Story, which made one fifteenth part of the defendant's book and one-sixtieth of Story; this matter being found in scattered paragraphs in the first third of the defendant's book: all the other portions of Judge Story's book were abridged without any trans.ription of his common language, the part so abridged comprising two-thirds of the defendant's book. The court granted an injunction as to the first 100 pages of the defendant's work, and thus stated the grounds of its decision:

"What is the character of the work complained of? Upon its title page it does not purport to be an abridgment, but 'An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries;' and in the preface the author says, 'It is not intended to supply the place of the Commentaries with any class of readers, but to serve simply as an introduction, a companion, and a supplement to their study. The text is substantially an abridgment of that work, &c.;' . . . but he also says that 'he has felt at liberty to make very considerable alterations and additions.' Alterations of the original work, and additions to the text, are not appropriate to an abridgment. In saying, therefore, that 'the text is substantially an abridgment,' Mr Holcombe could have meant nothing more than that, in writing his book, he followed the arrangement of the Commentaries, extracting certain parts, condensing others, with 'very considerable alterations and additions' of his own. A supplement to the Commentaries, which Mr Holcombe says in some sense is the character of his work, may supply defects in the original, but it can in no sense be considered an abridgment. This remark seems to have been made in reference to the notes added by the author. It may not be essential to exclude extracts entirely from an abridgment, but in making extracts merely there is no condensation of the language of the author, and, consequently, there is no abridgment of it. Much looseness is found in the decisions upon this subject. Some of the judges would seem to consider that where a book is greatly reduced in the size, though made up principally of extracts, it is an abridgment. In a book of Reports, such as 'Bacon's Abridgments,' the language of the Court is necessarily adopted often to show the principle of the decision. But

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the same necessity does not exist, and the same licence cannot be exercised in abridging an elementary work. Nearly one half of the text, in the first hundred pages of Mr Holcombe's book, appears to have been extracted from Story. To class these extracts under the head of 'abridgments,' would seem to be a perversion of terms. Whatever else this part of Mr Holcombe's book may be called, it is not an abridgment. With greater propriety it may be called a compilation, as the extracts contained in it are taken from various authors. As a compilation, this part of the book must be considered an infringement of the right of the plaintiffs, by the copious extracts made from the Commentaries, and the classification of the subjects copied from them. Looking at the smallness of Mr Holcombe's book in comparison of that from which it was principally taken, one might suppose that the former was a short abridgment of the latter. But this comparison of size or number of pages affords no guide to a proper decision. The character of the work must depend upon its matter; and it would seem from the considerations stated, that the first third part of Mr Holcombe's book, including one hundred pages, cannot be justly and legally called an abridgment, as it does not possess the essential ingredients of such a work; and that, viewing it as a compilation, it is an infringement of the plaintiff's right, on the ground that the plan of the Commentaries is copied; and also for the reason that the extracts extend beyond the proper limit for such a work. The remaining two-thirds of the book may be comprehended under a liberal construction of an abridgment. The matter is greatly condensed by Mr Holcombe, in his own language, and in a manner highly creditable to him. The prayer of the bill as to the first hundred pages is granted."

The publication of a "Life of Washington," in two volume, containing 866 pages, was restrained by Story, J., as an invasion of the copyright in "Sparks's Life and Writings of Washington," a work in twelve volumes; 353 pages of the former work being copied from the latter, 64 pages being official letters, and 255 being private letters of Washington, first published by Sparks under a contract with the owners of the original papers of Washington.(a)

Abridgment of
works of fiction.

Where the defendant published in a number of *Parley's Illuminated Library* (a weekly publication) a portion of a story entitled "A Christmas Ghost Story, re-originated from the original by Charles Dickens, Esq., and analytically

(a) *Folsom v. Marsh* (2 St. 100).

condensed expressly for this work," which, with the exception of a few colourable alterations, was in all respects similar to the "Christmas Carol" of Charles Dickens, this was held to be a clear invasion of Mr. Dickens's copyright in that work. (a)

It was contended on behalf of the defendant, on a motion to dissolve an injunction which had been granted, that his work was neither a colourable imitation nor a piracy of the other, but a fair abridgment, the result of the defendant's mental labour, and falling within the principle of *Dodsley v. Kinnersley*; (b) and it was urged that so far from any attempt being made to induce the public to believe they were buying for one penny what the eminent author of the "Christmas Carol" had written and published for five shillings, the defendant in his work had a dedication of his labours to Mr. Dickens himself. Knight Bruce, V.C., said, "The plaintiff appears to be the author and to own the copyright of a work of fiction, a novel, the copyright of which has not been contended to be not entitled to protection. The defendant has printed and published a novel of which fable, persons, names and characters of persons, the age, time, country, and scene are exactly the same; the style of language in which the story is told is in many instances identical, in all similar, except when certain alterations by way of extension or substitution have been made, as to which, whether they improve or do not improve upon the original composition, it is not necessary for me to express my opinion. Now this has been said to be an abridgment, and as an abridgment to be protected. I am not aware that one man has the right to abridge the works 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. The expressions of Lord Eldon, applied to a subject of copyright very different from the present, but still applied to the subject of copyright, are these: 'The question upon the whole is whether this is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work.' (c) And I agree that there may be such an use of another man's publication as, involving the exercise of a new mental operation, may fairly and legitimately involve it. It does not appear to me that there is anything in the present case which

(a) *Dickens v. Lee* (8 Jur. 183). (b) 4 Esp. 169. *Ante*, p. 186.
(c) 17 Ves. 426.

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brings that which the defendant has done within a legitimate use of the plaintiff's publication, within the terms 'fair exercise of a mental operation,' or within the expression of 'deserving the character of an original work.' I think it, therefore, entirely excluded from Lord Eldon's definition, if as a definition Lord Eldon meant it. It appears to me to be a mere borrowing with alterations and departures merely colourable, and when it is said that the difference of price and other circumstances of difference belonging to it are such as to render the invasion of no practicable mischief to the plaintiff, the person whose property has been taken is entitled to judge for himself how far he will consider that abstraction of his property to be prejudicial or not prejudicial. It is a valuable property, and he is entitled to be protected from the unauthorised use of it by another. I do not, however, as at present advised, at all accede to the argument that, whatever may be the relative merit of the two publications, whatever their relative prices, the publication and circulation of the cheaper may not in a pecuniary point of view, at least, if not so otherwise, materially prejudice the plaintiff. There are various points of view into which it is unnecessary for me to enter in which such a case may be put, in which material damage may arise from the subject, considered merely and solely as a question of property, which is the only point of view in which it is my duty or business to consider it."

Digests of legal decisions.

Somewhat in the nature of abridgments are those digests of legal decisions which are published from time to time. They give, under headings arranged alphabetically, a summary of the legal points decided in each case referred to, and there is no doubt that such an arrangement may be the product of skill and mental labour on the part of the compiler. If so, the general rule applies, and the compiler is guilty of no infringement of the copyright in the published reports of the cases digested, and is entitled to copyright in his own work.

But if the compiler's labour is purely mechanical, and he only arranges in alphabetical order the marginal or head notes of cases contained in published reports, the Court of Common Pleas has held that he is guilty of infringing the copyright in the published reports. In *Sweet v. Benning*, (a) which was such a case, Jervis, C.J., said: "I think the defendants in this case have been guilty of an abuse of the fair right of extract which the law allows for the purpose of comment, criticism, or illustration; and that this is in reality an unauthorised publication of a por-

(a) 16 C. B. 484.

tion of the plaintiff's work, without justifiable excuse. The plaintiff's publication, *The Jurist*, or that portion of it from which these extracts are made, consists of double reports in each case—a detailed report of the facts of the case, with the arguments and the judgment of the court, and an abstract in the shape of what is commonly called a side or marginal note, which professes to state the principle of law laid down in the case, if any such there be, or a summary statement of the facts and the decision of the court thereon. In truth, they are two reports, a short one and a long one. The gentleman who has compiled *The Monthly Digest* has taken the short reports *verbatim*. If the law allows him to do that, why should he not also be allowed to take the fuller report? And if he might take either the one or the other, why should he not take both? The question is whether a man can acquire a right to avail himself in this way of the labours of another, merely because he arranges the matter under heads and subdivisions, so as to form with other matter of the same sort, derived from other sources, what is called an analytical digest? I am of opinion that he cannot. A digest, undoubtedly, may be made from the published reports without necessarily subjecting the compiler to a charge of piracy: for instance, where the party applies the exertion and skill of his own brain in extracting the principle or the substance of the decisions before him, dressing it up in his own language so as to produce an original work. But here there is no thought or skill brought to bear upon the work that is complained of; it is a mere mechanical stringing together of marginal or side notes which the labour and intelligence of the authors have fashioned ready to the compiler's hand." (a) Cresswell and Crowder, JJ., took the same view as the Chief Justice, but the latter somewhat doubtingly. Maule, J., dissented from the judgment of the other members of the court, being of opinion that the defendant's work was different in its object and result from the plaintiff's reports, and would be a very imperfect substitute for them. "The object of a digest," he said, "is to afford facilities for finding out cases that are inserted in the reports without buying the reports themselves *in extenso*. The effect may be to induce many persons to abstain from purchasing the reports, relying upon the means of access to public libraries and other institutions for the fuller and more perfect information, when they have occasion for it. But that, I think, is no argument in favour of this being a piracy: rather the contrary, because it shows

(a) See also *Butterworth v. Robinson* (5 Ves. 709).

that the defendants' work is useful only for a different purpose from that of the plaintiffs, and is not, and never was intended as, a substitute for it. . . . By far the larger portion of the matter distributed is, as against the plaintiffs, the defendants' own property; and the method of arrangement is entirely their own. That being the state of things, the defendants have, as it seems to me, made and published a book altogether different from the plaintiffs' work, intending to answer, and really effecting, a totally different purpose. Therefore, I conceive that they have not, in a sense that is unlawful, copied any part of the plaintiffs' work, but that they have done nothing more than is done, and lawfully done, by one who, for the purpose of supporting and fortifying his own argument, avails himself of the work of another to the extent to which it is made *publici juris* for the purpose of being read and extracted from to a fair and *bonâ fide* and legitimate extent."

Prints in a book.

Prints not published separately, but forming part of a book, were held by Sir James Parker, V.C., in *Bogue v. Houlston*(^a) to be within the protection afforded to books by 5 & 6 Vict. c. 45, and he granted an injunction to restrain the publication of those prints by the defendant, on the plaintiff's undertaking to bring an action to try the right at law.

"It appears to me," said the Vice-Chancellor, "that a book must include every part of the book; it must include every print, design, or engraving which forms part of the book as well as the letter-press therein, which is another part of it. Prints published separately do not appear to have been within the Act by that express definition [the definition of a 'book' given in 5 & 6 Vict. c. 45, s. 2]. But the case now before the court is not the case of separately published prints, but the case of designs forming part of a book." In this case the plaintiff's publication consisted of letter-press and woodcuts, printed on the same large sheets of paper, the woodcuts appearing as separate leaves when the sheets were folded into their quarto size.

Piracy of name of work.

The name or title of a work may be considered as a kind of trade mark which no other person than the proprietor of the work can use so as to damage him in respect of his property in it.(^b) Cases of this kind depend rather upon the question whether the defendant has a right to sell as his own that in which another has acquired a description of property, than on the question of copyright.(^c)

(a) *Bogue v. Houlston* (5 De G. & Sm. 267).

(b) See *Seely v. Fisher* (11 Sm. 582); *Spottiswoode v. Clark* (2 Ph. 154). (c) *Per Wood*, V.C., in *Chappell v. Davidson* (2 K. & J. 126).

The proprietor of a magazine called *The Wonderful Magazine*, obtained an injunction to restrain the publication of a magazine under a similar title, described as a *new series improved*. The defendant was publishing "a number of a work as a continuation of (a) the plaintiff's old work; taking the merit, which had been acquired by that, to his own; and that he was not permitted to do." (b)

The proprietor of a newspaper called *The John Bull* having incorporated it with another newspaper called *The Britannia*, and issued the publication under the title of *The John Bull and Britannia*, was held entitled to an injunction to restrain the publication by the printer and publisher of *The Britannia* of a publication called the *True Britannia*, in imitation of and as a continuation of *The Britannia*. (c) The injunction in this case also restrained the defendant from soliciting custom in the name of the plaintiff's trade and business as for *The Britannia* newspaper.

The proprietors of *Bell's Life in London* obtained an injunction to restrain the publication of a newspaper under the title of the *Penny Bell's Life*. The possibility of mistaking the one publication for the other (the plaintiffs having an exclusive right to the title) was considered sufficient by Sir John Stuart, V.C., to entitle the proprietors to the protection of the court. (d)

The case of *Ingram v. Stiff*, (e) went very far in this direction. There the proprietor of a weekly penny publication, called *The London Journal*—a publication which was not a newspaper, but contained tales and romances, illustrated with wood engravings—sold his interest therein to the plaintiff, and covenanted with him not to publish, either alone or in partnership with anybody else, any weekly publication of a nature similar to *The London Journal*. An injunction to restrain him from publishing a *daily penny newspaper*, called *The Daily London Journal* was granted, on the plaintiff undertaking to abide by any order the court might make as to damages, and to bring an action at law within a week.

A song consisting of original words, adapted to an old American air by the plaintiffs, was published by them under the title of " 'Minnie;' sung by Madame Anna Thillon and Miss Dolby, at Monsieur Jullien's Concerts. Written by George Linley. London: Jullien and Co., 214, Regent-

(a) *Hogg v. Kirby* (8 Ves. 215).

(b) *Per Lord Eldon in Longman v. Winchester* (16 Ves. 271).

(c) *Prowett v. Mortimer* (2 Jur. N. S. 414; 4 W. R. 519).

(d) *Clement v. Maddick* (1 Giff. 98).

(e) 5 Jur. N. S. 947.

street, and 45, King-street," the title-page containing also a portrait of Madame Anna Thillon. The defendants having subsequently published a song to the same air, on the title-page being printed the words "Musical Bouquet. 'Minnie Dale;' sung at Jullien's Concerts (and always encored) by Madame Anna Thillon. The music composed by H. S. Thompson. London: Musical Bouquet Office, No. 192, High Holborn, and J. Allen, 20, Warwick-lane, Paternoster-row," the title-page containing also a portrait of Madame Anna Thillon, which was a copy with some slight alterations, but reduced in size, of the portrait on the title-page of the plaintiffs' song, Vice-Chancellor Wood granted an injunction to restrain the defendants from publishing their song, "Minnie Dale," or any copy or copies thereof, or any other publication containing a colourable imitation of the name, title, or title-page of the plaintiffs' song. (a) "The defendants," said the Vice-Chancellor, "do not profess that their song is by the same composer or the same publisher. But the first thing anybody proposing to purchase the song would say would probably be, 'I want "Minnie," sung by Madame Thillon;' and that name and description, it seems to me, the defendants have no right to whatever. The plaintiffs' publication is the identical song which that lady did sing; it was composed for the plaintiffs, it is called by the name of 'Minnie,' and they had a perfect right to entitle it 'Minnie,' as a song sung by that lady; and then the name, having acquired a celebrity as the name of a song sung by her, the defendants advertise another song by the same name as sung by this lady, which cannot be meant merely to refer to the melody as sung by her. No person who heard 'Scots wha hae,' sung by Braham, would ask for 'Hey Tuitte Taitte,' the name of the old melody. Therefore, it seems to me that there was a plain and palpable purpose in the assumption of the name. The original song, as sung in America, was 'Lillie Dale,' and the defendants have changed it into 'Minnie Dale, sung by Madame Thillon;' and such a description can be for no other purpose than to appropriate the property of the plaintiffs."

An injunction was also granted to restrain another defendant from publishing a song consisting of different words to the same air, with a title page on which was a different portrait of Madame Anna Thillon copied from an American publication, and the words "*Minnie, dear Minnie. Madame Anna Thillon.*" This Vice-Chancellor Wood considered an obvious attempt to pass off the defendant's publication

(a) *Chappell v. Davidson* (2 K. & J. 123).

for that of the plaintiff. It was urged on the part of the defendant in this case that he had cautioned his shop-boys and others to say that it was not the song of the plaintiffs; but the Vice-Chancellor considered that that afforded no defence, as there was no security that retail dealers would sell the song with the same caution to the public. (a)

The case of *Lord Byron v. Johnston* (b) stands on a peculiar footing. There an injunction was granted by Sir Thomas Plumer, V.C., and continued by Lord Eldon, restraining the defendant from publishing a poem as the work of Lord Byron, who was then abroad, on an affidavit of Lord Byron's agents of circumstances rendering it highly probable that it was not his work, and the defendant declining to swear that he believed it was.

Copyright may also be infringed by the importation, for sale or hire, into any part of the British dominions of copies printed abroad. This is now prohibited by statute under a penalty of 10*l.* for every offence, and double the value of every copy imported, besides the forfeiture of such copy. Importation of pirated copies.

5 & 6 Vict. c. 45, s. 17, enacts, "that after the passing of this Act it shall not be lawful for any person, not being the proprietor of the copyright, or some person authorised by him, to import into any part of the United Kingdom, or into any other part of the British dominions, for sale or hire, any printed book first composed or written or printed and published in any part of the said United Kingdom, wherein there shall be copyright, and reprinted in any country or place whatsoever out of the British dominions; and if any person, not being such proprietor or person authorised as aforesaid, shall import or bring, or cause to be imported or brought, for sale or hire, any such printed book into any part of the British dominions, contrary to the true intent and meaning of this Act, or shall knowingly sell, publish, or expose to sale or let to hire, or have in his possession for sale or hire, any such book, then every such book shall be forfeited, and shall be seized by any officer of Customs or Excise, and the same shall be destroyed by such officer; and every person so offending, being duly convicted thereof before two justices of the peace for the county or place in which such book shall be found, shall also for every such offence forfeit the sum of ten pounds, and double the value of every copy of such book which he shall so import or cause to be imported into any part of the British dominions, or shall knowingly sell, publish, or expose to sale or let to hire, or shall cause to be sold, published, or

(a) 2 K. & J. 123. Cf. *Sykes v. Sykes* (3 B. & C. 541). (b) 2 Meriv. 29.

PART I.
CHAPTER XVI.

Lists of prohibited books.

exposed to sale or let to hire; or shall have in his possession for sale or hire, contrary to the true intent and meaning of this Act, five pounds to the use of such officer of Customs or Excise, and the remainder of the penalty to the use of the proprietor of the copyright in such book.”

Printed lists of such prohibited books are to be put up at the different ports in Her Majesty's dominions. Sect. 46 of 16 & 17 Vict. c. 107, enacts that “the Commissioners of Customs shall cause to be made, and to be publicly exposed at the several ports in the United Kingdom and in Her Majesty's possessions abroad, printed lists of all books wherein the copyright shall be subsisting, and as to which the proprietor of such copyright, or his agent, shall have given notice in writing to the said commissioners that such copyright exists, stating in such notice when such copyright expires.” If notice is not given, the importation will not be prohibited.

By sect. 160 of the same Act it is provided that “no such books shall be prohibited to be imported as aforesaid, unless the proprietor of such copyright, or his agent, shall have given notice in writing to the Commissioners of Customs that such copyright subsists, and in such notice shall have stated when the copyright will expire.” But the concluding portion of the section enacts that nothing therein contained “shall be taken to prevent Her Majesty from exercising the powers vested in her by the 10 & 11 Vict. c. 95, intituled—*An Act to amend the law relating to the protection in the colonies of works entitled to copyright in the United Kingdom, to suspend in certain cases such prohibition.*”^(a)

Remedy for wrongful entry in list of prohibited books.

18 & 19 Vict. c. 96, s. 39, gives a remedy, by application to a judge at chambers, for any wrongful entry of a book in the aforesaid lists of prohibited books. It enacts that “if any person shall have cause to complain of the insertion of any book” in those lists “it shall be lawful for any judge at chambers, on the application of the person so complaining, to issue a summons calling upon the person upon whose notice such book shall have been so inserted to appear before such judge at a time to be appointed in such summons, to show cause why such book shall not be expunged from such lists, and such judge shall at the time so appointed proceed to hear and determine upon the matter of such summons, and make his order thereon in writing, and upon service of such order, or a certified copy thereof, upon the Commissioners of Customs, or their secretary for the time being, the said com-

(a) Similar provisions were contained in the repealed Act, 5 & 6 Vict. c. 47.

missioners shall expunge such book from the list, or retain the same therein, according to the tenor of such order; and in case such book shall be expunged from such lists, the same shall not be deemed to be prohibited under the table of prohibitions and restrictions inwards contained in sect. 44 of 'The Customs Consolidation Act, 1853.'"

"If at the time appointed in any such summons the person so summoned shall not appear before such judge, then upon proof by affidavit that such summons or a true copy thereof has been personally served upon or left at the last known or usual place of abode of the person so summoned, or, in case the person to whom such summons was directed and his place of abode cannot be found, that due diligence has been used to ascertain the same, such judge shall be at liberty to proceed *ex parte* to hear and determine the matter." (a)

If either party is dissatisfied with the order made by the judge, he "may apply to the superior court of which such judge is a member, to review such order, and make such further order thereon as such court may see fit." (b)

Sect. 40 of the same Act requires, as a preliminary, a declaration of the truth of the contents of the notice. It enacts that—"No book shall be inserted in any list published by the Commissioners of Customs under the 46th and 160th sections of the 'The Customs Consolidation Act, 1853,' until the person giving the notice thereby required shall have made and subscribed a declaration before the collector of the customs or any justice of the peace, at some port or place in the United Kingdom, that the contents of such notice are true; Provided always that nothing in this Act contained shall prevent, prejudice, or affect any proceedings at law or in equity which any party, aggrieved by reason of the insertion of any book in any such list, in pursuance of any such notice, or upon the removal of any book from such list, pursuant to any such order as aforesaid, or by reason of any declaration to be made under the authority of this Act being false, might or would otherwise have against any party giving such notice, or obtaining any such order, or making such false declaration as aforesaid."

Where a person simply sells pirated copies of the work of another, Wilde, C.J., held, in *Leuder v. Strange*, (c) that he is not liable to an action unless he has acted with guilty knowledge. The Chief Justice was of opinion in that case that, although sect. 15 of 5 & 6 Vict. c. 45, presumed guilty knowledge in some cases, it did not presume

(a) 18 & 19 Vict. c. 96, s. 39. (b) *Ib.* (c) 2 Car. & K. 1010.

Sale of pirated copies.

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it from the mere fact of selling printed works; and as the declaration in the case before him did not allege guilty knowledge on the part of the defendant, if there were not evidence of it, his lordship ruled that the jury must, as to the publishing, find for the defendant. (a)

Where the copyright has been assigned, it is not an infringement of the assignee's copyright for the assignor to sell copies of the work which have been printed before the assignment was made. (b)

Periodicals.

Copyright in periodical publications may be infringed in the same manner as in the case of other literary works. But this species of property may also be infringed in a manner peculiar to itself. We have seen already (c) that even when the copyright in contributions to encyclopædias, reviews, magazines, and other periodicals is vested in the proprietors of such encyclopædias, &c., the right of publishing his contribution in a separate form reverts to the author after twenty-eight years from the first publication, and the proprietor cannot, during the term of his own copyright, publish it in a separate form without the previous consent of the author or his assigns. The author has a modified property in possession, and the sole property in reversion.

It is, then, an infringement of the author's property to publish, without his consent, any of his contributions in a separate form; and such separate publication will be restrained. (d)

A republication in supplemental numbers of a periodical of a selection of various tales previously published in that periodical, is a separate publication within the meaning of sect. 18 of 5 & 6 Vict. c. 45, and such republication will be restrained. (e)

Musical compositions.

Musical compositions are "books" within the meaning of the Copyright Acts, and the copyright in them may be infringed in manner similar to other works.

Although, as we have seen, the score of an opera or piece of concerted music is so far an independent work as to

(a) In the case of paintings, drawings, and photographs, the stat. 25 & 26 Vict. c. 68, states expressly that when a person sells copies not made by himself but by others, he must do so *knowingly* in order to render himself liable to the penalty. See sect. 6 of the Act, and *per* Blackburn, J., in *Ex parte Beal* (9 B. & S. 400; L. Rep. 3 Q. B. 387; 18 L. T. N. S. 285; 37 L. J. 161, Q. B.) *Ante*, p. 121.

(b) *Taylor v. Pillow* (L. Rep. 7 Eq. 418). (c) *Ante*, pp. 98, 99.

(d) See the cases of the *Bishop of Hereford v. Griffin* (16 Sim. 190); *Mayhew v. Maxwell* (1 J. & H. 312); *Murray v. Maxwell* (3 L. T. N. S. 466); *Stewart v. Black* (9 Scotch Ses. Cas. 1026); *Fullarton v. M'Phun* (13 Scotch Ses. Cas. 219).

(e) *Smith v. Johnson* (4 Giff. 632; 6 L. T. N. S. 437; 33 L. J. 137, Ch.).

require to be registered in the name of the compiler of the score, it would seem, although the point has not been expressly decided, that no one may compile and publish such a score without the consent of the composer of the opera or piece. (a)

Piracy may be of part of an air as well as of the whole, says Lord Lyndhurst in *D'Almaine v. Boosey*. (b)

The same learned judge held in that case that to publish in the form of quadrilles and waltzes the airs of an opera, of which there exists an exclusive copyright, is an act of piracy.

“It is said,” observed his Lordship, in giving judgment, “that the present publication is adapted for dancing only, and that some degree of art is needed for the purpose of so adapting it; and that but a small part of the merit belongs to the original composer. That is a nice question. It is a nice question what shall be deemed such a modification of an original work, as shall absorb the merit of the original in the new composition. No doubt such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are in their nature original. Their compiler intends to make of them a new use; not that which the author proposed to make. Digests are of great use to practical men, though not so, comparatively speaking, to students. The same may be said of an abridgment of any study. It will be said, one author may treat the same subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite distinct from that of others who preceded him; but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the author, and which may in such case be the subject of piracy; and you commit a piracy if, by taking not a single bar, but several, you incorporate in the new work that in which the whole meritorious part of the invention consists.” His lordship, after referring to a case at *Nisi Prius*, in which Sir George Smart, who was a witness, said that three or four bars might constitute a phrase though one would not, proceeded: “Now it appears to me that if you take from the composition of an author all those bars consecutively which form the entire air or melody, without any material alteration, it is a piracy; though, on the other hand, you might take them, in a different

(a) See the opinions of Cockburn, C.J., and Blackburn, J., in *Wood v. Boosey* (L. Rep. 2 Q. B. 350, 354; 7 B. & S. 869; 15 L. T. N. S. 530; 36 L. J. 103, Q. B.) and Kelly, C.B., on appeal (L. Rep. 3 Q. B. 223; 9 B. & S. 175; 37 L. J. 84, Q. B.; 18 L. T. N. S. 105, ante, p. 118).

(b) 1 Y. & C. 301.

order or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognised by the ear. The adding variations makes no difference in the principle."

ENGRAVINGS AND LITHOGRAPHS.

17 Geo. 3, c. 57.

The statute 17 Geo. 3, c. 57, forbids every "engraver, etcher, printseller, or other person," during the term of statutory copyright in engravings, "to engrave, etch, or work, or cause or procure to be engraved, etched or worked, in mezzotinto or chiaro oscuro, or otherwise, or in any other manner copy in the whole or in part, by varying, adding to, or diminishing from the main design," or to "print, reprint, or import for sale, or publish, sell, or otherwise dispose of, or cause or procure to be published, sold, or otherwise disposed of any copy or copies of any historical print or prints, or any print or prints of any portrait, conversation, landscape or architecture, map, chart, or plan, or any other print or prints whatsoever, which hath or have been, or shall be engraved, etched, drawn, or designed in any part of Great Britain, without the express consent of the proprietor or proprietors thereof first had and obtained in writing signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of and attested by two or more credible witnesses."

A person is guilty of piracy under this section who sells a piratical copy, although he does not know it to be such. (a) The former part of the section applies to persons who actually make the copy, and who therefore must know that it is a copy; but the latter branch applies to all persons who import for sale or sell any piratical copy. (b)

(a) *West v. Francis* (5 B. & Ald. 737).

(b) *Ib.* Per Bayley, J., who points out that the Act omits the words "knowing the same to be so reprinted," which were contained in 8 Geo. 2, c. 13.

Doubts having been entertained whether the provisions of that statute extended to lithographs and other impressions, sect. 14 of 15 Vict. c. 12, was passed for the purpose of declaring that the provisions of the former Act were intended to include prints taken by lithography or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely.

It has been decided that prints engraved and struck off abroad, but published here, are not protected from piracy by 17 Geo. 3. c. 57.(a) Sir L. Shadwell, V.C., said "The object of the legislature was to protect those works which were designed, engraved, etched, or worked in Great Britain, and not those which were designed, engraved, etched, or worked abroad, and only published in Great Britain."

In the case of prints first published abroad since the passing of the International Copyright Act (7 Vict. c. 12), sect. 19 of that Act provides that the inventor, designer, or engraver of them shall have no copyright therein otherwise than such (if any) as he may become entitled to under that Act.

The terms of 17 Geo. 3, c. 57, are very general, and prohibit the copying of a print in *any manner whatever*. And it is now finally settled that a picture or engraving may be pirated by taking photographic copies of it, or copies by any other process, mechanical or otherwise, whereby they may be indefinitely multiplied.

How piratical
copy may be
taken.

This was the opinion of the Court of Common Pleas in *Gambart v. Ball*.(b) Erle, C.J., in that case said, "The object of the statute to my mind was, not merely to prevent the reputation of the artist from being lessened in the eyes of the world, but to secure to him the commercial value of his property—to encourage the arts by securing to the artist a monopoly in the sale of an object of attraction. If that be the object of the statute, it is plain that a photographic copy may excite in the mind of the beholder the same pleasurable emotions as would be communicated by a copy of any other description: and I see no reason why these very wide and general words should not be construed according to their plain and ordinary meaning, and be held to apply to any mode of copying known at that time, and to such other modes of multiplying copies as the ingenuity of man may from time to time discover."(c)

The same question came again before the Court of Common Pleas in 1866, in the case of *Graves v. Ashford*, when a decision similar to that in the last case was pro-

(a) *Page v. Townsend* (5 Sim. 395).

(b) 14 C. B. N. S. 306; 32 L. J. 166, C. P. (c) 14 C. B. N. S. 317.

nounced. The defendants appealed to the Exchequer Chamber, and that court unanimously affirmed the decision of the Court of Common Pleas. Kelly, C.B., in delivering the judgment of the court, said, (a) "It is obvious that the Legislature could not, in providing for the protection of works of art, describe a piracy by means of a process not then within the knowledge of mankind. But it by no means follows that when words large enough to embrace it are used, the prohibition should not, as well as the protection, be extended to a subsequently discovered mode of reproducing and multiplying copies. It appears to us, therefore, that the argument derived from the 15 & 16 Vict. c. 12, and 25 & 26 Vict. c. 68, altogether fails; and that the effect of all the Acts taken together is, that any process, whether known at the time, or the result of subsequent invention or discovery, by which pictures or engravings may be imitated or copied, is within the mischief as well as within the express words which the Legislature has used. And we cannot help thinking that a more limited construction would be contrary to the whole spirit of the legislation on the subject, and productive of great injustice."

What is a copy.

A copy is defined by Bailey, J., in *West v. Francis* (b) to be "that which comes so near to the original as to give every person seeing it the idea created by the original."

Trifling variations are not material; (c) and in the case of photographs it makes no difference that the photograph is of smaller dimensions than the print. "It is not," said Erle, C.J., in *Gambart v. Ball*, (d) "the extent of the paper covered by the picture which conveys the pleasure to the mind. Thus, in the representation of 'The Horse Fair' [by Rosa Bonheur, one of the engravings in question in that case], we feel the same degree of pleasure in looking at the forms and attitudes of the beautiful animals there portrayed, whether we see them in the size in which they are drawn in the original picture, or in the reduced size of the engraving, or in the still more diminished form in which they appear in the photograph." And in *Moore v. Clarke*, (e) an action for pirating an engraving, it was held to have been a correct direction to the jury to consider whether the main design of the plaintiff's engraving had been copied, and whether the defendant's engraving was substantially a copy of the plaintiff's.

Publicly exhibiting a copy.

But where a person made and publicly exhibited for money a large painted dioramic copy of a copyright print,

(a) L. Rep. 2 C. P. 421; 16 L. T. N. S. 98; 38 L. J. 139, C. P.

(b) 5 B. & Ald. 743.

(c) 14 C. B. N. S. 317.

(d) *Ib.* 742, 743.

(e) 9 M. & W. 692.

this was held not to be within the mischief intended to be remedied by 17 Geo. 3, c. 57. "Exhibiting for profit," said the Vice-Chancellor (Shadwell), "is in no way analogous to selling a copy of the plaintiff's print, but is dealing with it in a very different manner. . . . It appears to me that 17 Geo. 3, c. 57, never was intended to apply to a case where there was no intention to print, sell, or publish, but to exhibit in a certain manner; and therefore I ought not to grant the injunction until the right has been established at law. Then with respect to the defendant representing his copy as the plaintiff's picture. It must be either better or worse; if it is better the plaintiff has the benefit of it; if worse, then the misrepresentation is only a sort of libel, and this court will not prevent the publication of a libel." (a)

The prints prohibited by the Acts to be engraved, etched, or sold, or otherwise disposed of, are prints struck off from engravings pirated from other engravings. Hence the sale of prints unlawfully struck off from the original plate does not amount to piracy. Thus where an engraver, being employed by the owner of certain drawings to engrave plates of those drawings, took off from the plates so engraved a number of proof impressions, which he kept for himself, and which on his bankruptcy were advertised by his assignees to be sold, it was held that an action for piracy would not lie against him or them. (b) It was contended in support of the action that the words "without the express consent of the proprietor or proprietors" in sect. 1 of 17 Geo. 3, c. 57, refer to all the antecedent clauses of that section, and so apply to the sale of copies. But the Court of King's Bench did not adopt this view. The court considered that the Acts of Parliament did not apply to prints taken from the original plate, but only to those taken from engravings which had been pirated from other engravings; only with respect to them did 8 Geo. 2, c. 13, and 7 Geo. 3, c. 38, impose a forfeiture, and 17 Geo. 3, c. 57, give an action on the case. "The injury complained of in this case," said Lord Tenterden, C.J., "required no Act of Parliament to put an end to it, for the engraver having contracted to engrave the plate, and to appropriate the prints taken from it to the use of another, an action at common law would lie against him for the breach of that contract;" (c) but an action under 17 Geo. 3, c. 59, would not lie.

Prints unlawfully struck off from original plate.

As to prints forming part of a book, see the case of *Bogue v. Houlston*, referred to *ante*, p. 196.

(a) *Martin v. Wright* (6 Sim. 297). See also *per Best, C. J.* (4 Bing. 245). (b) *Murray v. Heath* (1 Bar. & Ad. 804). (c) *Ib.* 811.

PART I.

CHAPTER XVI.

In what piracy
consists.

PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.

Piracy in the case of a painting, drawing, or photograph consists in the infringement of "the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing and the design thereof, or such photograph and the negative thereof *by any means and of any size.*"

Sect. 6 of 25 & 26 Vict. c. 68, enacts that "if the author of any painting, drawing, or photograph in which there shall be subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, any such work or the design thereof, or, knowing that any such repetition, copy, or other imitation has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be imported, sold, published, let to hire, distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding ten pounds; and all such repetitions, copies, and imitations made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright."

Acts forbidden
by 25 & 26 Vict.
c. 68, s. 7.

Sect. 7 of the Act forbids, under a penalty, the following acts:

(1.) Fraudulently signing or otherwise affixing, or fraudulently causing to be signed or otherwise affixed, to or upon any painting, drawing, or photograph, or the negative thereof, any name, initials, or monogram: (a)

(2.) Fraudulently selling, publishing, exhibiting, or disposing of or offering for sale, exhibition, or distribution, any painting, drawing, or photograph, or negative of a

(a) It was held in *Reg. v. Closs* (7 Cox Cr. Cas. 494; 27 L. J. 54, M. C.) that the putting of the name of a painter upon the copy of one of his pictures, in order that it may be passed off as the original, is not a forgery at common law; but such passing off of the copy of the picture as the original and obtaining money by means of such false representation, is a cheat at common law.

photograph, having thereon the name, initials, or monogram of a person who did not execute or make such work :

(3.) Fraudulently uttering, disposing of, or putting off, or causing to be uttered or disposed of, any copy or colourable imitation of any printing, drawing, or photograph, or negative of a photograph, whether there shall be subsisting copyright therein or not, as having been made or executed by the author or maker of the original work from which such copy or imitation shall have been taken :

(4.) Making or knowingly selling or publishing or offering for sale during the life of the author or maker without his consent any painting, drawing, or photograph made either before or after the passing of the Act, which the author or maker shall have sold, or of which he has parted with the possession, and in which any alteration has afterwards been made by any other person by addition or otherwise, or making or knowingly selling, or publishing, or offering for sale any copies of such work so altered as aforesaid, or any part thereof, as and for the unaltered work of such author or maker.

The section provides that "every offender under" it "shall, upon conviction, forfeit to the person aggrieved a sum not exceeding 10*l.*, or not exceeding double the full price, if any, at which all such copies, engravings, imitations, or altered works shall have been sold or offered for sale; and all such copies, engravings, imitations, or altered works shall be forfeited to the person, or the assigns or legal representatives of the person whose name, initials or monogram shall be so fraudulently signed or affixed thereto, or to whom such spurious or altered work shall be so fraudulently or falsely ascribed as aforesaid; provided always that the penalties imposed by this section shall not be incurred unless the person whose name, initials, or monogram shall be so fraudulently signed or affixed, or to whom such spurious or altered work shall be so fraudulently or falsely ascribed as aforesaid, shall have been living at or within twenty years next before the time when the offence may have been committed."

The Act also contains an absolute prohibition against the unauthorised importation of pirated works, made in any foreign state or in any part of the British dominions.^(a)

In *Ex parte Beal*,^(b) a doubt was suggested whether taking the words "the author of any painting, drawing, or photograph," *reddendo singula singulis*, they might

(a) Sect. 10. See the chapter on "Remedies for Infringement," *post*.

(b) 9 B. & S. 395; L. Rep. 3 Q. B. 387; 18 L. T. N. S. 285; 37 L. J. 161, Q. B.

not "mean where a painting is made which is the copy of another painting, a drawing which is the copy of another drawing, or a photograph which is the copy of another photograph;" but the Court, looking at the very extensive terms in which the copyright is given in sect. 1, on the infringement of which the penalty followed, considered it plain that the photograph of a painting, or the photograph of a drawing of a painting, or the photograph of a photograph, all equally come within the Act, and are infringements of the copyright.

Making an unauthorised photograph of the engraving of a picture is a photographing or copying the picture itself. If the design is copied, it is immaterial whether it is done directly from the original or indirectly through the medium of a copy. (a) It would be otherwise if the owner had parted with the right to multiply engravings. (b)

Separate penalty
for each copy
sold.

The penalty inflicted for selling, &c., "any repetition, copy, or imitation," is a separate penalty for every copy sold even where a number are sold at the same time. "Look at the nature of the thing," said Blackburn, J. "It would be a monstrous absurdity if a man might import a cargo of pirated works from France and 10*l.* be the utmost penalty that could be imposed. Such a state of the law would render it worth a man's while to do wrong. The Legislature, however, were dealing with an offence which they knew was likely to be committed in a wholesale way. If a man sells ten pirated copies at once that makes ten offences, as much as a man who utters ten bad shillings at one time is guilty of ten utterings of false coin." (c)

Sculpture,
models, and
busts.

The copyright in sculpture, models, and busts, may be infringed by making or importing, or causing to be made or imported, or exposed to sale, or otherwise disposed of, any pirated copy, or pirated cast of any subject within the Sculpture Copyright Acts, (d) whether such pirated copy, or pirated cast be produced by moulding or copying from, or imitating in any way any such subject, to the detriment, damage, or loss of the original or respective proprietor or proprietors of any such work so pirated. (e)

There are no decided cases on this kind of piracy.

RIGHT OF DRAMATIC AND MUSICAL REPRESENTATION.

Right of repre-
sentation and
performance of
dramatic and
musical compo-
sitions.

The nature and duration of the right (secured by 3 & 4 Will. 4, c. 15, extended by 5 & 6 Vict. c. 45) to the sole

(a) *Ex parte Beal* (9 B. & S. 395, 401). (b) *Ib.* (c) *Ib.*
(d) *Vide ante*, pp. 124-126. (e) 54 Geo. 3, c. 56, s. 3.

representation and performance of dramatic and musical compositions are explained, *ante* pp. 114-118.

Infringement of the right, in the case of dramas, consists in representing or causing to be represented, contrary to the intent of the Act or right of the author or his assignee, without the consent in writing of the author or other proprietor first had and obtained, at any place or places of dramatic entertainment within the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions, any production in which the right exists, or any part thereof.(a)

The right which may be infringed in the case of musical compositions, is "the sole liberty of representing or performing, or causing, or permitting to be represented or performed" any musical composition.(b)

It will be perceived that the words "at any place or places of dramatic entertainment" contained in 3 & 4 Will. 4, c. 15, are omitted from the enactment relating to musical compositions.(c) On this account Vice-Chancellor Shadwell, was of opinion, in *Russell v. Smith*,(d) that the authors of musical compositions were more extensively protected than the authors of dramatic pieces.

The consent in writing required by sect. 2 of 3 & 4 Will. 4, c. 15, need not be in the author's own handwriting; it may be given in that of an agent having due authority. Consent may be by agent.

Thus, where a society, called the Dramatic Authors' Society, allowed the dramas composed by its members to be represented by others, on the fulfilment of certain conditions, a written permission given by the secretary to the defendant "to play dramas belonging to the authors forming the Dramatic Authors' Society" was held sufficient to bind the plaintiff, a member of the society, and to disentitle him to recover penalties for the performance of certain of his dramas by the defendant.(e) The court pointed out that the Act requires only the "consent in writing of the author or proprietor," but does not say that the consent shall be written by the author, or signed by him, or indeed by anybody; and in the case before them there was a consent in writing, and they considered it that of the author, who, by remaining a member of the society, authorised the secretary to do what he had done.

(a) 3 & 4 Will. 4, c. 15, ss. 1, 2.

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

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

(d) 15 Sim. 187.

(e) *Morton v. Copeland* (16 C. B. 517; 24 L. J. C. P. 169).

The licence given by the secretary was held to apply to the dramas composed by members of the society after the date of the licence, as well as to those composed before.

A written introduction to a pantomime is, as we have already stated, within the protection of this Act.^(a)

It was made a question in *Russell v. Smith*^(b) whether the Acts of 3 & 4 Will. 4, c. 15, and 5 & 6 Vict. c. 45, prohibited the unauthorised performance of musical compositions if they were not dramatic in their nature, or performed at a place of dramatic entertainments; but the court did not find it necessary to decide the point, as they were of opinion that the musical composition in question in that case was of a dramatic nature. It was a song relating the burning of a ship at sea, and the escape of those on board, and describing their feelings in vehement language—sometimes expressing them in the supposed words of the suffering parties. The court held that it was dramatic. Sect. 2 of 5 & 6 Vict. c. 45, declares that “dramatic piece” within that Act includes “tragedy, comedy, play, opera, farce, or” any “other scenic, musical, or dramatic entertainment.” “These words,” said Lord Denman, C.J., “comprehend any piece which could be called dramatic in its widest sense; any piece which, on being presented by any performer to an audience, would produce the emotions which are the purpose of the regular drama, and which constitute the entertainment of the audience. They comprehend, therefore, the production in question. . . . The absence of scenes and appropriate dresses and a regular theatre has been urged for the defendant. But we should take away a part of the protection conferred on authors if we held that there could be no public representation without these accompaniments.”

Knowledge not
necessary to
piracy.

To establish the offence prohibited by these statutes it is not necessary to show or to aver in the declaration that the offender *knowingly* invaded the proprietor's right.

“The object of the registration,” said Wilde, C.J., in *Lee v. Simpson*,^(c) “was to protect authors against the piratical invasion of their rights. In the sense of having committed an *offence against the Act*, of having done a thing that is prohibited, the defendant is an offender. The plaintiff's rights do not depend upon the innocence or guilt of the defendant: . . . the allegation and proof of a *scienter* were not necessary to entitle the plaintiff to such protection. The statute would altogether fail to effect its object if it were necessary

(a) *Lee v. Simpson* (3 C. B. 871).

(b) 12 Q. B. 217.

(c) 3 C. B. 883.

to show that the defendant had a knowledge of the plaintiff's right of property."

The answer to the question, What is a place of dramatic entertainment within the statutes 3 & 4 Will. 4, c. 15, and 5 & 6 Vict. c. 45? is given by the Court of King's Bench in *Russell v. Smith*.^(a) Any place in which a piece of a dramatic character is represented is, for the time being, a place of dramatic entertainment within the meaning of those statutes. "The use for the time in question," says Lord Denman, C.J., in that case, "and not for a former time, is the essential fact. As a regular theatre may be a lecture-room, dining-room, ball-room, and concert-room on successive days, so a room used ordinarily for either of those purposes would become for the time being a theatre, if used for the representation of a regular stage play."^(b)

It was decided in *Russell v. Briant*^(c) that no person can be made liable to an action for an offence against these Acts, at the suit of the author or proprietor of a dramatic or musical composition, unless that person by himself or his agent actually takes part in a representation which is a violation of the copyright.

In that case the defendant had let a room in his tavern to a person who gave a musical entertainment there. After the entertainment had been continued for some nights, the defendant received a formal notice from the plaintiff's attorneys that certain of the pieces performed were the copyright property of the plaintiff, and warning him against causing or permitting them to be performed at his house. The defendant, notwithstanding this, permitted the entertainment to be continued, furnished the platform and lights for the performances, allowed bills of them to be put up in the tavern, and tickets of admission to be advertised to be sold at the bar, and he himself sold one ticket. The question for the decision of the Court was, did this conduct on the part of the defendant amount to a "representing or causing to be represented" within the meaning of the Acts? and the Court of Common Pleas held that it did not. "If it were to be held," said Wilde, C.J., "that all those who supply some of the means of representation to him who actually represents, are to be regarded as thereby constituting him their agent, and thus causing the representation within the meaning of the Act, such a

(a) 12 Q. B. 217.

(b) The court guarded itself against saying that the performance of such a dramatic song as that in question would be unlawful, without a theatrical licence, within the statute 6 & 7 Vict. c. 68.

(c) 8 C. B. 836.

doctrine would, we think, embrace a class of persons not at all intended by the Legislature.”

The doctrine laid down in *Russell v. Briant* was carried a step further in *Lyons v. Knowles* by the Court of Queen's Bench, the decision of that court being confirmed on appeal by the Exchequer Chamber. (a) In the former case it appeared that the defendant received a fixed sum per night for the room in which the performance took place, and derived no other profit from it. In the latter case the defendant who was the licensed proprietor of a theatre, received as his remuneration for the use of the theatre, one-half of the gross receipts, which were taken by his own servants at the doors, the remainder being handed to one Dillon, to whom the defendant let the use of the theatre for the purpose of dramatic entertainments. Dillon provided the company, and had the selection of the pieces to be represented, together with the entire management of their representation, and exclusive control over the persons employed in the theatre. The defendant, on his part, paid for printing and advertising, furnished the lighting, door keepers, scene shifters, and supernumeraries, and hired the band, music being a necessary part of the performance. Certain of the copyright pieces of the plaintiff having been performed without his consent, an action was brought against the defendant. It was held that the defendant was not liable, the Court being of opinion that he was nothing more than the proprietor of the theatre, who had transferred for the time the exercise of all his rights in it, as such, to Dillon, and that Dillon was the person who “represented, or caused to be represented,” any pieces performed there while he had the sole possession. With regard to the scene-shifters, &c., supplied by the defendant, Blackburn, J., said, “Even apart from authority, I do not think that, by furnishing servants to another, a man can be said to do all that is done by those servants while under the command of that other.” And with respect to the division of profits, Crompton, J., said, “The question is whether, looking at the present case fairly, it amounts to more than this—that the rent of the theatre is to be paid by part of the profits. In one respect, I do not agree with my brother Pigott; (b) I do not think

(a) 3 B. & S. 556; 10 L. T. N. S. 876; 12 W. R. 1083.

(b) Pigott, Serjt., had argued, on behalf of the defendant, that a person who could neither prevent nor control the representation of a piece could in no sense be considered the party representing it, and that a man who lets a house to another is not responsible for an illegal act done in it by the person who has hired it.

that the defendant's divesting himself of control over the theatre would divest him of liability if he and Dillon were partners. Suppose there had been an agreement of partnership between the defendant and Dillon that each should contribute so much money, or that each should contribute so much capital, though of a different kind, and the theatre were taken between them. I should think the act of either was the act of both. But the authorities clearly show that two persons merely receiving payment out of the *gross* profits of a business does not make a partnership between them, even as against the world." Blackburn, J., added, "If the receipt of the money in this way was only a colourable pretence to escape the consequence of a partnership, I do not say that that would not have made a difference."

If the proprietor of the theatre were also the proprietor of the scenery, lights, &c., and the employer of the actors and actresses, he would be liable for an unauthorised representation of a dramatic piece, even although on the occasion of its representation he had for a fixed sum let his theatre to another person who was to have all the profits and to select the pieces to be performed. Thus, in *Marsh v. Conquest* (a) the defendant granted to his son, who was also his stage-manager and one of his actors, the use of the company of actors, with the scenery, &c., for a benefit night, in consideration of a fixed sum paid, the son to choose the pieces to be played. A piece belonging to the plaintiff having been played without his consent, the defendant was held liable to pay the statutory penalty. The Chief Justice (Erle) distinguished this case from *Inyons v. Knowles*: "There Dillon, to whom the defendant in that case had let his theatre, brought his own company of actors and actresses; whereas here the defendant was the owner of the dramatic company, with whom the son performed the piece. The defendant, therefore, I think, in this case, caused such piece to be performed."

What is a representation within the Acts is a question for the jury. Where the jury found that the singing of two or three songs of the plaintiff's libretto to Weber's opera of "Oberon," was a representation of part of the plaintiff's composition, the Court of Common Pleas refused to grant a new trial. (b) "It is difficult" said Tindal, C.J., "to say what is or is not a representation of part of a dramatic production: the subject *patitur majus et minus*, and it must

What is a representation is a question for the jury.

(a) 10 Jur. N. S. 989; 33 L. J. 319, C. P.; 10 L. T. N. S. 717; 12 W. R. 309.

(b) *Planchè v. Braham* (4 Bing. N.C. 17).

be left to a jury to determine the fact." Vaughan, J., added, "We should be interfering with the province of the jury, if we did not leave it to them to say whether this was a representation of a part of the plaintiff's production."

CHAPTER XVII.

REMEDIES FOR INFRINGEMENT OF COPYRIGHT.

Remedies
twofold.

THE remedies for infringements of literary property are of a twofold nature, those existing at law and those for which recourse is had to courts of equity. At law there is an action for damages or for the penalty imposed by statute, and further, in the case of engravings and other works of the fine arts, a summary mode of proceeding before justices. To equity peculiarly belongs the remedy by injunction, though Courts of Law are now empowered under certain circumstances to apply that remedy also.^(a)

UNPUBLISHED WORKS.

Copyright in un-
published works.

We have already seen^(b) that the author of every unpublished work of an innocent nature has a common law right of property in it—a right to give or withhold publication. Now if a man has a right, he must have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it: for, as has been observed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.^(c)

An action is the peculiar mode pointed out by the law for enforcing a remedy, or for prosecuting a claim or demand in a court of justice,^(d) and so an action at law will lie to recover damages for the infringement of copyright in unpublished works.

Courts of Chancery will aid by injunction the proprietor of unpublished innocent works, and restrain the authorised publication of them. In the leading case of *Prince Albert v. Strange*^(e) the Court of Chancery granted an injunction

(a) 17 & 18 Vict. c. 125, ss. 79-82; 23 & 24 Vict. c. 126, ss. 32, 33; 25 & 26 Vict. c. 68, s. 9.

(b) *Ante*, p. 48.

(c) *Ashby v. White* (2 Lord Ray, 953); *Winsmore v. Greenbank* (Willes, 577).

(d) Co. Lit. 285, a.

(e) 2 De G. & S. 652; 1 M. N. & G. 25; see the facts of this case, *ante*, pp. 50-54.

to restrain the publication, not only of certain unpublished etchings belonging to the plaintiff, but even of a descriptive catalogue of them.

Equity has also restrained the unauthorised publication of works not previously published, in the case of a conveyancer's clerk, who sought to publish the conveyancing drafts of his deceased master,^(a) and in the case of an attempted publication of notes belonging to another which had been surreptitiously obtained.^(b) The Court of Chancery also restrained the publication of a certain paper of trials which the applicant for its aid had bought from the Lord Mayor.^(c)

In the case of the *Duke of Queensberry v. Shebbeare*,^(d) the defendant was restrained from publishing the Earl of Clarendon's History of the Reign of Charles II., though the Earl of Clarendon had in his lifetime given the defendant permission to take a copy of the original manuscript.

An injunction will also be granted to restrain the publication of letters, except in such cases as are mentioned in chapter ii. of this work.^(e) The nature of the property which the writer of letters has in them, is explained in that chapter.

The property in unpublished engravings, maps, and charts, would of course be protected in a similar manner.

In the case of *Abernethy v. Hutchinson*,^(f) an injunction was granted to restrain the publication of oral lectures delivered to medical students at a hospital, on the ground of an implied contract between the lecturer and his hearers that the latter should only make use of them for their own information. The property in oral lectures is now regulated by 5 & 6 Will. 4, c. 65.^(g)

PUBLISHED WORKS.

Sect. 1.—*Remedies at Law.*

In the case of published works the same remedies are open to the proprietor as in the case of unpublished works, and in addition, special penalties for infringement are by

(a) *Webb v. Rose* (cited 4 Burr. 2330).

(b) *Forrester v. Waller* (*Ib.*). (c) *Manley v. Owen* (*Ib.* 2329).

(d) 2 Eden. 329.

(e) *Vide ante*, pp. 15-18; *Pope v. Curl* (2 Atk. 342); *Thompson v. Stanhope* (Amb. 737); *Percival v. Phipps* (2 V. & B. 19); *Gee v. Pritchard* (2 Swanst. 402); *per Story, J.*, in *Folsom v. Marsh* (2 St. Rep. 100, 111).

(f) 1 H. & T. 39; 3 L. J. 209, Ch.; *ante*, pp. 19, 20.

(g) *Vide ante*, pp. 20-22.

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 Remedy for
 piracy of books
 by action on the
 case.

statute made recoverable from the offender. The enactments relating to the remedy by action at law are as follow :

5 & 6 Vict. c. 45, s. 15, enacts " that if any person shall in any part of the British dominions, after the passing of this Act, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed, from parts beyond the sea, or, knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought in any court of record in that part of the British dominions in which the offence shall be committed."

The same section provides that " in Scotland such offender shall be liable to an action in the Court of Session in Scotland, which shall and may be brought and prosecuted in the same manner in which any other action of damages to the like amount may be brought and prosecuted there."

An interesting point on the construction of this section came before the Court of Common Pleas for decision in the case of *Novello v. Sudlow*,^(a) in which the defendant had published, unauthorised, a piece of music of the plaintiff's by gratuitously distributing lithographed copies of it. The words of the interpretation clause of 5 & 6 Vict. c. 45, are wide enough to embrace such a case, as it defines copyright to be " the sole and exclusive liberty of printing or *otherwise multiplying* copies of any subject" to which the word is applied in the Act; thus protecting literary works from unauthorised multiplication by other means than the press. But sect. 15 gives the remedy by special action on the case only where anyone shall " *print* or cause to be printed" any book for sale, hire, or exportation. Did this clause operate to take away the common law remedy by action in all other cases than those which it enumerates? If so, the plaintiff in that action could not recover; if it did not, then the ordinary rule by which the common law gives an action on the case for the violation of rights conferred by statute, would apply, and would render the unauthorised multiplication of copies by lithography the proper subject of an action. The court held that sect. 15 did not take away the common law

(a) 12 C. B. 177.

remedy by action in cases of multiplication of copies, not enumerated in that section, and that if otherwise construed it would destroy the effect of the words "otherwise multiplying" in the interpretation clause.

Any doubt that existed on the subject of multiplication of copies by lithography is now put an end to by sect. 14 of 15 & 16 Vict. c. 12, which declares that the provisions of the Copyright Acts shall apply to prints taken by lithography, or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely. (a)

In a case decided under the repealed statute 9 Geo. 2, c. 36 [see now 5 & 6 Vict. c. 45, sec. 17], it was held that two penalties might be recovered from the defendant for two distinct acts of selling, on the same day, pirated copies of books imported into this country. One act of sale was by the defendant himself in the morning, the other by his wife in the afternoon in an open shop. (b)

The defendant in an action of piracy must give notice in writing of the objections to the plaintiff's title on which he means to rely on the trial.

Defendant to give notice of the objections to plaintiff's title on which he means to rely.

Sect. 16 provides, "that after the passing of this Act, in any action brought within the British dominions against any person for printing any such book for sale, hire, or exportation, or for importing, selling, publishing, or exposing to sale or hire, or causing to be imported, sold, published, or exposed to sale or hire, any such book, the defendant, on pleading thereto, shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of such action; and if the nature of his defence be that the plaintiff in such action was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person whom he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when and the place where such book was first published, otherwise the defendant in such action shall not at the trial or hearing of such action be allowed to give any evidence that the plaintiff in such action was not the author

(a) See also *Boosey v. Tolkien* (5 C. B. 476).

(b) *Brooke v. Milliken* (3 T. R. 509). See *Ex parte Beal* (9 B. & S. 395; ante, p. 210).

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

Plea of not guilty.

A plea of not guilty merely, in an action for infringement of copyright, only denies the alleged infringement, whether it be selling, printing, &c., or whatever be the wrongful act; it does not deny the copyright of the plaintiff. This must be done by a special plea.(a)

Requisites of sect. 16 must be strictly complied with.

The requisites laid down by sect. 16 as to the notice of objections must be strictly complied with. Thus a general objection to the plaintiff's title to copyright in a book that some person whose name is to the defendant unknown, and not the plaintiff, was the proprietor of the said copyright, was held in *Boosey v. Davidson*(b) not sufficient to satisfy the words of the section, which require the defendant in such a case to specify in his notice of objections "the name of the person whom he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein."

"The Copyright Act," says Wightman, J., "throws on a defendant, if he seek to defend the infringement on the ground that the plaintiff is not the proprietor, the onus of showing who is, in order that the plaintiff may not be taken by surprise at the trial."(c)

In the subsequent case of *Boosey v. Purday*(d) the judges of the Court of Exchequer took a less strict view of the requirements of the section, and pointed out the inconveniences which would follow from a rigid adherence to its words. Alderson, B., addressing the counsel, who moved for a rule to amend the notice of objections given in that case, said, "Suppose a man were to enter his name at Stationers' Hall as proprietor of the *Ἐικὼν βασιλική*; according to your argument he would acquire the property in it, for it would puzzle excessively to find out the author of that book; or, as proprietor of the works of Homer—that

(a) See No. 16 of the Pleading Rules, 'T. T. 1853.

(b) *Boosey v. Davidson* (4 Dow. & L. 147). See also *Leater v. Purday* (7 C. B. 4).

(c) 4 Dow. & L. 153.

(d) 10 Jur. 1038.

“would raise the question, was there such a man?” Rolfe, B., observed “the Court must endeavour to get at some construction of the statute which shall not force a man to say who first published at one place or another. It may have been that the defendant saw the work at both places.” Alderson, B., added “The defendant in his objections ought to show a definite publication by somebody. That construction will remove all the absurdity which otherwise would follow from a literal interpretation of the statute.”

Where the defendant intends to rely on the objection that the plaintiff in the action was not the author or first publisher of the book, or the proprietor of the copyright, sect. 16 requires that he should specify, in addition to the name of the proprietor or first publisher, the *title* of the work, the *time* when, and the place *where*, the first publication took place.

“The time when” is sufficiently specified by naming the year of the first publication; it is not necessary to name the day or month. (a) “Time when”
first published.

“The place where” a book was first published is not sufficiently specified by a statement that “the work was not first printed or published in the British dominions.” (b) “Place where”
first published.

The following objections were also considered too vague, and were struck out: “That the plaintiff never acquired any title by assignment *or otherwise*” to the copyright claimed; “that there was no *valid* assignment of the copyright to the plaintiff, or to anyone under whom he claims,” the word *valid* being ordered to be struck out; “that there is no copyright in a work first published out of the British dominions, *under such circumstances as the books in question were published*” under. (c) Objections too
vague.

Where, in an action for piracy at the suit of two plaintiffs, it appeared that the defendant had published the work in question pursuant to the conditions of a *cognovit*, given by him to one of the plaintiffs and one P. in a former action for not performing an agreement to write the same work, this was held to be a sufficient defence to the action for infringement of the plaintiff’s copyright. (d)

According to the decision of the Irish Court of Queen’s Bench in *Rooney v. Kelly*, (e) it is not necessary, in an action for the infringement of copyright in a book, to aver that the Declaration in
action.

(a) *Boosey v. Davidson* (4 Dow. & L. 155).

(b) *Ib.*

(c) *Ib.* The notice of objections as amended is given in a note to this case, p. 155. See also *Boosey v. Purday* (10 Jur. 1038).

(d) *Sweet v. Archbold* (10 Bing. 133).

(e) 14 Ir. Com. L. Rep. 158.

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defendant published the plaintiff's book; and a declaration charging the defendant with publishing "divers parts of the book of the plaintiff," states a good *prima facie* cause of action, though it is open to the defendant to displace such *prima facie* charge by showing that either from the quantity and quality of such portions, or from the nature and character of defendant's book, the copying and printing, &c., of those portions were justifiable, and should not properly be considered as an infringement of the copyright. (a)

It was further held, on demurrer, in this case, that the charge of defendant's book "containing printed therein, various parts" of plaintiff's book, was not answered by a plea, in confession and avoidance, to the effect that the books of the plaintiff and defendant were composed by the same author from common sources of information, and that no part of the defendant's book was copied or colourably altered from that of the plaintiff.

Interrogatories.

Where an action is brought for infringement of copyright in a book, the court will allow interrogatories as to the number of copies sold for a limited period before and after the date of the infringement, to be administered to the plaintiff, for the purpose of ascertaining the amount of damage sustained, and enabling the defendant to pay into court a sum sufficient to meet it. (b)

Limitation of
time for pro-
ceedings.

All actions, suits, bills, indictments, or informations for any offence that shall be committed against the Act 5 & 6 Vict. c. 45, must be brought, sued, and commenced within twelve calendar months next after such offence committed; otherwise they are void, and of none effect. (c)

But this limitation of time is not to extend or be construed to extend to any actions, suits, or other proceedings which, under the authority of the Act, shall or may be brought, sued, or commenced for, or in respect of any copies of books to be delivered for the use of the British Museum, or of any one of the four libraries mentioned in the Act. (d)

It was held by the Scotch Court of Session, in *Clarke v. Bell*, (e) that the limitation of "all actions, suits, bills, indictments, or informations" for offences committed against the Act of 8 Anne, c. 19, applied only to the penalties and forfeitures inflicted by the Act, but not to a prohibition to restrain infringement of copyright.

(a) 14 Ir. Com. L. Rep. 174.

(b) *Wright v. Goodlake* (13 L. T. N. S. 120).

(c) Sect. 26.

(e) 13 Fac. Dec. 335, 29th February, 1804.

(d) *Ib.*

And in the case of a book published before 5 & 6 Vict. c. 45, an objection that the action to recover damages for infringement of copyright in it was not brought within twelve months after the offence had been committed, was overruled by the same court in the case of *Stewart v. Black*.(a) No reason is given for the decision.

If any action or suit is commenced or brought against any person or persons for doing, or causing to be done, anything in pursuance of the Act 5 & 6 Vict. c. 45, the defendant or defendants may plead the general issue and give the special matter in evidence; and if upon such action a verdict is given for the defendant, or the plaintiff is nonsuited or discontinues his action, the defendant is to recover his full costs, for which he is to have the same remedy as a defendant in any case by law has.(b)

Proceedings for anything done in pursuance of this Act.

This enactment embraces, according to the general rule, not only those who in doing or causing to be done anything "in pursuance of the Act" keep strictly within the line of their duty, but also those who, through mistake, transgress that limit, in exercising the powers which they honestly believe the Act confers upon them.(c)

We have already seen that the assignee of an engraver of a print may maintain an action for the piracy of it, though none of the Acts expressly gives him such a right.(d) The conditions which must be observed in order to ground an action for the piracy of engravings have been stated, *ante*, p. 110-113.

Engravings and prints.

The first Act which gave a copyright in engravings (8 Geo. 2, c. 13), in its first section, inflicts on any printseller or other person whatsoever, who, within the time limited by that Act [fourteen years, since extended to twenty-eight], should engrave, etch, or work, or in any other manner copy and sell, or cause to be engraved, etched, or copied and sold, in the whole or in part, by varying, adding to, or diminishing from the main design, or should print, reprint, or import for sale, or cause to be printed, reprinted, or imported for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him or them respectively in the presence of two or more credible witnesses, or, knowing the same to be so printed or reprinted without

(a) 9 Scotch Sess. Cas. 2 Ser. 1029.

(b) Sect. 26.

(c) See *Smith v. Shaw* (10 B. & C. 277); *Cook v. Leonard* (6 B. & C. 351); *Theobald v. Crichmore* (1 B. & Ald. 227); *Gaby v. The Wilts, &c., Canal Company* (3 M. & Sel. 580).

(d) *Thompson v. Symonds* (5 T. R. 41), *ante*, p. 165.

the consent of the proprietor or proprietors, should publish, sell, or expose to sale, or otherwise, or in any other manner dispose of or cause to be published, sold, or exposed to sale, or otherwise, or in any other manner disposed of, any print or prints in which copyright is given by the Act, without such consent first had and obtained as aforesaid, the penalty of forfeiting the plate or plates on which such print or prints are or shall be copied, and all and every sheet or sheets (being part of, or whereon such print or prints are or shall be so copied or printed) to the proprietor or proprietors of the original print or prints, who are forthwith to destroy and damask the same; and every such offender or offenders shall also forfeit five shillings for every print which shall be found in his, her, or their custody, either printed or published and exposed to sale, or otherwise disposed of contrary to the true intent and meaning of the Act, one moiety thereof to go to the Crown and the other to any person or persons that shall sue for the same, to be recovered in any of the Courts of Record at Westminster, by action of debt, bill, plaint, or information, &c.

All pecuniary penalties incurred, and all unlawful copies, imitations, and other effects and things forfeited by offenders pursuant to this Act, may now be recovered either by action or by summary proceeding before justices in England or Ireland, and in Scotland either by action before the Court of Session in ordinary form or by summary action before the sheriff of the county where the offence is committed or the offender resides. (a)

A further remedy, by action on the case for damages is given by 17 Geo. 3, c. 57. The words of the enactment are: "From and after the 24th day of June, 1777, if any engraver, etcher, printseller, or other person shall, within the time limited by the aforesaid Acts, (b) or either of them, engrave, etch, or work, or cause or procure to be engraved, etched, or worked, in mezzotinto or chiaro oscuro, or otherwise, or in any other manner copy in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, or cause or procure to be printed, reprinted, or imported for sale, or shall publish, sell, or otherwise dispose of, or cause or procure to be published, sold, or otherwise disposed of, any copy or copies of any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart or plan, or any other print or prints

(a) 25 & 26 Vict. c. 68, s. 8. *Vide ante*, p. 108.

(b) 8 Geo. 2, c. 13; 7 Geo. 3, c. 58.

whatsoever which hath or have been, or shall be engraved, etched, drawn, or designed in any part of *Great Britain* without the express consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of, and attested by, two or more credible witnesses, then every such proprietor or proprietors shall and may, by and in a special action upon the case, to be brought against the person or persons so offending, recover such damages as a jury, on the trial of such action, or on the execution of a writ of inquiry thereon, shall give or assess, together with double costs of suit.” (a)

In an action in Scotland for damages for infringement of the copyright of certain engravings, the *locus* of the alleged acts of infringement was not specified. The Court of Session considered this a grave defect in the averments, but allowed an amendment on payment of expenses since the closing of the record. (b) “In the second article, as it now stands,” said the Lord President, “there is no averment as to where the offence was committed. The defender is designed in the summons as being a printseller at 27, Sanchie-hall-street, Glasgow; but we do not know even whether that is his shop or his residence. Be it the one or the other, however, it is not alleged that the defender sold a copy of the print there, nor that he did it in Glasgow, nor even that he did it within the United Kingdom, though that is necessary to bring the case under the statutes. That is a very grave imperfection; but I think it is just one of those which it is the policy of the recent statute to allow to be amended on certain conditions. And therefore I think that we should allow the record to be amended in this respect on payment of expenses since the closing of the record.”

In the same case the Lord Ordinary thought it too vague and uncertain for the pursuer to rest his case on an alleged violation of various Copyright Acts, “or one or other of them;” but the Inner House was of a different opinion. “These statutes,” said the Lord President, “are all to be read together, I apprehend, in considering the nature and privileges of printers and publishers of engravings. It may very well be that in this case the provisions of one of the statutes may be more applicable than those of another; but it is not necessary for the pursuer to tie himself down to one particular statute or clause of a statute.”

(a) Double costs are taken away in all cases by 5 & 6 Vict. c. 97.

(b) *Graves v. Logan* (7 Scotch Sess. Cas. 3 Ser. 204).

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According to a decision of Bacon, V.C.,^(a) it is not necessary to register under 5 & 6 Vict. c. 45, before suing for a piracy of engravings or lithographs, that Act not mentioning or interfering in any way with the Acts of Geo. 2 and Geo. 3, which confer a copyright in works of this description.

Dramatic and
musical compo-
sitions.

Dramatic and musical compositions are "books" within the meaning of the Copyright Act, 5 & 6 Vict. c. 45; the word "book" being construed to mean and include "every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published." The remedies, therefore, for infringement of copyright in dramatic and musical compositions are the same as in cases of infringement of copyright in books.

For infringement of the right of *representing* and *performing* such compositions remedies are given by 3 & 4 Will. 4, c. 15, and 5 & 6 Will. 4, c. 45.

If, during the continuance of the sole liberty of representing or causing to be represented at any place of dramatic entertainment in any part of the United Kingdom, the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions, which the first section of the former Act confers on the author of any dramatic piece, any person shall, contrary to the intent of the Act or right of the author or his assignee, represent or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, every such offender shall be liable for each and every such representation to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of the Act, to be recovered, together with double costs of suit, by such authors or other proprietor in any court having jurisdiction in such cases in that part of the United Kingdom or of the British dominions in which the offence shall be committed.^(b)

It is also provided that in every such proceeding, where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such

^(a) *Stannard v. Lee* (23 L. T. N. S. 306).

^(b) 3 & 4 Will. 4, c. 15, s. 2.

sole liberty without stating the same to be subject to such right or authority or otherwise mentioning the same. (a)

These provisions are extended to musical compositions by 5 & 6 Vict. c. 45, ss. 20, 21.

All actions or proceedings for infringements of the right are to be brought, sued, and commenced within twelve calendar months next after the offence committed, or else to be void and of no effect: (sect. 3 of 3 & 4 Will. 4, c. 15.)

The onus of proving the consent of the author or proprietor in an action for penalties lies on the defendant. (b)

Besides the remedy at law, there is a further remedy in equity by injunction restraining the representation or performance. (c)

In the case of paintings, drawings, and photographs, as well as engravings, in addition to the action on the case, the author has now a further remedy by summary proceeding before two justices in England or Ireland or the sheriff in Scotland. Paintings, drawings, and photographs.

Sect. 8 of 25 & 26 Vict. c. 68, enacts that "all pecuniary penalties (d) which shall be incurred, and all such unlawful copies, imitations, and all other effects and things as shall have been forfeited by offenders pursuant to this Act, and pursuant to any Act for the protection of copyright engravings, may be recovered by the person hereinbefore, and in any such Act as aforesaid, empowered to recover the same respectively, and hereinafter called the complainant or complainer, as follows:—

"In England and Ireland, either by action against the party offending, or by summary proceeding before any two justices (e) having jurisdiction where the party offending resides:

"In Scotland by action before the Court of Session in ordinary form, or by summary action before the sheriff of the county where the offence may be committed or the offender resides, who, upon proof of the offence or offences, either by confession of the party offending, or by the oath or affirmation of one or more credible witnesses, shall convict the offender, and find him liable to the penalty or penalties aforesaid, as also in expenses, and it shall be lawful for the sheriff, in pro-

(a) 3 & 4 Will. 4, c. 15, s. 2.

(b) *Morton v. Copeland* (16 C. B. 517; 24 L. J. 169, C. P.).

(c) *Russell v. Smith* (15 Sim. 181).

(d) For these penalties, *vide ante*, p. 208, 209.

(e) A metropolitan police magistrate, or stipendiary magistrate, or the Lord Mayor or any Alderman of London may now act alone in such a case: (11 & 12 Vict. c. 43, ss. 33, 34.)

nouncing such judgment for the penalty or penalties and costs, to insert in such judgment a warrant, in the event of such penalty or penalties and costs not being paid, to levy and recover the amount of the same by poinding: provided always, that it shall be lawful to the sheriff, in the event of his dismissing the action and assoilzieing the defender, to find the complainer liable in expenses, and any judgment so to be pronounced by the sheriff in such summary application shall be final and conclusive, and not subject to review by advocacy, suspension, reduction, or otherwise."

Bankruptcy of
offender.

Whether a penalty inflicted under this Act would be provable under the bankruptcy of the person on whom it is inflicted, appears to be doubtful. But it would seem that the prosecutor could not prove for it if he allowed imprisonment to be suffered for non-payment of it.^(a)

It is now settled by the case of *Ex parte Graves*,^(b) notwithstanding a decision of the Court of Bankruptcy (Mr. Commissioner Winslow) to the contrary,^(c) that if a person is imprisoned in default of payment of a penalty inflicted under this section, the execution of a deed of composition containing a release of his debts will not entitle him to his discharge.

In this case nineteen summonses were taken out by Mr. Graves against a printseller to recover penalties for violating his copyright in certain engravings by selling photographs of them, and a penalty of 5*l.* was inflicted for each offence, with fourteen days' imprisonment in each case in default of payment. Before the summonses were heard the offender prepared a deed of composition with his creditors, containing a release from all debts, and whilst the magistrate was giving judgment, and in fact after sentence for two of the offences had been pronounced, the deed was duly executed and was subsequently registered. On application being made to the Court of Bankruptcy to discharge the offender from custody under the 112th section of the Bankruptcy Act, 1849, on the ground that he was not in custody for any criminal offence, the registrar ordered his discharge, but the Lords Justices on appeal reversed this decision, holding that the process under which the debtor was arrested was of a criminal nature and not for a debt. Wood, L.J., considered that the argument that the debtor

(a) See *per* Wood, L.J., *Ex parte Graves* (L. Rep. 3 Ch. App. 645;

(b) L. Rep. 3 Ch. App. 642; 19 L. T. N. S. 241; 16 W. R. 993. Cf. *Bancroft v. Mitchell* (L. Rep. 2 Q. B. 549; 16 L. T. N. S. 558).

(c) *Ex parte Johnson* (15 L. T. N. S. 163; 15 W. R. 160).

escapes by paying money, and therefore that imprisonment is only a process to enforce payment of money, was answered by the judgment of Blackburn, J., in *Bancroft v. Mitchell*.^(a) "Another answer to the same argument," said the Lord Justice, "is that there is the other process against him for damages. The imprisonment is the real punishment for the offence, but he can get off by paying the penalty." Selwyn, L.J., added, "Whether we take the letter or the spirit of the Act the result is the same. If we look at the letter, the words used are 'penalty' and 'conviction,' all pointing to a criminal offence. If we look to the spirit of the act, we find certain acts prohibited and treated as offences, and certain penalties imposed; and in addition to the penalty, the prosecutor may recover damages by action. The application for discharge must be dismissed with costs."

The proprietor may also obtain an injunction from any of the Superior Courts of Record at Westminster or Dublin. Sect. 9 of 25 & 26 Vict. c. 68, provides that "in any action in any of Her Majesty's Superior Courts of Record at Westminster and in Dublin, for the infringement of any such copyright as aforesaid, it shall be lawful for the court in which such action is pending, if the court be then sitting, or if the court be not sitting then for a judge of such court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such court or judge may seem fit."

Before the passing of this Act, in the case of *Mayall v. Higbey*,^(b) where photographs were lent by the owner to another person who became insolvent, and, the photographs being sold, the purchaser, by photographically printing from negatives, obtained reduced copies, which he published and sold, it was held that the owner of the originals, irrespectively of copyright, was entitled to a writ of injunction to restrain the further taking or selling of copies, and also to recover them or their value under a count in detinue.

^(a) L. Rep. 2 Q. B. 555; 16 L. T. N. S. 558. This was a case of commitment for non-payment of a sum directed by justices' order to be paid for the support of the prisoner's mother. "It seems to me," said Blackburn, J., "that the commitment is not in the nature of civil but of criminal process, to punish the plaintiff for not performing the duty imposed on him by statute. It is quite true that on payment of the money he would get off the imprisonment, but still it is in the nature of criminal process, and consequently the plaintiff was not entitled to his discharge."

^(b) 1 H. & C. 148; 6 L. T. N. S. 362; 10 W. R. 631.

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 Importation of
 pirated copies

The importation of pirated works is absolutely prohibited, and the copies may be detained by the officers of Her Majesty's Customs.

Sect. 10 enacts that "all repetitions, copies, or imitations of paintings, drawings, or photographs, wherein or in the design whereof there shall be subsisting copyright under this Act, and all repetitions, copies, and imitations of the design of any such painting or drawing, or of the negative of any such photograph, which, contrary to the provisions of this Act, shall have been made in any foreign state, or in any part of the British dominions, are hereby absolutely prohibited to be imported into any part of the United Kingdom, except by or with the consent of the proprietor of the copyright thereof, or his agent authorised in writing; and if the proprietor of any such copyright, or his agent, shall declare that any goods imported are repetitions, copies, or imitations of any such painting, drawing, or photograph, or of the negative of any such photograph, and so prohibited as aforesaid, then such goods may be detained by the officers of Her Majesty's Customs."

In cases of infringement of the copyright in sculpture, models, and busts, (a) sect. 3 of 54 Geo. 3, c. 56, gives to the proprietor or proprietors, or their assignee or assignees, a special action on the case against the person or persons offending, to recover such damages as a jury on the trial of such an action shall give or assess, together with double costs of suit. (b)

If the sculpture, model, copy or cast has been registered under the Designs Act, 1850 (13 & 14 Vict. c. 104, s. 6), then in any case of piracy which would render the party offending liable to the special action last mentioned, he is also rendered liable to forfeit for every offence a sum not less than 5*l.* and not exceeding 30*l.* to the proprietor of the sculpture, model, copy or cast of which the copyright has been infringed. This penalty may be recovered in England (c) by an action of debt or on the case against the party offending, or by summary proceeding before two justices having jurisdiction where the party offending resides; in Scotland by action before the Court of Session in ordinary form, or by summary action before the sheriff of the county where the offence is committed, or the offender resides; in Ireland either by action in a Superior Court of

(a) *Vide ante*, pp. 124-126 and p. 210.

(b) Double costs are taken away in all cases by 5 & 6 Vict. c. 97, s. 1, and only the usual costs between party and party may be recovered.

(c) 13 & 14 Vict. c. 104, s. 7.

Sculpture,
 models, and
 busts.

law at Dublin, or by civil bill in the Civil Bill Court of the county or place where the offence is committed.(a)

The proprietor of the sculpture, model, copy or cast which is registered under the Designs Act, 1850, is not to be entitled to the benefit of that Act, unless every copy or cast of such sculpture, model, copy or cast which shall be published by him after registration be marked with the word "registered," and with the date of registration.(b)

Sect. 2.—*Remedies in Equity.*

The great remedial process, which was for a long time peculiar to equity, is the writ of injunction. This may be described to be a judicial process, whereby a party is required to do a particular thing or to refrain from doing a particular thing, according to the exigency of the writ. Its object is generally preventive and protective rather than restorative; it seeks to prevent a meditated wrong more often than to redress an injury already done.(c) It is a remedy of a very flexible nature; and it may be total or partial, qualified or unconditional, as well as temporary or perpetual.(d)

There are two sorts of injunctions—(1) provisional, *i.e.*, such as are to continue only until a certain specified period, such as the coming in of the defendant's answer, or the hearing of the cause; and (2) perpetual, *i.e.*, such as form part of the decree made at the hearing upon the merits, whereby the defendant is perpetually enjoined from the assertion of a right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience.(e)

Lord Eldon(f) thus states the grounds on which equity interferes by injunction in the case of infringements of copyright: "The jurisdiction upon subjects of this nature is assumed merely for the purpose of making effectual the legal right, which cannot be made effectual by any action for damages; as, if the work is pirated, it is impossible to lay before a jury the whole evidence as to all the publications which go out in the world to the plaintiff's prejudice. A court of equity, therefore, acts with a view to make the legal right effectual by preventing the publication altogether; and, accordingly, in the exercise of this jurisdic-

(a) Sect. 13 & 14 Vict. c. 104, s. 7, and 5 & 6 Vict. c. 100, s. 8.

(b) 13 & 14 Vict. c. 104, s. 7. (c) 2 St. Eq. Jur. ss. 861, 862.

(d) 2 St. Eq. Jur. s. 886. (e) 2 Daniell's Chanc. Pr. 1462.

(f) *Wilkins v. Aikin* (17 Ves. 424).

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tion, where a fair doubt appears, as to the plaintiff's legal right, the court always directs it to be tried, making some provision in the interim, the best that can be, for the benefit of both parties." Elsewhere the same learned judge says, "The principle of granting the injunction in those cases is, that damages do not give adequate relief; and that the sale of copies by the defendant is in each instance not only taking away the profit upon the individual book, which the plaintiff probably would have sold, but may injure him to an incalculable extent, which no inquiry for the purpose of damages can ascertain." (a)

Procedure to
obtain
injunction.

To obtain an injunction, the course of procedure is for the proprietor to file a bill, stating his title to the original work, the nature of the piracy, and the consequent injury. The particular facts are next to be verified by affidavit, and a special motion may then be made to restrain the publication. The whole question may thus be brought before the court; and an injunction will either be granted forthwith, or an issue directed to try the question before a jury. (b)

Where plaintiff's
title is doubtful.

An injunction will not be granted where the title is in doubt. Thus, where the plaintiff claimed an injunction as the purchaser, from the composer, of the copyright of certain songs, and the defendant produced affidavits from the composer and one Elliston, from which it appeared that Elliston had a copyright, but whether qualified or absolute was doubtful, Sir John Leach refused to grant an injunction. (c)

In a case decided under the Copyright Act of Anne, an injunction obtained by the plaintiff to restrain the unauthorised publication of a book in which he claimed copyright, was dissolved by Lord Chancellor King, on the ground that the plaintiff had not set out a good title in his bill or affidavit, as it was there stated only that he had purchased or legally acquired the copy, which was not sufficient without saying that he purchased or acquired it "of the author." (d)

Courts of equity used formerly to direct an issue to be tried by a jury in a court of common law in order to determine the plaintiff's title to copyright. But sect. 1 of 25 & 26 Vict. c. 42, now directs that every question of law or fact, cognizable in a court of common law, on the determination of which the title to the relief or remedy sought in a court of equity depends, shall be determined by or before that court, unless (sect. 2) where questions of fact may be more conveniently determined at the assizes or in a court of

(a) *Hogg v. Kirby* (8 Ves. 225).

(b) *Maugham*, 169.

(c) *Lowndes v. Duncombe* (2 Cowp. 216).

(d) *Gilliver v. Snaggs* (2 Eq. Cas. Ab. 522; 4 Viner's Abridg. 279).

common law in Westminster or Middlesex, in which cases issues of fact may be directed to be tried as before. (a)

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DAMAGES.

Courts of equity are now also empowered to award damages to the party injured, either in addition to or in substitution for an injunction. (b) The measure of damages in a case of piracy was thus stated by James, V.C., in a recent case: "That the defendant is to account for every copy of his book sold as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he would have received from so many additional copies." (c)

A provisional injunction, if granted, would sometimes be productive of more mischief than that which it was intended to remedy, *e.g.*, if the book whose publication was sought to be restrained were of such a nature that its chief value depended upon its appearing immediately. "There is a great difference" said Lord Eldon, (d) "between works of a permanent and of a transitory nature. The case upon the former may be brought to a hearing. But the effect is very different upon a work of this kind [an East Indian Calendar], perishable; particularly in this instance; consisting of the names of persons continually fluctuating: a work that would be good for nothing in another year."

Where injunction would be mischievous.

The difficulty in such cases is forcibly stated and the mode of avoiding it suggested by Lord Cottenham, C., in dealing with the question of an Almanac, alleged to be pirated from another. (e) "The greatest of all objections" said the Lord Chancellor, "is that the court runs the risk of doing the greatest injustice in case its opinion upon the legal right should turn out to be erroneous. Here is a publication which, if not issued this month [December], will lose a great part of its sale for the ensuing year. If you restrain the party from selling immediately, you probably make it impossible for him to sell at all. You take property out of his pocket and give it to nobody. In such a case, if the plaintiff is right, the court has some means at least, of indemnifying him, by making the defendant keep an account; whereas, if the defendant is right and he be restrained, it is utterly impossible to give him compensation for the loss he will have sustained. And the effect of the order in that event will be to commit a great and irremediable injury. Unless, therefore, the court is quite clear as to

(a) See *Re Hooper* (11 W. R. 130).

(b) 21 & 22 Vict. c. 27, s. 2; see *per Wood*, V.C., *Tinsley v. Lacy* (11 W. R. 877).

(c) *Pike v. Nicholas* (20 L. T. N. S. 909; 38 L. J. 529, Ch.).

(d) *Mathewson v. Stockdale* (12 Ves. 275).

(e) *Spottiswoode v. Clarke* (2 Phil. 156).

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what are the legal rights of the parties, it is much the safest course to abstain from exercising its jurisdiction till the legal right has been determined."

Where the work is of such a nature as those just referred to, the Court of Chancery orders the defendant to keep an account of all copies sold, until the title of the plaintiff is ascertained, when the proceeds must be handed over to him.

Person having legal title should be made a party.

Although an equitable title to the work pirated is sufficient to entitle to the assistance of a court of equity, (a) the person who has the legal title should also be made a party to the suit. (b)

Joint owners may sue.

The author or the proprietor of the copyright in a work may associate with himself any person or persons he pleases in the book of registry at Stationers' Hall, and such persons will have a right to sue jointly with him in equity for an infringement of the copyright. (c)

Joinder of defendants.

On the other hand, where there are distinct infringements of copyright by several persons they cannot be joined as defendants in the same suit. Thus, where different booksellers take copies of a spurious edition of a work for sale there is no privity between them, and they must be proceeded against by separate bills. (d)

Form of injunction.

Where a bill for an injunction prayed that the defendant might be restrained from publishing, selling, or otherwise disposing of a number of a periodical containing a piratical abridgment of a work of fiction, and from copying or *imitating* in whole or in part that work, Knight Bruce, V.C., granted the injunction as prayed, except as to the words "or imitating" for which he could find no precedent. "I am not satisfied," said his Honour, "that the words would go too far. Certainly, I am not satisfied that any legal or proper act would be restrained by them; but I am struck with the absence of any precedent for the use of those words in any injunction upon a case merely literary; and as I am of opinion, if I rightly understand it, that what is apprehended by the counsel for the plaintiff this court would restrain, I think it more prudent and safe to narrow the present injunction, rather than to leave in it a word apparently new in such cases, and which may be susceptible of an erroneous interpretation." (e)

(a) See *Mawman v. Tegg* (2 Russ. 385), *Pierpoint v. Fowle* (2 Wood. & Min. 35), *Little v. Gould* (2 Blatch. 181); per Abinger, C.B., in *Chappell v. Purday* (4 Y. & C. 493); per Shadwell, V.C., in *Bohn v. Bogue* (10 Jur. 420), and *Sweet v. Cater* (11 Sim. 581).

(b) *Colburn v. Duncombe* (9 Sim. 151). See *Sweet v. Shaw* (3 Jur. 217), and *Sweet v. Cater* (11 Sim. 581).

(c) *Stevens v. Wildy* (19 L. J. 190, Ch.)

(d) *Dilly v. Doig* (2 Ves. 486). (e) *Dickens v. Lee* (8 Jur. 185).

“The largest words,” said the Vice-Chancellor, “that the registrar has furnished me with are in a case of *Faden v. Stockdale*,^(a) which are very large indeed.” The words of the injunction in that case were: “To restrain the defendant, his servants, agents, and workmen from printing, upon a reduced scale or otherwise, and from publishing or selling any copy or copies of the map of the Island of St. Domingo, compiled, drawn, or engraved by, or for the use of the plaintiff, or any other of the like nature or kind, or upon any such or the like plan, until answer or further order.”

It has been observed that nothing, in general, can call forth a court of equity into activity but conscience, good faith, and personal diligence, and one of the leading maxims that guides its interference is—*Vigilantibus non dormientibus æquitas subvenit*.^(b) If one slumbers over his rights instead of asserting them in proper time, or if one, by his conduct, acquiesces in or encourages the infringement of a right which he afterwards seeks to enforce, equity will not grant him its aid, but leave him to his remedy at law.

Plaintiff must not be guilty of laches, or mislead by acquiescence.

A leading case on this subject is *Saunders v. Smith*^(c) in which, without pronouncing any judgment on the legal right of the defendant to publish, with notes annexed, certain legal cases previously published by the plaintiff, the Lord-Chancellor (Cottenham) refused to grant an injunction to stay the publication by the defendant of a second volume of his “Leading Cases” on account of the line of conduct pursued by the plaintiffs. Mr. Smith had published his first volume of “Leading Cases” in 1837, containing some cases taken from the plaintiffs’ books, and he stated in the preface his intention to publish a second volume which would carry the work down to the time he wrote. Mr. Smith proceeded with his second volume, and a communication on the subject of taking a share in it was made by his publisher (Mr. Maxwell) to the plaintiffs, and the plaintiffs made no remonstrance until the first part of the second volume was published, when they applied for an injunction to restrain its publication. Lord Cottenham, in refusing the injunction, said: “I do not give any opinion upon the legal question. I am only to decide whether the plaintiffs are entitled, under the circumstances, to the interposition of the court to protect their legal right, when that legal right has not yet been established. But I assume the existence of the legal right, and I say that whatever legal

(a) Reg. Lib. A. 1796, fol. 32*.

(b) See 2 Sp. Eq. Jur. 60, 61; St. Eq. Jur. s. 959, a.

(c) 3 My. & Cr. 711.

right the plaintiffs may have, the circumstances are such as to make it the duty of a court of equity to withhold its hand, and to abstain from exercising its equitable jurisdiction, at all events until the plaintiffs shall come here with the legal title established. In doing this, I am only doing what Lord Eldon did in *Rundell v. Murray*, and what is very generally done upon questions of patent right. 'The court always exercises its discretion whether it shall interfere by injunction before the establishment of the legal right.'

The circumstances of the case of *Rundell v. Murray*,^(a) referred to by Lord Eldon, were peculiar. The authoress gave her book to the defendant to publish at his expense on condition of giving her a few copies, and she stated in the book that it was given to the public in the idea that it might be useful, and as "she will receive from it no emolument, so she trusts it will escape without censure." The book proved a success, and the publisher sent her 150*l.*, which she acknowledged by letter to be a free gift. After the period of fourteen years had elapsed from the first publication, the authoress sought to restrain the further publication of the work by the defendant, but Lord Eldon held that she was not entitled to do so. His Lordship said: "There has often been great difficulty about granting injunctions where the plaintiff has previously, by acquiescing, permitted many others to publish the work; where ten have been allowed to publish, the court will not restrain the eleventh. A court of equity frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining has led to the state of things that occasions the application; and therefore, without saying with whom the right is, whether it is in this lady or whether it is concurrently in both, I think it is a case in which strict law only ought to govern."

In *Platt v. Button*^(b) Lord Eldon said that where permission was given to some persons to publish, and then others copied, it was necessary for the proprietor to bring his action at law before he could come to equity for an injunction.

If any delay occurs in the assertion of the title to a copyright infringed, the delay must be accounted for to the satisfaction of the court, otherwise no assistance will be given.^(c)

(a) 1 Jac. 311. See also *Southey v. Sherwood* (2 Mer. 438), and the American case of *Heine v. Appleton* (4 Blatch. 125).

(b) Coop. Ch. Cas. 304.

(c) See *Baily v. Taylor* (1 R. & M. 76; s. c. Tamlyn, 295) *Mawman v. Tegg* (2 Russ. 385, 393), *Lewis v. Chapman* (3 Beav. 135), *Lewis v. Fullarton* (2 Beav. 6), *Buxton v. James* (5 De G. & Sm. 80, 84), per Wood, V.C., in *Tinsley v. Lacy* (11 W. R. 877; 32 L. J. 539, Ch.); and the analogous cases as to patents, *Bridson v. Benecke* (12 Beav. 3); per

The right to an account in equity appears to be entirely ancillary to the right to an injunction. (a)

“The court,” says Sir John Leach, M.R., (b) “has no jurisdiction to give to a plaintiff a remedy for an alleged piracy, unless he can make out that he is entitled to the equitable interposition of this court by injunction; and in such case, the court will also give him an account, that his remedy here may be complete. If this court do not interfere by injunction, then his remedy, as in the case of any other injury to his property, must be at law.”

Neither has a court of equity any jurisdiction with reference to a mere question of damages unless the primary right to an injunction exists. (c)

It was held in an American case (d) that commissions on the sale of a pirated work, received by a bookseller from the publisher of it, are profits which the bookseller must account for to the proprietor of the copyright, where a decree for an account has been made.

Curtis, J., in that case, after referring to the law relating to profits made by one member of a partnership, said: “The jurisdiction in cases of copyright rests upon a similar principle. If the proprietor will waive his action for damages, he may have an account of profits, upon the ground that the defendant has, by dealing with his property, made gains which equitably belong to the complainant. And I perceive no sound reason for restricting those gains to the difference between the cost and the sale price of the map or book, or limiting the right to an account to those persons who have sold the work solely on their own account. He who sells on commission does in truth sell on his own account, so far as he is entitled to a percentage on the amount of the sales. What he so receives is the gross profit coming to him from the proceeds of the sales, and what he so receives, diminishes the net profit of the one who employs him to sell. That part of the profits of the sales, being in the hands of the commission merchant, the consignor is not accountable for them. But why should not the commission merchant, who has them, account for them? He was liable to an action for damages for selling. That right is waived. I think he should pay over to the

Lord Brougham, C., in *Crossley v. Derby Gas Light Company* (4 L. J. 26, Ch.); per Wood, V.C., in *Smith v. London and South-Western Railway Company* (1 Kay, 416, 417). (a) 1 Kay, 417.

(b) *Bailey v. Taylor* (1 R. & M. 75).

(c) 1 Kay, 415; *Stevens v. Caddy* (2 Curt. 200); and see the case of *Monk v. Harper* (3 Edw. Ch. 114).

(d) *Stevens v. Gladding* (2 Curt. 608).

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proprietor in lieu of the damages, the gain he has made from the sales. It does not seem to me that the term 'profits' necessarily, or when construed in reference to the subject matter, properly has so restricted a meaning as to exclude commissions received from the proceeds of sales of the property of the complainant." (a)

Injunction where value of property is small.

That the value of the property infringed is small does not disentitle the owner to an injunction; (b) but it may be of such trifling value that the court will not encourage litigation by interfering to protect it by injunction.

Where some pages of an article on a subject under public discussion at the time, were extracted from a monthly periodical and commented on by a weekly newspaper, Lord Cottenham, in dissolving an injunction which had been obtained, said: "It is impossible to say there is any value in the nature of the property in what is here inserted; the question is so minute as a question of property or value—how far, in point of value, it interferes with the sale of the *Monthly Chronicle*. The injunction is not to depend altogether on a question of account; but to what value the question in point of utility is to be carried. If no other danger were to arise from granting this application than what would be consequent on encouraging the litigation of such minute inquiries, it would be a sufficient ground to refuse it, that the court should not be so occupied to the exclusion of other matters which press upon it. The injunction is dissolved, each party paying their own costs." (c)

Where, however, the work of which the copyright is infringed is of value, the court will grant an injunction without proof of actual damage. When once the court has found that there is "*injuria*" the proprietor of the copyright will be allowed to judge of the "*damnum*." (d)

Sale of pirated copies after expiration of term.

If copies pirated during the continuance of a term of copyright are not published till after the expiration of the term, equity will, it seems, as in the similar case of patents, restrain such publication by injunction. (e)

Injunction where only part of work is pirated.

Where part of a book only is pirated from another work, the

(a) *Stevens v. Gladding* (2 Curt. 608).

(b) *Buxton v. James* (5 De G. & Sm. 83).

(c) *Bell v. Whitehead* (3 Jur. 68). See also *per* Lord Eldon in *Mathewson v. Stockdale* (12 Ves. 275); and *Cox v. Land and Water Journal Company* (L. Rep. 9 Eq. 324; 21 L. T. N. S. 548; 39 L. J. 152, Ch.; 18 W. R. 207).

(d) *Per* Wood, V.C., in *Tinsley v. Lacy* (32 L. J., 539, Ch.; 11 W. R. 876).

(e) Compare the remarks of Wood, V.C., in *Smith v. London and South-Western Railway Company* (Kay, 415) with the arguments in *Sheriff v. Coates* (1 R. & M. 165, 166).

extent to which an injunction goes will depend on the particular circumstances of the case. Lord Bathurst seems to have been of opinion that an injunction could not be granted against the whole of such a work, unless the part pirated was such that granting an injunction against that part necessarily destroyed the whole. (a)

Lord Eldon thought it was the business of the defendant, where a considerable portion of his work was shown to have been taken from that of the plaintiff, to separate and point out such pirated part. (b)

The presiding judge has frequently made the comparison for himself. (c) In some cases a reference has been made to the master to report to what extent one book is pirated from another; (d) and in one case Lord Hardwicke thought the best course was to get a report from two persons of learning in the law, chosen by the litigants themselves. (e)

The effect of an injunction against the whole of a book is sometimes produced by an order against the publication of any copy or copies containing the portions pirated from another work, or any passages taken or colourably altered from such work. (f)

The extent to which the injunction ought to go, must, in each case, depend on the particular circumstances of that case. (g)

The peculiar nature of the case may sometimes render the remedy by injunction inappropriate, even where the piracy is clearly established. *vs Malins, V.C.*, refused to grant an interlocutory injunction to restrain the publication in a weekly paper of a "list of hounds," which he was satisfied was copied from the list published in another weekly paper. (h) The Vice-Chancellor, after referring to the rule that where the information is open to all who seek to obtain it, each publisher must, nevertheless, get it at his own expense and as the result of his own labour, and is not entitled to the results

B remedy by
injunction
sometimes
inap ropriate.

(a) *Per Wood, V.C.*, in *Jarrold v. Houlston* (3 K. & J. 719).

(b) *Mawman v. Tegg* (2 Russ. 395).

(c) See the cases of *Matthewson v. Stockdale* (12 Ves. 277), *Whittingham v. Wooler* (2 Swanst. 460), *Lewis v. Fullarton* (2 Beav. 8), *Murray v. Bogue* (1 Drew, 368), *Spiers v. Brown* (6 W. R. 352), *Jarrold v. Houlston* (3 K. & J. 708); *Pike v. Nicholas* (20 L. T. N. S. 906; 38 L. J. 529, Ch.; L. Rep. 5 Ch. App. 251).

(d) *Carnan v. Bowles* (2 Bro. C. C. 85); *Nicol v. Stockdale* (12 Ves. 277); *Story's Executors v. Derby* (4 M'Lean, 160, 161).

(e) *Gyles v. Wilcox* (2 Atk. 143).

(f) See *Lewis v. Fullarton* (2 Beav. 6); *Jarrold v. Houlston* (3 K. & J. 708).

(g) *Per Lord Eldon*, in *Mawman v. Tegg* (2 Russ. 393).

(h) *Cox v. Land and Water Journal Company* (L. Rep. 9 Eq. 324; 21 L. T. N. S. 548; 39 L. J. 152, Ch.; 17 W. R. 207.)

of the labour undergone by others, said: "But in this case, as in many others, the question arises, is it a case for the interference of the Court of Chancery at all? and if it is a case for interference, is it a case for interference on an interlocutory application? Now, I do not think it is a case to be decided on an interlocutory application; and my reason is this: this list must be corrected from week to week; it could not be a correct list from the 1st of November until April, or to the end of the hunting season. Changes must take place; the list of masters, huntsmen, and whips can hardly continue to be correct even for a week. Now, suppose I were to grant an injunction, how can it be acted upon? The defendants have only to issue a fresh circular, make an urgent appeal for answers, or send a person by rail and get the information from the masters of the hunts, and next week bring out a very correct list; and how am I to know the way in which they got their information? At present, I do not see that I can interfere. Whether the plaintiff is entitled to any remedy I do not at present decide, but I do not think it a case for an injunction, though the defendants are not entitled to avail themselves of the plaintiff's labours. . . . I would suggest to the parties that the wisest thing would be to let the bill be dismissed without costs. But if they do not agree, then I simply refuse the motion, leaving the case to be decided at the hearing. It may be a question for damages, but I shall certainly not grant an injunction."

Where the appropriation of another's work is small in amount, and pervades the whole work, so that no permanent injunction can issue without destroying the whole work, it has been the opinion of some judges that the remedy by injunction would be disproportionate and unsuited to the case, and therefore unjust; and that as the damages sustained might be obtained in a suit at law without destroying the whole work, such would be the most equitable relief.^(a)

It is not necessary for a person who complains that his copyright has been infringed and seeks an injunction, to specify, either in his bill or his affidavit, the parts of the defendant's work which he thinks have been pirated from his work. It is sufficient to allege generally that the defen-

Not necessary to state in bill or affidavit parts pirated.

(a) See *per* Woodbury, J., in the American case of *Webb v. Powers* (2 Wood. & Min. 521). "Though this Court," says Lord Eldon, in *Mawman v. Tegg* (2 Russ. 394), "has long exercised the jurisdiction of protecting literary property by injunction, there may be much doubt whether it would exercise the jurisdiction, where only a few pirated passages occurred, and would not rather in such a case leave the party complaining to his action at law."

dant's work contains several passages which have been pirated from the plaintiff's, and to verify the rival works by affidavit. (a)

The production of his manuscript is sometimes very important on the part of the person charged with piracy. (b)

Where the proprietor of copyright notes on the Bible sold the stereotype plates of a quarto edition containing these notes, together with the right of printing from them, and the plates were afterwards sold to a third party at a public sale, at which a specimen leaf of the work was exhibited, the Scotch Court of Session granted an interdict to restrain the purchaser from publishing a folio Bible, printed from the plates, with the addition of a commentary at the foot of each page, on the following grounds: that what was sold were the plates of a particular Bible, of which a specimen leaf had been shown, and had been referred to in the catalogue; that the nature of stereotype plates was to multiply copies of the same work until they were worn out, whereas, if commentaries were added to each page, the work would be a different one, and if sold as cheap as the original quarto the value of the latter would be diminished, and that, not by the multiplication of the same work, but by the production of a different one from the plates, a thing not intended when the sale was made. (c)

Sale of stereo-
type plates.

An advertisement of a work which merely disparages a rival work will not be restrained by injunction, where it is not such as would induce the public to take the one book for the other. (d)

Publication
disparaging a
rival work.

Lord Cottenham, C., said that an allegation that matter contained in a particular edition of a work was spurious and of no value was, if untrue, no subject for an injunction, although it might be the subject of an action, as being a libel on or disparagement of the edition. (e)

(a) *Sweet v. Maugham* (11 Sim. 51).

(b) *Murray v. Bogue* (1 Drew. 361); *Pike v. Nicholas* (20 L. T. N. S. 908; 38 L. J. 529, Ch.).

(c) *Fullarton v. McPhun* (13 Scotch Sess. Cas. 2nd Ser. 219).

(d) *Seeley v. Fisher* (11 Sim. 581).

(e) *Id.* 583.

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AMERICAN LAW OF COPYRIGHT.

General law
throughout the
United States.

THE general law on the subject of copyright is the same throughout the whole of the United States, since the Federal Constitution of 1789,^(a) gave to the Supreme Congress "power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; also to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Local copyright.

But, though a particular state cannot take away from an individual the property given him by an Act of Congress, and though the laws of such state are inoperative as against the laws of the United States with which they may come in collision,^(b) yet if an author or inventor, instead of resorting to the Act of Congress, should apply to the Legislature of a particular state for an exclusive right to his production, there is nothing to hinder that state granting it, though the operation of such grant would be confined to the limits of the state.^(c) And the use of the property is exclusively of local cognisance. Like all other property, it must be used and enjoyed within each state, according to the laws of such state.^(d)

Copyright Acts.

The first Act on the subject of copyright was passed in 1790. Chap. 15 of that Act (designed "for the encouragement of learning by securing the copies of maps, charts, and books, to the authors and proprietors of such copies") fixed the term of copyright at fourteen years, with a right of renewal for fourteen years more, if at the expiration of the first term the author were living, and a citizen of or resident in the United States. This Act was repealed by an Act passed in 1831, which, amended and enlarged by subsequent Acts (passed in 1834, 1846, 1856, 1859, 1861, 1865, 1867), continued in force down to July, 1870, when an Act was passed to revise, consolidate, and amend the statutes relating to copyrights and patents, repealing the previous enactments on the subject.

Terms of
copyright.

The term of copyright fixed by the Act of 1870 is twenty-eight years from the time of recording the title thereof, with a right of renewal for fourteen years more

(a) Art. 1, sect. 8. (b) See *Gibbons v. Ogden* (9 Wheat. 186).
(c) *Livingston v. Van Ingen* (9 Johns. 581). (d) *Ib.*

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

A claim under a renewal necessarily involves the validity of the right under the first as well as under the second term. (b)

It is now settled, however the matter may have been formerly regarded, that copyright is dependent solely on the statute law; and that an author cannot set up any common law right to the exclusive printing or publishing of his work. (c)

Even what has been termed copyright before publication is not, in America, dependent solely on the common law. Sect. 102 of the Act of 1870 provides that any person who shall print or publish any manuscripts whatever, without the consent (d) of the author or proprietor first obtained (if such author or proprietor be a citizen of the United States or resident therein) shall be liable to said author or proprietor for all damages occasioned by such injury, to be recovered by action on the case in any court of competent jurisdiction. Unpublished manuscripts.

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

An author has a common law right in his manuscript until he relinquishes it by contract or some equivocal act. (f)

A surreptitious publication of an important part of a

(a) Sect. 88.

(b) *Wheaton v. Peters* (8 Pet. 663.)

(c) *Dudley v. Mayhew* (3 Coms. 12); *Wheaton v. Peters* (8 Pet. 663.); *Clayton v. Stone* (2 Paine, 388).

(d) The Act of 1831 (now repealed) required this consent to be in writing, signed in the presence of two or more credible witnesses: (Sect. 9.)

(e) *Woolsey v. Judd* (4 Duer. 385); *Wheaton v. Peters* (8 Pet. 657); *Jones v. Thorne* (1 N. Y. Leg. Obs. 409); *Bartlett v. Crittenden* (4 M'Lean, 301). See also *Hoyt v. M'Kenzie* (3 Barb. Ch. 323).

(f) *Bartlett v. Crittenden* (5 M'Lean, 36, 38).

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manuscript is as much within the statute as if the manuscript were complete ; and the whole of a manuscript need not be printed.(a)

The enactment as to unpublished manuscripts operates in favour of a resident of the United States, who has acquired the proprietorship of an *unprinted* literary composition from a non-resident alien author ; but it gives no redress for an unauthorised theatrical representation.(b)

Definition of
copyright.

Copyright has been defined to be "an exclusive right to the multiplication of copies for the benefit of the author or his assigns, disconnected from the plate or any other physical existence."(c)

Subject matters
in which copy-
right is granted.

Sect. 86 of the Act enumerates the subject matters in which copyright is granted. It provides "that any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print or photograph, or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and his executors, administrators, or assigns, shall, upon complying with the provisions of this Act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same ; and in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others ; and authors may reserve the right to dramatise, or to translate their own works."

Who may
possess
copyright.

The Act confers copyright only on those who are citizens of the United States, or resident therein. The word "resident" has been interpreted to mean permanently resident ; so that a person temporarily residing in America, even though he has declared his intention of becoming a citizen, cannot take or hold a copyright.(d) Nor can the assignee of a work composed by a non-resident alien obtain a copyright in it.(e)

The illiberality of the rule, which requires permanent residence in order to entitle to copyright, contrasts very disadvantageously with the rule of our law on the subject, as laid down in the cases of *Jeffreys v. Boosey* and *Low v. Routledge* (*ante*, pp. 27, 33).

(a) *Bartlett v. Crittenden* (5 M'Lean, 39, 40).

(b) *Keene v. Wheatley* (9 Amer. Law Reg. 45).

(c) *Stephens v. Cadly* (14 How. 530).

(d) *Carey v. Collier* (56 Niles's Reg. 262).

(e) *Keene v. Wheatley* (9 Amer. Law. Reg. 45).

Sect. 103 provides that nothing contained in the Act shall be construed to prohibit the printing, publishing, importation, or sale of any book, map, chart, dramatic, or musical composition, print, cut, engraving, or photograph, written, composed, or made by any person not a citizen of the United States, nor resident therein.

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The degree of originality required, in order to entitle a book to the protection of the Act, is the same as English courts require. To constitute one an author he must, by his own intellectual labour applied to the materials of his composition, produce an arrangement or compilation new in itself. (a) But one who gets another or others to compile a work or engrave a print is not entitled to copyright. (b) In the case of subjects open to all, the work of another must not be copied, but recourse must be had to the original sources. (c)

A book within the meaning of the Act may consist of a single sheet, as the words of a song, or the music accompanying it. (d) But a newspaper or price current is not a book within the meaning of the Act. (e)

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

Two complete printed copies of the best edition of every copyright book or other article, or description or photograph of such article as before required must be "mailed" by the proprietor to the librarian of Congress at Washington, within ten days after publication, and also a copy of every subsequent edition in which substantial changes are made, under a penalty of twenty-five dollars. (g)

(a) *Atwill v. Ferrett* (2 Blatch. 46). See *per Story, J.*, quoted *ante*, pp. 79, 80.

(b) *Pierpont v. Fowle* (2 Wood. & Min. 46); *Atwill v. Ferrett* (2 Blatch. 46).

(c) *Blunt v. Fatten* (2 Paine, 400, 401); *Emerson v. Davies* (3 Story, 781); *Gray v. Russell* (1 Story, 17).

(d) *Clayton v. Stone* (2 Paine, 383, 391).

(e) *ib.*

(f) For the requisites which had to be observed before this Act, see *Jollie v. Jacques* (1 Blatch. 618).

(g) Sects. 93, 94.

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The copyright book or other article may be sent to the librarian of Congress by mail, free of postage, provided the words "copyright matter" are plainly written or printed on the outside of the package; (a) and the postmaster to whom it is delivered must, if requested, give a receipt for it, and forward it without cost to its destination. (b)

If a work is published without a copyright being secured, this is a dedication of it to the public, and any one may republish it. (c)

The publication of an official report under the direction of Congress, and for the benefit of the public, is a dedication of it and of what is contained in it, to the public, and any one may reprint it. (d)

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

For recording the title or description, the sum of fifty cents is to be paid to the librarian, and the same amount for every copy under seal. For recording any instrument of assignment of copyright, fifteen cents must be paid for every hundred words, and for every copy thereof, ten cents for every hundred words. All these moneys when received are to be paid into the treasury of the United States. (f)

Notice of entry.

To entitle the proprietor to maintain an action for the infringement of his copyright, a further requisite must be observed: notice must be given by inserting in the general copies of every edition published, on the title-page, or the page immediately following, if it be a book, or if a map,

(a) Sect. 95.

(b) Sect. 96.

(c) *Bartlett v. Crittenden* (5 M'Lean, 87).

(d) *Herne v. Appletons* (4 Blatch., cited Law's Digest of Patent, Copyright, and Trademark Cases, p. 214).

(e) Sect. 91.

(f) Sect. 92.

chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design, intended to be perfected and completed as a work of the fine arts, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words—"Entered according to Act of Congress, in the year , by A. B., in the office of the librarian of Congress, at Washington."(a)

A penalty of 100 dollars (to be recovered by action in any court of competent jurisdiction) is inflicted on every person inserting or impressing such a notice on any of the articles named, for which he has not obtained a copyright, one moiety of the penalty to go to the person suing for it, and the other to the use of the United States.(b)

If any one, after the recording the title of any book according to the Act, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, print, publish, or import, or knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such book, such offender shall forfeit every copy thereof to the said proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction.(c)

There is a similar provision as to maps, prints, &c. Sect. 100 enacts, "that if any person after the recording of the title of any map, chart, musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary or model or design intended to be perfected and executed as a work of the fine arts as provided in the Act, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article as aforesaid, he shall forfeit to the said proprietor all the plates on which the same shall be copied, and every sheet thereof either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his

(a) Sect. 97.

(b) Sect. 98.

(c) Sect. 99.

PART I.
CHAPTER XVIII.

Dramatic representations.

possession, or which have by him been sold or exposed for sale; one moiety to go to the proprietor, the other to the United States."

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

An assignee of a dramatic composition cannot maintain an action for its unauthorised representation unless he has performed *all* the acts required by law to secure a copyright. (b)

An authorised public circulation of a printed copy of a drama, for which there is no legislative copyright, is a publication which legalises a subsequent theatrical representation by anybody from such copy. (c)

Piracy in general.

If so much is taken as to impair the value of the original work, or so that the labours of the original author are substantially appropriated, that is sufficient to constitute a piracy. (d) But the question of piracy does not depend solely on the question of quantity. (e)

Intention is not a necessary element in the offence of piracy. If a copyright has been invaded, whether the party knew the work was copyrighted or not, he is liable to the penalty for violation. (f)

A translation is not a copy of a book within the meaning of the statute. (g) The words "copy of a book" mean a transcript or copy of the entire book. (h)

Limitation of actions.

All actions for forfeitures and penalties under the Act must be commenced within two years after the cause of action shall have arisen. (i)

Remedies for infringement.

All actions, suits, controversies, and cases are to be originally cognisable, as well in equity as at law, whether civil or penal in their nature, by the circuit courts of the United States, or any district court having the jurisdiction of a circuit court, or in the Supreme Court of the District of Columbia, or any territory; and the court is empowered upon bill in equity, filed by any party aggrieved, to grant

(a) Sect. 101.

(b) *Keene v. Wheatley* (9 Amer. Law Reg. 44).

(c) *Ib.*

(d) *Folsom v. Marsh* (2 St. 115).

(e) *Story's Executors v. Holcombe* (4 M'Lean, 309, 310).

(f) *Millett v. Snowden* (1 West. L. J. 240).

(g) *Stowe v. Thomas* (2 Amer. Law Reg. 250).

(h) *Rogers v. Jewett* (12 Mo. L. Rep. 340, 341).

(i) Sect. 104.

injunctions to prevent the violation of any rights secured by the copyright laws according to the course and principles of courts of equity, on such terms as the court may deem reasonable. (a)

A writ of error or appeal to the Supreme Court of the United States lies from all such judgments and decrees of any court in the same manner and under the same circumstances as in other judgments and decrees of such courts, without regard to the sum or value in controversy. (b)

In all recoveries either for damages, forfeitures, or penalties, full costs are to be allowed. (c)

In all actions under the copyright laws the defendant may plead the general issue and give the special matter in evidence. (d)

The jurisdiction given to the Federal Court by the Acts of Congress has not taken away or diminished the original jurisdiction, which before such Acts (e) the State Courts exercised; except where the jurisdiction was made exclusive in express terms, or by the necessary construction of the Federal Constitution. (f)

Under the Acts giving to the circuit courts cognisance of these cases, the citizenship of the litigant parties is immaterial. (g)

Copyrights may be assigned in law by *any instrument of writing*. Such assignment is to be recorded in the office of the librarian of Congress within 60 days after its execution, in default of which it is to be void as against any subsequent purchaser or mortgagee for a valuable consideration without notice. (h)

Assignment of
copyright.

The librarian of Congress is made chargeable with all the duties pertaining to copyrights required by law. (i) He is to make an annual report to Congress of the number and description of copyright publications for which entries have been made during the year. (k)

(a) Sect. 106. (b) Sect. 107. (c) Sect. 108. (d) Sect. 105.

(e) *Pierpont v. Fowle* (2 Wood & Min. 43-45).

(f) *Woolsey v. Judd* (4 Duer, 382).

(g) *Keene v. Wheatley* (9 Amer. Law Reg. 44, 45).

(h) Sect. 89.

(i) Sect. 109.

(k) Sect. 85.

PART II.

LAW RELATING TO NEWSPAPERS.

Whether there
is copyright in
newspapers.

THE question whether a newspaper is within the Copyright Act (5 & 6 Vict. c. 45), first came before a court for express decision in the recent case of *Cox v. The Land and Water Journal Company*, (a) where the plaintiff, the proprietor of the *Field* newspaper, sought to restrain the publication in the *Land and Water Journal* of a "list of hounds," alleged to be copied from a list printed in the former paper. It was contended, on behalf of the defendants—(1) that the plaintiff had no copyright in the article of the piracy of which he complained; (2) that if he had a copyright he could not sue until his paper was registered under the Copyright Act. Malins, V.C., said: "The preliminary objection taken in this case raises a point of vast importance to the proprietors of newspapers and to the public at large. It is so important that it seems almost incredible that the point should never have arisen, namely, whether the proprietor of a newspaper has or has not such a property in articles published in that newspaper, and paid for by the proprietor, as entitles him to prohibit the publication by any other newspaper in any other form whatever." On account of the importance of this, the only case decided on the subject, we shall give in full the Vice-Chancellor's reasons for holding that a newspaper does not require to be registered in order to entitle the proprietor to one in respect of a piracy of its contents.

"For the purposes of the argument," said his Honour, "it must be assumed that the article complained of was a copy of the article of the plaintiff, and upon that ground the defendant takes the objection that there can be no copyright in any article published in this newspaper, because it is not registered under the Act 5 & 6 Vict. c. 45, commonly called the Copyright Act. Now suppose, for instance, the

(a) L. Rep. 9 Eq. 324; 21 L. T. N. S. 548; 18 W. R. 206.

proprietor of a newspaper employs a correspondent abroad, and that correspondent, being employed and sent abroad at great expense, makes communications to a newspaper which are highly appreciated by the public, can it be said that another newspaper, published perhaps in the evening of the same day, may take and publish those communications *in extenso*, with or without acknowledgment? If the contention of the defendants is right, the paper which copied might say: 'But they are common property. True it is, I admit, that you have paid for them. I admit that you have given a great deal of money for them, and they are so very valuable that I desire to turn them to account by publishing them in my newspaper; but you have no property in them, although you pay for them; you cannot sue for your newspaper as a book, for then the copyright must be registered, and as you have not registered the book, nothing in the newspaper is protected.' If that is the law, it is a monstrous state of the law—repugnant to common sense and common honesty—because that there is a property in these articles there can be no shadow of doubt. Still, however clear the right of property may be, if the case falls within the Act of Parliament, I must follow the same course which I took in the Brighton Directory case, *Mathieson v. Harrod*. (a) Now, I have put the case of letters from correspondents abroad. With foreign papers, we all know, it is the practice to publish novels, and in some English newspapers it is also done. Supposing a newspaper proprietor were to engage the first novelist of the day to write for him a novel to be published in his newspaper, part every day, and pay him highly, is the proprietor of such a newspaper to lose all property because the paper is not registered? What information would it give if it were registered? Would the registration of a paper called the *Field*, registered twenty years ago, give information as to when the copyright would commence and end?—not the slightest; and therefore it is not within the policy of the Act, and I am of opinion that it is not within the words of the Act. The question depends first upon the 2nd section of the Act. What is a book? because every book must, by the 24th section, be registered. We find that 'book' under the 2nd section 'shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music,

(a) L. Rep. 7 Eq. 270; 19 L. T. N. S. 629; 38 L. J. 129, Ch. In this case a bill to restrain the piracy of the plaintiff's directory was dismissed with costs because the entry at Stationers' Hall of the date of first publication contained only the month, and not the day of the month, on which it had first been published. *Vide ante*, p. 89.

or dramatic piece,' and so forth. Now, certainly, a newspaper does not fall within any of these descriptions, and if it was intended that this Act should be applied to newspapers, it would have been inserted, as the word 'newspaper' is well understood: and that word not being inserted, I must take it as advisedly omitted because it was not the intention of the Legislature that newspapers should be included within the Act. Then comes the section which prescribes what is to be done with regard to periodical publications. Sect. 19 provides 'that the proprietor of the copyright in any encyclopedia, review, magazine, periodical work, or other work published in a series of books or parts, shall be entitled to all the benefits of the registration at Stationers' Hall, under this Act, on entering in the said book of registry the title of such encyclopedia, review, periodical work, or other work, published in a series of books or parts, the time of the first publication of the first volume, number, or part thereof, or of the first numbers or volume first published after the passing of this Act in any such work which shall have been published heretofore, and the name and place of abode of the proprietor thereof and of the publisher thereof, when such publisher shall not also be the proprietor thereof.' That again, does not mention newspapers, and I must come to the same conclusion—that a newspaper was not mentioned, because it was not intended to be included. Then, can a person have any copyright or property in that which is not registered under the Act? This depends, I apprehend, upon the construction of the 18th section, which enacts that when any publisher or other person shall have projected, conducted, and carried on any encyclopedia, review, magazine, periodical, work, or work published in a series of books or parts, or any book whatsoever, and shall have employed any person to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, &c., shall be composed on the terms that the copyright shall belong to such proprietor, and be paid for by him; then the proprietor of such work shall be entitled to copyright (except that after the term of twenty-eight years the copyright shall revert to the author), and shall be entitled to sue upon registering the same at Stationers' Hall. Now, must every right included in this section be registered according to the Act? The present Lord Chancellor decided that question in *Mayhew v. Maxwell*.(a) Mr. Mayhew wrote a certain

(a) 1 J. & H. 312.

article, or series of articles, in a periodical called the *Welcome Guest*, and the proprietor proceeded to publish them in a separate form. The plaintiff filed his bill to restrain him from publishing in any other form than in that for which he wrote the work. The same point arose in *Strahan v. Graham*, where Mr. Graham had sold the right of publishing photographs of the Holy Land in a publication called *Good Words*, in which Dr. M'Leod was publishing a work with regard to the Holy Land, and the proprietors of *Good Words* had given him permission to use the photographs; but Mr. Graham contended that Mr. Strahan had no right to give it to Dr. M'Leod. I decided in that case, and my decision was confirmed by Lord-Chancellor Chelmsford, that there was no right to publish in a separate form that which he had authority only to use in *Good Words*, and that Mr. Graham had a good right of action. But these are distinct authorities to show that there is a property in a publication, although it is not registered. That is the ground upon which Vice-Chancellor Wood commented on the 24th section in *Mayhew v. Maxwell*. He says: 'The plaintiff has not registered under the 24th section.' Now I have been referred to the case of *Sweet v. Benning*,^(a) which was a case between Mr. Sweet, the proprietor of the *Jurist*, and Mr. Benning, a bookseller. Sweet brings an action against Benning for copying the marginal notes of cases in a separate publication. This was the subject of the action. I suppose the *Jurist* had been published before this Act of 5 & 6 Vict., and therefore it was not registered at all. If so, the question whether these reports, published in the *Jurist*, were subject to the provisions of the Act, did not arise. Now, in deciding that case, Jervis, C.J., said:^(b) 'I think, that, under the circumstances stated, there is an implied condition, understanding, or arrangement between the proprietors of the *Jurist* and the gentlemen who furnished them with reports, that the former shall acquire a copyright in the articles so written.' Now, therefore, it appears to me that a 'newspaper,' which is the best possible and only definition of such a publication as the *Field*, not being within any of the provisions of this Act, I must infer that it was not the intention of the Legislature to apply the Act to newspapers (for it was absolutely impossible that it should have missed insertion in some of the sections), and that the circumstance of non-registration throws no difficulty in the way of the plaintiff maintaining his right in law or equity; and, though it is seldom worth the while of

(a) 16 C. B. 459.

(b) *Ib.* 480, 481.

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proprietors to assert the copyright in articles in a newspaper, I am of opinion that, whether it be the letters of a correspondent abroad, or the publication of a tale or a treatise, or the review of a book, or whatever else, he acquires—I will not say as copyright, but as property—such a property in every article for which he pays under the 18th section of the Act, or by the general rules of property, as will entitle him, if he thinks it worth while, to prohibit any other person from publishing the same thing in any other newspaper, or in any other form.”

The effect of this decision, which cannot be considered a satisfactory one, is that the proprietor of a newspaper has a property in its published contents entitling him to restrain the piracy of any portion thereof *for which he has paid*, under the 18th section of the Act, without the necessity of a preliminary registration at Stationers' Hall. This right, it is obvious, is exactly “the sole and exclusive liberty of printing, or otherwise multiplying copies” which sect. 2 of 5 & 6 Vict. c. 45, calls “copyright,” a term which the Vice-Chancellor is reluctant to apply to it, but which section 18 does expressly apply to it, enacting that the proprietor who has paid for the article shall have “such term of copyright therein as is given to the authors of books by this Act.” Now, it is settled by the decision of the House of Lords, in *Donaldson v. Beckett*,^(a) that the common law right of property in literary works after publication, if such right ever existed, has been taken away by statute, and that copyright after publication is now altogether dependent on statutory enactment. It exists only in those works, and can be enforced only on the observance of those conditions which are mentioned and prescribed in the Acts now in force. Considerations of the great hardship of allowing the unauthorised copying and publication of the copies of paintings, drawings, and photographs were not regarded as sufficient to justify the courts of law or equity in interfering for the protection of the owners of such works, and the intervention of the Legislature was necessary to confer a copyright in them; so that the observations of the Vice-Chancellor on the hardship of denying a protection from piracy to the proprietor of newspaper articles, are by no means decisive as to the existence of a right to prevent such piracy independent of the statute. If it be thought only just, as everybody must think it, that the publisher of a newspaper should be able to restrain the wholesale piracy of its contents, there does not seem to be much difficulty in

(a) 4 Burr. 2408.

Decision in *Cox v. Land and Water Journal Company* considered.

the way of interpreting a newspaper to be a "book" within the meaning of sect. 2 of the above Act, there construed to mean and include "every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published," or in holding it to be a "periodical work, or other work published in a series of books or parts," within the meaning of sect. 19 of the same Act; in either of which cases, however, registration would be necessary before the proprietor could sue in respect of an infringement of his copyright.

Whether a copyright exists at all in the case of newspapers has been doubted by Lord Chelmsford, in *Platt v. Walter*, (a) and his Lordship refers to the language of Knight Bruce, L.J., in *Ex parte Foss*, (b) as seeming to imply a doubt in the mind of that learned judge also whether there was such a thing as copyright in a newspaper. The Lord Justice spoke of the right to publish newspapers bearing a particular name as "that which has been called the copyright of a newspaper." Turner, L.J., however, in the same case, considers copyright in a newspaper as a right "which undoubtedly exists." (c)

Nature of property in a newspaper.

Though it is somewhat doubtful whether a copyright in newspapers exists, the right of publishing a newspaper is no doubt a species of property. It has been held to be goods and chattels under the Bankruptcy Acts. (d)

And, though there is nothing analogous to copyright in the name of a newspaper, the proprietor has a right to prevent any other person from adopting the same name for any other similar publication; and this right is a chattel interest capable of assignment. (e)

Name of newspaper

The right of publishing a newspaper is not capable of seizure by the sheriff under an execution; but the doctrine of reputed ownership under the Bankruptcy Acts was held applicable to it. (f)

Right of publishing a newspaper.

Where the registered proprietor of certain newspapers published by him, being also the owner of the type and plant used in the printing of them, mortgaged the news-

(a) 17 L. T. N. S. 159. See also the American case of *Clayton v. Stone* (2 Paine, 383, 391).

(b) 2 De G. & J. 230.

(c) 2 De G. & J. 239.

(d) *Longman v. Tripp* (2 Bos. & P., 67); *Ex parte Foss*, 2 De G. & J. 230. See per Lord Chelmsford, C., in *Platt v. Walter* (17 L. T. N. S. 159).

(e) Per Page Wood, L.J., in *Kelly v. Hutton* (L. Rep. 3 Ch. App. 708; 19 L. T. N. S. 231; 38 L. J. 917 Ch.); and see the cases referred to in the preceding note, and *Keene v. Harris*, referred to 17 Ves. 338).

(f) *Ex parte Foss*, *ubi supra*. See also *Longman v. Tripp* (2 Bos. & Pul. 67).

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papers, type, and plant to F., who took no steps to alter the registration of proprietorship, and the sheriff entered under an execution issued by a creditor of the publisher, and though possession was demanded by F., remained in possession till after the publisher became bankrupt, which took place after two days, it was held that the type and plant were not within the order and disposition of the bankrupt at the time of his bankruptcy with the consent of the true owner, but that as the right of publication was not capable of seizure by the sheriff, and the bankrupt continued the sole registered proprietor, and nothing had been done to make it apparent that he was not the sole owner, the doctrine of reputed ownership applied to the newspapers. (a)

It was held by the Scotch Court of Session that the goodwill of a newspaper is a right transmissible to the owner's representatives, and that where the surviving joint proprietors of a newspaper do not agree to purchase the share of a deceased partner, that share may be sold for behoof of his representatives. (b)

As to the interpretation of an agreement relating to the user by one newspaper of the matter and types of another, see the case of *Platt v. Walter*, referred to in the next part (on Contracts between Authors, Publishers, and Printers).

The Government for a long time regarded the press with jealousy, and many enactments were made to facilitate the proof of the publication of newspapers as well as to secure to Government the heavy duties with which they were charged. Even the size of newspapers was to a late period regulated by statute. An Act of the 6 Geo. 4, c. 119, first allowed them to be printed on paper of any size.

Amongst the provisions swept away by the Act of 32 & 33 Vict. c. 24 (called "The Newspapers, Printers, and Reading Rooms' Act") were enactments requiring, before the publication of any newspaper, the delivery at the Stamp Office of a declaration containing the title of the paper, description of the house where it was to be published, and the names and places of abode of the printer, publisher, and proprietor, (c) certified copies of which declarations were to be received as conclusive evidence of everything contained in them relating to the newspapers (d). Copies of all newspapers published had to be delivered to the Commissioners of Stamps and Taxes, and might be produced in

(a) *Ex parte Foss* (2 De G. & J. 230).

(b) *M'Cormick v. M'Cubbin* (1 Scotch Sess. Cas. 541, 4 July, 1822)

(c) 6 & 7 Will. 4, c. 76, s. 6.

(d) Sect. 8.

evidence. (a) Every supplement to a newspaper must have had the word "supplement" printed on it, and have had the same title and date as the newspaper, and a penalty was incurred by publishing supplements without the newspapers. (b)

Every person who prints any paper for hire, reward, gain, or profit, must still carefully preserve and keep one copy (at least) of every paper so printed by him or her, on which he or she must write, or cause to be written or printed, in fair and legible characters, the name and place of abode of the person or persons by whom he or she is employed to print the same. Every person so printing who neglects to have written or printed the name of the employer, or to keep or preserve it for the space of six calendar months next after the printing thereof, or to produce and show the same to any justice of the peace who within the said space of six calendar months may require to see the same is, for every such omission, neglect, or refusal, to forfeit and lose the sum of twenty pounds. (c)

Printer must keep a copy of every paper, with name of employer thereon.

This does not apply to any papers printed by the authority and for the use of either House of Parliament; (d) or to the impression of any engraving; or to the printing by letterpress of the name, or the name and address, or business or profession, of any person, and the articles in which he deals; or to any papers for the sale of estates or goods by auction or otherwise. (e)

Exceptions.

Neither is it required that the name and residence of the printer should be printed upon any bank note, or bank post bill of the Governor and Company of the Bank of England; upon any bill of exchange, or promissory note, or upon any bond or other security for payment of money; or upon any bill of lading, policy of insurance, letter of attorney, deed, or agreement; or upon any transfer or assignment of any public stocks, funds, or other securities, or upon any transfer or assignment of the stocks of any public corporation or company authorised or sanctioned by Act of Parliament, or upon any dividend warrant of or for any such public or other stocks, funds, or securities; or upon any receipt for money or goods; or upon any proceeding in any court of law or equity, or in any inferior court, warrant, order, or other papers printed by the authority of any public board or public officer in the execution of the duties of their respective offices, notwithstanding the whole

(a) Sect. 13.

(b) Sect. 5.

(c) 39 Geo. 3, c. 79, s. 29; 32 & 33 Vict c. 24, sched. 2.

(d) *Ib.* s. 28.

(e) Sect. 31.

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or any part of the said several securities, instruments, proceedings, matters, and things aforesaid shall have been or shall be printed. (a)

Recovery of penalties.

Penalties (not exceeding the sum of 20*l.*) may be recovered in a summary way before any justice or justices of the peace for the county, stewardry, riding, division, city, town, or place in which the same are incurred, or the person who has incurred them happens to be; (b) and when so recovered, one moiety of the penalty is to go to the informer and the other moiety to the Crown. (c)

Prosecutions or actions for penalties under this Act are to be brought within three calendar months next after they are incurred; (d) and they can only be brought and prosecuted in the name of Her Majesty's Attorney or Solicitor-General in England, or Her Majesty Advocate in Scotland; every proceeding commenced or prosecuted in the name or names of any other person or persons is to be null and void to all intents and purposes. (e)

Printer to print his name and address on papers, &c.

On every person who prints any paper or book whatsoever which is meant to be published or dispersed, and who does not print upon the front of every such paper, if the same shall be printed on one side only, or upon the first or last leaf of every paper or book which shall consist of more than one leaf, in legible characters, his or her name and usual place of abode or business, sect. 2 of 2 & 3 Vict. c. 12, (f) inflicts a penalty of not more than five pounds for every copy of such paper so printed. A similar penalty is inflicted on every person who publishes, or disperses, or assists in publishing or dispersing, any printed paper or book on which the name and place of abode of the person printing the same is not printed as aforesaid. But this provision is not to be construed to impose any penalty upon any person for printing any of the papers above excepted. (g)

In the case of books or papers printed at the University Press of Oxford or the Pitt Press of Cambridge, the printer, instead of printing his name thereon, is to print the following words, "Printed at the University Press, Oxford," or "The Pitt Press, Cambridge," as the case may be. (h)

Proceedings for the recovery of any fine, penalty, or forfeiture under the provisions of this Act must be commenced, prosecuted, entered, or filed in the name of the Attorney or Solicitor-General in England, or Her Majesty's

(a) 51 Geo. 3, c. 65, s. 8; 32 & 33 Vict. c. 34, sched. 2.

(b) Sect. 35.

(c) Sect. 36.

(d) Sect. 34.

(e) 9 & 10 Vict., c. 33, s. 1; 32 & 33 Vict. c. 24, sched. 2.

(f) 32 & 33 Vict. c. 24, sched. 2.

(g) *Vide ante*, p. 257.

(h) 2 & 5 Vict. c. 12, s. 3.

Advocate for Scotland (as the case may be respectively). All proceedings commenced, prosecuted, or filed otherwise are to be null and void to all intents and purposes. (a)

None of the preceding enactments apply to Ireland. (b)

As to the enforcement by bill in equity of the discovery of the proprietors, printers, or publishers of newspapers, sect. 19 of 6 & 7 Will. 4, c. 76, (c) enacts that, "if any person shall file any bill in any court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper, in order the more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compellable to make the discovery required."

Bill for discovery of proprietors, &c. of newspapers.

A proviso is added "that such discovery shall not be made use of as evidence or otherwise in any proceeding against the defendant, save only in that proceeding for which the discovery is made."

This enactment applies to Ireland.

Previously to the passing of the Act 16 & 17 Vict. c. 63, a duty was payable on all advertisements contained in or published along with newspapers, or periodical or other literary works. Sect. 5 of that Act repealed the duty on advertisements in all such cases. And down to the passing of the Act 18 Vict. c. 27, it was not allowable to print or publish newspapers except on stamped paper. That Act abolished the necessity of stamped paper except for the purpose of free transmission by post. The Customs and Inland Revenue Act of last year (d) does away with all stamp duties on newspapers for the future. (e)

Stamp duties.

As to the registration of newspapers at the Post Office, the Post Office Act of last year, (f) after describing what is a newspaper within its meaning, provides (sect. 7) that the proprietor or printer of any newspaper, and the proprietor or printer of any publication which, regard being had to the proportion of advertisements to other matter therein, is not within the description aforesaid, but which was stamped as a newspaper before the passing of the Act 18 & 19 Vict. c. 27, may register it at the General Post Office in London at such time in each year and in such form and with such particulars as the Postmaster-General from time to time

Registration at Post-Office.

(a) 2 & 3 Vict. c. 12, s. 4. (b) See 32 & 33 Vict. c. 24, sched. 2. (c) *Id.*
 (d) 33 & 34 Vict. c. 32. (e) Sect. 12. (f) 33 & 34 Vict. c. 79.

directs, paying on each registration such fee not exceeding five shillings as the Postmaster-General, with the approval of the Treasury, from time to time directs.

The Postmaster-General may from time to time revise the register and remove therefrom any publication not being a newspaper. (a)

The decision of the Postmaster-General on the admission to or removal from the register, of a publication is final, save that the Treasury may, if they think fit, on the application of any person interested, reverse or modify the decision, and order accordingly. (b)

Any publication for the time being on the register is for the purposes of this Act to be deemed a registered newspaper. (c)

Postage.

Registered newspapers, book packets, pattern or sample packets, and post cards may be sent by post between places in the United Kingdom, at the following rates of postage :—

On a registered newspaper, with or without a supplement or supplements ... One halfpenny.

On each registered newspaper in a packet of two or more, with or without a supplement or supplements ... One halfpenny.

On a book packet or pattern or sample packet :—

If not exceeding two ounces in weight One halfpenny.

If exceeding two ounces in weight, for the first two ounces and for every additional two ounces or fractional part of two ounces ... One halfpenny.

On a post card ... One halfpenny.

But a packet of two or more registered newspapers with or without a supplement or supplements is not to be liable under this section to a higher rate of postage than the rate chargeable on a book packet of the same weight. (d)

The Postmaster-General may from time to time, with the approval of the Treasury, make, in relation respectively to registered newspapers, book packets, pattern or sample packets, and post cards, sent by post, such regulations as he thinks fit, for all or any of the following purposes :—

For prescribing and regulating the times and modes of posting and delivery :

(a) 33 & 34 Vict. c. 79, s. 7.

(b) *Ib.*

(c) *Ib.*

(d) Sect. 8. The enactments as to the postage of newspapers, contained in sects. 42 & 44 of 3 & 4 Vict. c. 96, are repealed by this Act: (Sect. 4, sched. 1).

For prescribing prepayment and regulating the mode thereof :

For regulating the affixing of postage stamps :

For prescribing and regulating the payment again of postage in case of redirection :

For regulating dimensions and maximum weight of packets :

For regulating the nature and form of covers :

For prohibiting or restricting the printing or writing of marks or communications or words :

For prohibiting inclosures ;

and such other regulations as from time to time seem expedient for the better execution of the Act.(a)

Any approval of the Treasury under this Act is to be deemed an order within the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), which Act is to have effect as if the Postmaster-General were mentioned in the first column, and any secretary or assistant-secretary of the Post Office were mentioned in the second column of the schedule to that Act.(b)

If any registered or other newspaper, supplement, publication, book packet, pattern or sample packet, or post card, is sent by post otherwise than in conformity with the Act or any Treasury warrant or Post Office regulations, it shall be either returned to the sender thereof or forwarded to its destination, in either case charged with such rate of postage not exceeding the letter rate of postage, or without any additional charge, as the Postmaster-General, with the approval of the Treasury, from time to time directs, having been, if necessary, detained and opened in the Post Office.(c)

The Postmaster-General may from time to time, with the approval of the Treasury, make such regulations as he thinks fit for preventing the sending or delivery by post of indecent or obscene prints, paintings, photographs, lithographs, engravings, books, or cards, or of other indecent or obscene articles, or of letters, newspapers, supplements, publications, packets, or post cards, having thereon, or on the covers thereof, any words, marks, or designs of an indecent, obscene, libellous, or grossly offensive character.(d)

Any publication coming within the following description

(a) Sect. 9.

(b) Sect. 21.

(c) Sect. 15. The enactments contained in sects. 13, 16, & 17 of 3 & 4 Vict. c. 96, as to newspapers posted without being stamped or prepaid, or sufficiently stamped, are repealed by the present Act (sect. 4, sched. 1). So also are the enactments contained in sect. 45 of the former Act as to the examination of newspapers by the Postmaster-General.

(d) Sect. 20.

Newspapers, &c
not sent in con-
formity with
Act.

Indecent or
obscene papers.

What are news-
papers within
the Act.

PART II.

is, for the purposes of this Act, to be deemed a newspaper—any publication consisting wholly or in great part of political or other news, or of articles relating thereto, or to other current topics, with or without advertisements; subject to these conditions—

That it be printed and published in the United Kingdom;

That it be published in numbers at intervals of not more than seven days;

That it be printed on a sheet or sheets unstitched;

That it have the full title and date of publication printed at the top of the first page, and the whole or part of the title and the date of publication printed at the top of every subsequent page. (a)

The definition of a newspaper contained in 6 & 7 Will. 4, c. 76, s. 4 (not repealed by the Act of last year), viz., “any paper containing public news, intelligence, or occurrences, printed in any part of the United Kingdom to be dispersed and made public; also any paper printed in any part of the United Kingdom weekly or oftener, or at intervals not exceeding twenty-six days, containing only, or principally advertisements; and also any paper containing any public news, intelligence, or occurrences, or any remarks or observations thereon, printed in any part of the United Kingdom for sale and published periodically, or in parts, or numbers, at intervals not exceeding twenty-six days between the publication of any two such parts, papers or numbers, where any of the said papers, parts or numbers respectively shall not exceed two sheets of the dimensions” (b) specified in the Act, &c., is not to be deemed to contain or affect the definition of a newspaper for the purposes of the Act of last year or any other enactments regulating the sending of newspapers by post. (c)

Supplements.

And the following is, for the purposes of the Act, to be deemed a supplement to a newspaper,—a publication consisting wholly or in great part of matter like that of a newspaper, or of advertisements, printed on a sheet or sheets or a piece or pieces of paper, unstitched, or consisting wholly or in part of engravings, prints, or lithographs illustrative of articles in the newspaper; such publication in every case being published with the newspaper, and having the title and date of publication of the newspaper printed at the top of every page, or at the top of every sheet or side on which any such engraving, print, or lithograph appears. (d)

(a) 33 & 34 Vict. c. 79, s. 6.

(b) See *Attorney-General v. Bradbury* (7 Exch. 97).

(c) 33 & 34 Vict. c. 79, s. 4.

(d) *Id.*, sect. 6.

If a question arises whether any publication, not being a registered newspaper, is a newspaper or a supplement, or whether any packet is a book packet or pattern or sample packet, within the Act or any Treasury warrant or Post Office regulations, the decision thereon of the Postmaster-General is, by the Act, made final, save that the Treasury may, if they think fit, on the application of any person interested, reverse or modify the decision, and order accordingly. (a)

The Treasury may from time to time, by Treasury warrant, allow any newspapers, British, colonial, or foreign, to be sent by post between the United Kingdom and places out of the United Kingdom, or between places out of the United Kingdom, whether through the United Kingdom or not, at such rates of postage, not exceeding threepence for each newspaper irrespectively of any colonial or foreign postage, and on such conditions, as they think fit, and according to Post Office regulations to be from time to time made in that behalf. (b)

Any Treasury warrant and Post Office regulations made in that behalf before the passing of the Act of last year, are confirmed by it, and are to continue in force unless and until altered by Treasury warrant or Post Office regulations (as the case may be). (c)

A registered newspaper is to be deemed a newspaper for the purposes of any arrangement or convention between Her Majesty's Government and any colonial or foreign government for securing advantages for newspapers sent by post. (d)

The foreign postage marked on any newspaper or letter, or printed paper brought into the United Kingdom, is to be received in all courts of justice and other places as conclusive evidence of the amount of foreign postage payable in respect of such newspaper, &c., in addition to the British postage; and such foreign postage is to be recoverable within the United Kingdom and Her Majesty's other dominions as postage due to Her Majesty. (e)

The Commissioners of Inland Revenue are from time to time to provide proper dies and other implements for denoting by adhesive or embossed or impressed stamps, or otherwise, the duties of postage payable in the United Kingdom under

(a) Sect. 14. The similar provision in sect. 46 of 3 & 4 Vict. c. 96, is repealed (sect. 4, sched. 1).

(b) Sect. 12. The provisions on this subject contained in sects. 47-51 (both inclusive) of 3 & 4 Vict. c. 96, are repealed (sect. 4, sched. 1).

(d) Sect. 11.

(c) *Ib.*
(e) 3 & 4 Vict. c. 96, s. 32.

Colonial and
foreign postage.

Stamps.

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this Act, or any Treasury warrant thereunder; and those duties are to be deemed stamp duties, and to be under the management of the Commissioners of Inland Revenue. (a)

So much of the Act, 3 & 4 Vict. c. 96, as relates to stamp duties under that Act is to apply to the stamp duties under this Act. (b)

Newspapers liable to postage, if posted in any town or place within the United Kingdom, and inclosed in stamped covers, or having a stamp or stamps affixed thereto (the stamp or stamps being in every case affixed or appearing on the outside, of the proper value, and not used before), are to pass by the post free of postage; and the amount of stamps required may be made up by affixing such a number of adhesive stamps as, alone or in combination with the stamp already impressed, may be required. (c)

Forging or
counterfeiting
stamp dies, &c.

It is a felony to forge or counterfeit, or cause to be forged or counterfeited, the dies, plates, or other instruments used for stamping, or to forge, counterfeit, or imitate, or cause or procure to be forged, counterfeited, or imitated, the stamp, mark, or impression of any such die, &c., or to have in one's possession knowingly and without lawful excuse (the proof whereof lies on the person accused) any false, forged, or counterfeited die, &c., or any part of one, or any instrument resembling or intended to resemble it, wholly or in part; or to stamp or mark, or cause or procure to be stamped or marked any paper, or other substance or material whatsoever, with any such false, forged, or counterfeited die, &c.; or to use, utter, sell or expose to sale, or cause to be used, uttered, or exposed to sale, or knowingly and without lawful excuse (the proof whereof lies on the person accused) to have in one's possession any paper, or other substance or material, having thereon the impression or any part of the impression of any such false, forged, or counterfeit die, &c., or having thereon any false, forged, or counterfeit stamp or impression, resembling or representing, either wholly or in part, or intended or liable to pass or be mistaken for the stamp, mark, or impression of any such die, &c., which has been or shall be, or may be so provided, made or used as aforesaid, knowing such false, forged, or

(a) 33 & 34 Vict. c. 79, s. 18.

(b) *Ib.* The enactments contained in sects. 3 and 4 of 16 & 17 Vict. c. 63, as to stamp duties on newspapers and supplements, and as to the cancelling and allowing for newspaper stamps on hand, are repealed by the present Act: (sect. 4, sched. 1). So is the whole of the Act of 18 & 19 Vict. c. 27, passed to amend the laws relating to the stamp duties on newspapers, and to provide for the transmission by post of printed periodical publications: (*Ib.*) (c) 3 & 4 Vict. c. 96, s. 12.

counterfeit stamp, mark, or impression to be false, forged, or counterfeit; or with intent to defraud Her Majesty, her heirs, or successors, privately or fraudulently to use, or cause or procure to be privately or fraudulently used, any die, &c., so provided, made or used, or hereafter to be provided, made, or used as aforesaid, or, with such intent, privately to stamp or mark, or cause or procure to be stamped or marked, any paper, substance, or material whatsoever with any such die, &c., as last mentioned; or knowingly and without lawful excuse (the proof whereof lies on the person accused) to have in one's possession any paper, or other substance or material, so privately or fraudulently stamped, or marked as aforesaid. (a)

Fraudulently to remove or cause to be removed from any cover or paper the stamp or impression of any such die, &c., as mentioned in the last paragraph, with intent to use it on another; or fraudulently to use a stamp or impression so removed; or fraudulently to erase, cut, &c., or cause to be erased, cut, &c., from any cover or paper, any name, date, or other matter or thing thereon written, printed, or expressed, with intent to use any stamp or mark then impressed or being upon it, or that it may be used for the purpose of defrauding Her Majesty; or to do or be concerned in any other fraudulent act, contrivance, or device whatever, with intent to defraud Her Majesty, &c., of any of the rates or duties provided by the Act, is an offence punishable by a forfeiture of 20*l.*, to be recovered with full costs of suit. (b)

Fraudulent removal of stamps.

It is unlawful for any person to affix to a newspaper, supplement, publication, packet, letter, or card sent by post, or to the cover thereof (if any), by way of prepayment of postage thereon, an embossed or impressed stamp cut out or otherwise separated from the cover or other paper, card, or thing on which such stamp was embossed or impressed, although such stamp has not been before sent by post or used. (c)

Impressed stamped removed from another paper not to be used.

If any newspaper, supplement, publication, &c., is sent by post with a stamp affixed thereto, or to the cover thereof, (if any), that has been so cut out or separated, the postage thereof, as far as it purports to be prepaid by that stamp, is to be deemed to be not prepaid. (d)

The enactments contained in 6 & 7 Will. 4, c. 76, allowing a discount of 25 per cent. on newspaper stamps in Ireland; (e)

(a) 3 & 4 Vict. c. 96, s. 22.

(b) *Ib.*, sect. 23. Cf. sect. 18 of 33 & 34 Vict. c. 79.

(c) 33 & 34 Vict. c. 79, s. 19.

(d) *Ib.*

(e) 6 & 7 Will. 4, c. 76, s. 2.

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those relating to the cancelling of stamps rendered useless by that Act; (a) and those providing that a separate stamp or die should be used for each newspaper, and that every newspaper should be printed on paper stamped with such appropriate die; (b) as well as the section relating to the construction of the terms used in that Act, (c) are repealed by the present Act. (d)

For the purposes of the Post-Office Act, 1870, the Channel Islands and the Isle of Man are to be deemed parts of the United Kingdom; (e) and the Act of 11 & 12 Vict. c. 117, relating to the postage of newspapers published in the Channel Islands and the Isle of Man is repealed. (f)

Documents
falsely purport-
ing to be printed
by Government
printer.

Any person who prints any copy of any proclamation, order, or regulation which falsely purports to have been printed by the Government printer, or to be printed under the authority of the Legislature of any British colony or possession, or tenders in evidence any copy of any such proclamation, order, or regulation, which falsely purports to have been printed as aforesaid, knowing that the same was not so printed, is guilty of forgery, and on conviction is liable to be sentenced to penal servitude for such term as is prescribed by the Penal Servitude Act, 1864, as the least to which an offender can be sentenced to penal servitude, or to be imprisoned for any term not exceeding two years, with or without hard labour. (g)

For the purposes of this enactment the expression "British colony and possession" includes the Channel Islands, the Isle of Man, and such territories as may, for the time being, be vested in Her Majesty by virtue of any Act of Parliament for the Government of India, and all other Her Majesty's dominions; "Legislature" signifies any authority, other than the Imperial Parliament or Her Majesty in Council, competent to make laws for any colony or possession; and "Government printer" is to mean and include the printer to Her Majesty, and any printer purporting to be the printer authorised to print the statutes, ordinances, Acts of State, or other public Acts of the Legislature of any British colony or possession, or otherwise to be the Government printer of such colony or possession. (h)

Prohibition of
advertisements
respecting
stolen goods.

Advertisements of rewards for the return of stolen goods are prohibited under a penalty.

Sect. 102 of 24 & 25 Vict. c. 96, provides that whosoever

(a) Sect. 34.

(b) Sect. 3.

(c) Sect. 35.

(d) 33 & 34 Vict. c. 79, s. 4, sched. 1.

(e) Sect. 3.

(f) Sect. 4 and sched. 1.

(g) 31 & 32 Vict. c. 37, s. 4.

(h) *Ib.*, sect. 5.

shall publicly advertise a reward for the return of any property whatsoever, which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property, or shall print or publish any such advertisement, shall forfeit the sum of fifty pounds for every such offence to any person who will sue for the same by action of debt, to be recovered with full costs of suit.

This provision having given occasion to many vexatious proceedings at the instance of common informers against printers and publishers of newspapers, the Legislature intervened in an Act of last year^(a) to remedy the abuse.

The Act provides that no action shall be brought against the printer or publisher of a newspaper to recover the property under sect. 102 of 24 & 25 Vict. c. 96, unless the assent in writing of the Attorney or Solicitor General for England, if the action is brought in England, or for Ireland, if the action is brought in Ireland, has been first obtained to the bringing of the action.^(b)

It also limits the time for bringing the action to a period of six months after the forfeiture is incurred;^(c) and contains a provision for staying proceedings in actions brought before the passing of the Act.^(d)

The term "newspaper" for the purpose of this Act is to mean a newspaper as defined for the purposes of the Acts for the time being in force relating to the carriage of newspapers by post.^(e)

(a) 33 & 34 Vict. c. 65.

(d) Sect. 4.

(b) Sect. 3.

(e) Sect. 2. *Vide ante*, pp. 261, 262.

(c) *Ib.*

PART III.

CONTRACTS BETWEEN AUTHORS, PUBLISHERS,
PRINTERS, &c.

Contracts in
general, between
authors, pub-
lishers, &c.

THE foundation on which contracts between publishers, authors, and others rest, is the same as that which forms the basis of all ordinary contracts, and they may be enforced either by action on the special contract, or, where a special contract does not exist, by the usual action for work and labour done. (a)

Agreement not
to be performed
within a year.

If the agreement is one "that is not to be performed within the space of one year from the making thereof" no action can be brought upon it, "unless the agreement upon which such action shall be brought or some memorandum or note thereof is in writing, and signed by the party to be charged therewith," (b) and the word "agreement" includes the *consideration* for the promise as well as the promise itself. (c)

The following memorandum was made between the plaintiff, a law bookseller and publisher, and the defendant, the author and proprietor of the copyright in a dictionary of the practice of the Courts of King's Bench and Common Pleas, and signed with their respective initials: "Dict. of Practice. 80*l.* per annum for five years, commencing Mich. 1828; 60*l.* per annum for the remainder of Mr. Lee's life, if he survive the five years; payable in either case quarterly; the first payment Michaelmas 1828.

" T. L.

" S. S.

" Mr. Lee to separate the practices K. B. and C. P."

Parol evidence having been held admissible to explain the document, it was held that inasmuch as it appeared to be a memorandum of a contract that was not to be performed

(a) *Planchè v. Colburn* (8 Bing. 16).

(b) Sect. 4 of Statute of Frauds (29 Car. 2, c. 3).

(c) *Wain v. Warlters* (5 East, 10), *Saunders v. Wakefield* (4 B. & Ald. 595).

within a year, and no consideration was stated on the face of it; it was not capable of being enforced by action. (a)

A contract which does not comply with the requirements of the 4th section of the Statute of Frauds is not, however, *per se*, void, though no action can be brought upon it. Therefore it was held that the plaintiff in the case last referred to, having paid the annuity for several years under the above memorandum of agreement, could not recover back the money so paid, as upon a failure of consideration. (b)

It is not necessary that a contract, required by the Statute of Frauds to be in writing, should be contained in one document. It may be collected from any number of papers, (c) provided they are, upon the face of them, sufficiently connected in sense, and do not require parol evidence to establish the connection, parol evidence being inadmissible for that purpose.

Contract may be collected from a number of papers.

Thus, where a publisher proposed to publish by subscription an illustrated edition of Shakespeare, to appear in numbers, at the price of three guineas a number, two guineas to be paid at the time of subscribing, and the remaining guinea on the delivery of each successive number; the prospectus stating "that one number, at least, should be published *annually*," and that the proprietors were confident that they should be able "to produce *two numbers* within the course of *every year*;" and the defendant, wishing to become a subscriber, wrote his name in a book kept for the purpose in the plaintiff's shop, entitled, "*Shakspeare Subscribers, their Signatures*;" printed copies of the prospectus lying at the same time in the plaintiff's shop, but neither prospectus nor book of subscribers containing any reference the one to the other, it was held that the contract of the defendant was not one to be performed within the space of a year from the making thereof, and therefore that, in order to be enforceable by action, it must be in writing. (d)

The defendant having refused to continue to take in the numbers of the book, an action was brought against him by the publisher; but it was held that the action could not be maintained for want of a written agreement or memorandum signed by the party to be charged therewith, as required by the 4th section of the Statute of Frauds. The

(a) *Sweet v. Lee* (4 Scott's N. R. 77; 3 M. & Gr. 452). (b) *Ib.*

(c) *Jackson v. Lowe* (1 Bing. 9); *Phillimore v. Barry* (1 Camp. 513); *Saunderson v. Jackson* (2 B. & P. 398); *Johnson v. Dodgson* (2 M. & W. 658); &c.

(d) *Boydell v. Drummond* (11 East. 142).

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prospectus contained the terms of the agreement, and if it could be coupled with the book of subscribers in which the defendant had signed his name, it would be a sufficient memorandum of the agreement to satisfy the statute; but as it contained no reference to the book, nor the book to it, there was no connection in sense between them which would enable the court to couple them together, and treat them as one document; and parol evidence to establish such a connection was inadmissible. (a) "If," said Le Blanc, J., "there had been anything in the book which had referred to the particular prospectus, that would have been sufficient: if the title to the book had been the same with that of the prospectus, it might perhaps have done: but as the signature now stands, without reference of any sort to the prospectus, there was nothing to prevent the plaintiff from substituting any prospectus, and saying that it was the prospectus exhibited in his shop at the time, to which the signature related: the case therefore falls directly within this branch of the Statute of Frauds." (b)

Defective form
of agreement.

A difficulty in the interpretation of an agreement between an author and a publisher for the publication of the author's book, sometimes arises from the neglect to state distinctly in the agreement whether it is intended by the parties to operate as an assignment of the copyright, or merely as a licence to publish. The cases of *Stevens v. Benning* and *Reade v. Bentley*, already referred to (*ante*, pp. 160-162), exemplify the difficulty; in the latter of which cases the Vice-Chancellor (Wood) refused to allow costs to either party, considering each of them to blame for the defective form of the agreement.

✓ Fixing price
and choosing
embellishments.

Where the agreement is that the publisher shall take the whole charge and risk, and the whole duty of bringing out the work as he thinks best for the interest of both parties, it seems, according to Lord Hatherley, to be necessarily incident to the duty which the publisher has to perform, that he shall (c) also have the right of fixing the price at which the work is to be brought out.

His Lordship considered that it was further implied in the agreement in the case before him (*vide ante*, p. 161), that the publisher was to choose the embellishments and everything else connected with the publication, and that he was to do this for all editions which should be brought out during the subsistence of the agreement. (d) "Several difficulties," said his Lordship, "arising upon

(a) *Boydell v. Drummond* (11 East. 142).

(b) *Ib.*

(c) *Reade v. Bentley* (3 K. & J. 276).

(d) *Ib.*

such a construction have been suggested. It was argued, can it be supposed that the plaintiff intended to give to the publisher the power, if he chooses, of bringing out the work with absurd embellishments beneath its character and injurious to the reputation of the author? The simple answer to that is, the author will take care of himself in that respect by going to a respectable publisher, who would not commit any such absurdity. If he employed a publisher who was in the habit of adding ridiculous illustrations to his works, he would not have reason to complain if the work were so published. The author would select a publisher who, he would presume, would bring out the work in a manner creditable and desirable. So again with regard to the price, it is suggested that the publisher might just so arrange the balance of prices as to enable himself, by an accurate calculation, to get his 10% per cent. commission, and leave nothing to pay the author. The answer is similar: it is not to be supposed that the author would deal with any publisher who was guilty of so treating authors. If a publisher were to act in such a manner, although perhaps such conduct could not strictly be called a fraud, because it might not be a violation of the specific terms of the agreement, the result would be, that the author whom he so treated would never contract with him again."

In an agreement like the foregoing, where the work was to be brought out at the publisher's expense and the profits to be divided, the addition of a clause providing that the books sold should be "accounted for at the trade sale price, reckoning twenty-five copies as twenty-four, unless it be thought advisable to dispose of any copies, or of the remainder at a lower price, which is left to the judgment and discretion" of the publisher, does not justify an inference that the publisher has no discretion in fixing the price except in the particular case there mentioned. The meaning of such a clause is explained by Lord Hatherley, (when Vice-Chancellor) in *Reade v. Bentley*.^(a) "It is quite obvious that this clause was introduced with no such view, but because Mr. Bentley is to bring out the work, and in bringing it out, he is to fix a certain price to the trade; he is aware that there are persons who are in the habit of purchasing all these works for re-sale; there is a certain quantity in the first instance offered to the trade, as it is called, who send in their orders, each buyer for a certain quantity of copies, and it is brought out to the trade at a price which

(a) 3 K. & J. 277.

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is fixed upon each edition. Then it might happen that some copies would remain unsold. Mr. Bentley first agrees to account with the author for all copies at the trade price; but then, as that might be too hard upon the publisher, who has had all the expense of bringing out the work, it is agreed that, if any copies remain unsold, he is to have liberty, as regards that edition, to dispose of the unsold copies at a lower price. That is the obvious meaning of this clause, and it has no reference to the general question of fixing or not fixing the price."

Time and mode of publication.

On the same principle, the publisher is, in such a case, the proper person to fix the time and mode of publication. (a)

Agreement for division of profits after payment of expenses.

An agreement between an author and a publisher that the latter should publish, at his own risk and expense, a work belonging to the former, on the terms of an equal division of the profits after all expenses had been paid, may be regarded in the double light of a licence and a partnership—a licence for the publication of the work, and then a joint adventure between the author and publisher in the copies so to be published. (b) The publisher cannot be considered in such a case as merely the agent of the author, as a mere agent never embarks in the risk of the undertaking. (c)

Power to determine agreement.

When it is sought to put an end to such a joint adventure, a difficulty may sometimes arise in the choice of the time for making the requisite application. If the author seeks to determine the contract, and to prevent the publication of any subsequent edition by the publisher, he must take steps for the purpose before any expense is incurred by the publisher in respect to such subsequent edition. If the publisher has incurred expense of this nature, he has a right to be recouped it, and to have the benefit of all the profit, the hope of obtaining which induced him to incur such expenditure. (d) But where expense has not been incurred by the publisher in respect to a subsequent edition, the author has a right to determine the joint undertaking, and to prevent the further publication of his work by the publisher, even though the publisher has stereotyped the work previously to the publication of the last published edition. (e)

In determining the point last referred to, Lord Hatherley

(a) *Reade v. Bentley* (4 K. & J. 665).

(b) *Stevens v. Benning* (6 D. M. & G. 231); *Reade v. Bentley* (4 K. & J. 663).

(c) 4 K. & J. 662.

(d) 3 K. & J. 279.

(e) 4 K. & J. 656.

stated the difficulties that beset the question, and the grounds on which his decision rested. On the one hand it might be said on behalf of the publisher that he had given to the undertaking the benefit of his talents and position as a publisher, and had incurred expenses in bringing out the first edition, in the expectation of being recouped the cost of the first by the sale of the second and subsequent editions; and that to hold the author entitled, at his own instance, to determine the agreement when the first edition had been published, would be to enable him by an arbitrary and unreasonable exercise of that power to deprive the publisher of all his profits. On the other hand, it may be urged on the part of the author that, unless he has the power of determining the agreement, the consequence would be that he may be under an obligation to the publisher during the whole of the publisher's life, while the publisher will be under no reciprocal obligation to him. The publisher could compel the author to abstain from publishing a single copy of the work so long as he expressed his readiness to continue publishing, while the author has no reciprocal power: he could never compel the publisher to publish more than a single edition of the work. Further, the publisher, in the *bonâ fide* exercise of his discretion as to the fitting time and mode of publication, might decline indefinitely to publish, but without resigning his contract; while the author might, at the same time, be of a contrary opinion, and yet for months or even years might be kept in suspense and prevented from publishing on his own account, until his publisher should be of opinion that the time had come for the revival of the public interest in the work. His Lordship considered the position of the author, under such circumstances, to be one of so great hardship and difficulty, that unless it were clearly shown to have been contemplated by both parties to the agreement, it should not be forced upon him. (a)

Where the agreement between author and publisher states that after payment of the expenses of publication, &c., "the profits remaining of every edition that should be printed of the work are to be divided into two equal parts," one moiety to go to the author and the other to the publisher, this points out certain definite times for the adjustment of the accounts, and at which the author becomes entitled to terminate his agreement with the publisher. (b)

By stereotyping the work the publisher does not deprive the author of this right. It was objected in *Reads v. Bentley*, Meaning of "edition."

(a) 4 K. & J. 664-666.

(b) *Ib.*

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that when a work has once been stereotyped the term "edition" is no longer applicable; that when a work is published in what is called "thousands," twenty thousand or thirty thousand being circulated, each thousand could not properly be called an edition. To this Lord Hatherley replied: "I apprehend that not merely in point of etymology, but having regard to what actually takes place in the publication of any work, an 'edition' of a work is the putting of it forth before the public, and if this be done in batches at successive periods, each successive batch is a new edition; and the question whether the individual copies have been printed by means of movable type or by stereotype does not seem to me to be material. If movable type is used, the type having been broken up, the new edition is prepared by setting up the type afresh, printing afresh, and repeating all the other necessary steps to obtain a new circulation of the work. In that case the contemplated break between the two editions is more complete, because, until the type is again set up, nothing further can be done. But I apprehend it makes no substantial difference, as regards the meaning of the term 'edition,' whether the new 'thousand' have been printed by a re-setting of movable type, or by stereotype, or whether they have been printed at the same time with the former thousand or subsequently. A new 'edition' is published whenever, having in his storehouse a certain number of copies, the publisher issues a fresh batch of them to the public. This, according to the practice of the trade is done, as is well known, periodically, and if, after printing 20,000 copies, a publisher should think it expedient for the purpose of keeping up the price of the work, to issue them in batches of a thousand at a time, keeping the rest under lock and key, each successive issue would be a new edition in every sense of the word."^(a)

It was held by the Scotch Court of Session that a reprint of part of a book, to replace copies destroyed by an accidental fire, in the hands of the publisher, was not an edition entitling the editor of the work to insist on superintending the issue and receiving remuneration in pursuance of a contract by which he was to "superintend any other edition or editions of the work which should be thereafter published, for doing which he should receive" a certain remuneration.^(b)

^(a) 4 K. & J. 667.

^(b) *Blackwood v. Brewster* (23 Scotch Sess. Cas. 2nd ser. 142, December 7th, 1860).

Where the copyright in a work for a limited period is sold, the purchaser may continue to sell after the expiration of that period copies printed before its expiration, unless in a case of actual fraud.(a)

Selling copies after expiration of limited period of copyright.

In a case where the copyright for four years in a book was sold to a publishing firm, a motion for an injunction to restrain the selling of copies, four years after the expiration of the term, was refused. It was suggested that the effect of permitting the sale might be to destroy altogether the author's copyright, as the purchaser of the copyright for a limited period might during that period print off copies enough to last for all time. To this Wood, V.C. replied: "A nice question might arise as to the number of copies of which an edition might consist; but a publisher was not likely to incur the useless expense of printing copies enough to exhaust the demand for all time, and have them lying upon his hands unprofitably. Besides this, even if the effect of a sale for four years might operate in this way to deprive the author of all copyright in his work, the answer was, that he had not guarded himself against such a contingency. If a manifest case of fraud upon the author were established, the court would know how to deal with it; but nothing of the sort was shown. The defendants had acted quite *bonâ fide*, and were making a perfectly legitimate use of their contract."(b)

Where there is a mere licence to publish, and not an assignment of the copyright, the contract is of a personal nature on both sides, and the benefit of it is not assignable by either party without the consent of the other.(c)

More license not assignable.

Where a contract in writing was entered into between an author and a firm of publishers, whereby the former agreed to give unto the latter "the exclusive right to print and publish an edition of one thousand copies of a work to be written" by the author; in consideration whereof the publishers agreed "to print and publish an edition above mentioned (one thousand copies) at their own cost and expense, and pay the author the sum of fifteen cents each for all and every copy sold;" it being further agreed that if the publishers "find a second edition called for, the said author should revise and correct a copy of the first edition ready for the press, which the said publishers agree to have stereotyped at their own cost, having the exclusive use and control of the plates, printing as many copies as they can

(a) *Howitt v. Hall* (10 W. R. 381; 6 L. T. N.S. 348). (b) *Ib.*

(c) *Stevens v. Benning* (6 De G. M. & G. 223). See *Pulte v. Derby* (5 M'Lean, 335).

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sell, paying to the said author the sum of twenty cents for each and every copy sold; settlement to be made semi-annually from the day of publication, on their note at four months from the date of settlement;" and the publishers, with the author's knowledge and acquiescence, had themselves recorded as proprietors of the copyright, it was held, in America, that they had the legal title to the copyright in them, but only for the purposes of the contract. "The right," said the courts, "covers their interest, and protects it so long as they shall be engaged in the publication and sale of the work. Beyond this, they are not considered as having the right. They cannot transfer it. They have no power to assign the copyright, nor to publish the work except upon the terms of the contract. In this respect the parties are bound to each other, and the contract, it is considered, covers the entire printing and publishing of the work." (a)

The first edition of the work in this case having been exhausted, the publishers stereotyped the corrected manuscript of the second edition, but printed only 1500 copies of the first impression, and when these were sold 2000 more copies were published, being called in the title page the third edition. The author then revised a third edition, caused it to be stereotyped and printed, and took out a copyright in his own name, and filed a bill for an injunction to prevent the publishers from further printing, publishing, or selling their third edition, as contrary to his wishes and desires, and in fraud of his rights. The court held that the publishers were not limited under the contract to the number of copies which they might strike off at the first impression of the second edition, but might print any number they could sell, as they should be wanted during the existence of the copyright; and that the author had no right to print an edition for himself and take out a copyright, so long as the publishers complied with the contract. (b)

The court also held that though the publishers could not transfer their copyright to a third party, they might sell him the plates and authorise him to publish, still accounting to the author, pursuant to the contract. It was further held that the publishers were bound to keep the market supplied, and could not refuse to print if they could sell. (c)

A writer agreed with a publisher to edit a translation of Montaigne, adding notes and a biographical sketch of the author, for a particular sum, which was to be increased by other sums as further editions should be published. It was intended that the publisher should have the sole right of

(a) *Pulle v. Derby* (5 M'Lean, 328, 335). (b) *Ib.* (c) *Ib.*

multiplying copies of the work, but there was no assignment to him of the copyright. After the publisher's death his widow and executrix, with the author's knowledge and assent, registered the copyright in her own name. On the publication of a fresh edition, the widow paid the author money, and gave him copies of the work on the same terms as were contained in the agreement made with her husband in his lifetime; and on three occasions, when the author claimed remuneration on those terms, she did not repudiate all liability, but disputed merely the amount. This was held by the Court of Queen's Bench to be evidence from which a jury might infer an agreement on the part of the widow to remunerate the author on the same scale as in the agreement with her husband, in consideration of the author assenting to her registering the copyright in her own name. (a)

An author agreed with a bookseller for the publication of a work of science, to be entitled the "Elements of Mechanical Philosophy," and to be published in parts, each part to be paid for when published. After the publication of one volume, which constituted in itself a complete part, the progress of the work was interrupted by the death of the author. It was held by the Scotch Court of Session, that the representatives of the deceased author were entitled to payment of the stipulated price of the published volume. One judge dissented, thinking the contract was one for the entire work, and that the object of partial payment was the accommodation of the author, and not any qualification of the original obligation. (b)

Payment to author's representatives for unfinished work.

Courts of equity have no jurisdiction to decree specific performance of contracts between authors and publishers for the composition by the former of works to be published by the latter. (c)

Specific performance not decreed.

Where a barrister agreed with a publisher to write, for a stipulated remuneration, reports of cases decided in the Court of Exchequer, to be printed and published by the publisher, Lord Eldon refused an injunction to restrain the barrister from permitting reports written by him to be published by another person. "I have no jurisdiction," said his Lordship, "to compel Mr Price to write reports for the plaintiffs. I cannot, as in *Morris v. Colman*, (d) say that I will induce him to write for the plaintiffs by preventing him from writing

(a) *Hazlitt v. Templeman* (13 L. T. N. S. 593).

(b) *Constable v. Robison's Trustees* (14 Fac. Dec. 166, 1 June, 1808).

(c) *Clarke v. Price* (2 Wils. Ch. Cas. 157).

(d) 18 Ves. 437. *Vide post*, p. 282.

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for any other person, for that is not the nature of the agreement. The only means of enforcing the execution of this agreement would be to make an order compelling Mr. Price to write reports for the plaintiffs, which I have not the means of doing. If there be any remedy in this case, it is at law. If I cannot compel Mr. Price to remain in the Court of Exchequer for the purpose of taking notes, I can do nothing. I cannot indirectly, and for the purpose of compelling him to perform the agreement, compel him to do something which is merely incidental to the agreement. It is also quite clear that there is no mutuality in this agreement. I am of opinion that I have no jurisdiction in this case.”(a)

In the case of an agreement between an author and a publisher, that the latter should publish at his own risk and expense the work of the former, on the terms that the profits should be equally divided, and that the author should, if a subsequent edition were required, prepare it for the press, and the publisher should print it on the same terms, Knight Bruce, L.J., was of opinion that the duties on neither side were of such a nature that their performance could be specifically enforced by a court of equity.(b)

Damages for
breach of con-
tract.

Either party may, however, in such a case be made liable in damages for breach of contract.

Thus, where a person was employed to write a treatise on a particular subject to be published in the *Juvenile Library*, but before he had completed the treatise the *Juvenile Library* was abandoned by the defendants who had employed him, he was held entitled to recover damages for the breach of contract on the part of the defendants, without any tender or delivery of the treatise on his own part.(c)

And the publisher may maintain an action against the author for breach of contract to deliver the manuscript of a work to be published, provided the work is of an innocent character.(d)

Though the terms of the contract between author and publisher be that the latter should bring out the work at his own expense, and that the profits should be divided between both, this does not prevent the bringing of such an action as last referred to, because it is not brought to recover part-

(a) 2 Wils. Ch. Cas. 165.

(b) *Stevens v. Benning* (6 De G. M. & G. 229).

(c) *Planchè v. Colburn* (8 Bing. 14; 5 C. & P. 58); and see *Colnaghi v. Ward* (6 Jur. 969), where an action was brought for breach of contract to deliver an engraved plate to be published by the plaintiff.

(d) *Gale v. Leckie* (2 Stark. N. P. 107).

nership profits from the author, but to make him liable for not contributing his labour towards the attainment of profits to be subsequently divided between the parties. (a) Lord Ellenborough indicated the amount of damages to be given in such a case as that which would include the expenses of publication, and the profits which would probably have been derived from it. (b)

The defendant, having printed a book, sold 300 copies of it to the plaintiff, a bookseller, at 40s. a copy, and agreed by letter "only to sell to others at 48s. in quires, and single copies at 50s. until" the plaintiff's 300 copies were sold or the plaintiff should consent. The letter also contained these words: "I do not expect you to sell under 48s. and 50s.; but do as you like." The plaintiff, when he had sold part of the 300 copies, went into partnership with S., and transferred all his stock at the cost price; and also sold some copies at 45s. and 46s. An action being afterwards brought by him against the defendant for selling copies under the stipulated price, it was contended on behalf of the defendant, first, that the plaintiff was bound by implication not to sell the work himself under the price at which the defendant was to sell, and that his selling at 45s. and 46s. was an answer to the action, as being against the good faith and honour of the contract, inasmuch as it would tend to prevent the defendant from selling his copies at all; and, secondly, that the contract was put an end to by the plaintiff's going into partnership with S., and transferring his interest to a firm at 40s. a copy; because the undertaking of the defendant was only to continue in force till the 300 copies were sold by the plaintiff, and his parting with them to the firm of which he was only a partner was in fact a selling, just as much as it would be in the case of a joint-stock company. Lord Denman, C.J., held that he could not nonsuit on either ground;—upon the first ground, as the facts relied on did not appear to have been communicated to the defendant; and with respect to the second, enough did not appear of the terms on which the partnership commenced, to justify the decision that there was a parting with the books by the plaintiff, within the meaning of the agreement. His Lordship held, however, that on the question of damage it might be considered whether the plaintiff's own underselling had or had not contributed to affect the price of the work in the market. (c)

Agreement
between pub-
lishers not to
sell under a
certain price.

A contract between a publisher and a printer, whereby the

Contract to print
within a
specified time.

(a) *Gale v. Leckie* (2 Stark. N. P. 107).

(b) *Ib.*

(c) *Benning v. Dove* (5 Car. & P. 427).

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latter undertakes to print a work within six months, does not bind the former to furnish the materials within the six months in the absence of an express stipulation to that effect. (a) Such an engagement to print within six months is only conditional upon the copy being supplied to the printer fast enough; but it does not create by inference an engagement by the employer to furnish it within that time. It would, however, be an answer to any action that might be brought against the defendant for not printing the work within the six months, to say that the copy was not supplied fast enough. (b)

Specific performance of contract for sale of copyright.

Courts of equity have jurisdiction to enforce the specific performance of a contract for the sale of a copyright; even when other matters are mixed up with it. (c) Lord Langdale, M.R., overruled a demurrer to a bill for the specific performance of a contract for the purchase of a copyright, stereotype sheets, prints, stock-in-trade, &c. (d)

It has not been decided whether, on the sale of a copyright, the law would imply a warranty of title in the absence of an express warranty.

Warranty on sale of copyright.

Where the executor (who was also the son) of a deceased author, in reply to an offer from a publishing house relating to one of his father's works, replied that he would be happy to treat with them "respecting the copyright" in it; and, in another letter, said he had accepted their offer "for the exclusive right of publishing it," and gave a receipt for the money paid "for permission to publish the work so long as the copyright may endure; that right to be exclusively their [the publishers'] own for ten years from this date," it was held that this amounted to an express warranty of title; and an equitable assignment of the copyright having, unknown to the executor, been previously made to another publisher, the executor was held liable to an action for breach of the warranty. (e)

Contracts between joint owners of copyright.

Joint owners of a copyright in a work may, no doubt, make what contract they please between themselves as to the printing and publishing of it, and neither will be permitted to set up against the other his original rights as a joint owner in violation of such contract. (f)

(a) *Mawman v. Gillett* (2 Taunt. 325).

(b) *Ib.*

(c) *Thomblson v. Black* (1 Jur. 198).

(d) *Ib.*

(e) *Sims v. Marryat* (17 Q. B. 281).

(f) See the American case of *Gould v. Banks* (8 Wend. 568). "There is no principle or authority," said the Court, "which will inhibit such a contract between parties, because they may be partners in the subject matter of it. They may bind themselves by a private agreement concerning the partnership business, but so far as third persons may be

If a person contracts to supply another with a composition in such a form as to enable the latter to publish it as his own, a court of equity will not restrain the publication of the manuscript in an altered or mutilated form. (a) The present Lord Chancellor (when Vice-Chancellor Wood) expressed an opinion that, unless there is a special contract, express or implied, reserving to the author a qualified copyright, the purchaser of a manuscript is at liberty to alter and deal with it as he thinks proper. (b)

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Alteration of
work by pub-
lisher.

But it seems that if a publisher puts forth an inaccurate edition of an author's work, purporting to be executed by him, the author may maintain an action against the publisher for injury to his reputation, even where the publisher is the owner of the copyright. (c)

An injunction will not be granted to restrain the publication of a manuscript on the ground that the sum agreed to be paid to its author for contributing it, has not been paid; for such payment may be enforced at law, and the title to it is not a ground for the interposition of a court of equity. (d)

Payment of
author.

If an author has agreed with a publisher for the publication of his book, and the publisher has in consequence made advances of money, an injunction would, it seems, be granted to restrain the publication of the work by another publisher until the former had been repaid. (e)

Where a bookseller agreed with an author for an edition of a new translation of Buchanan's "History of Scotland," with a continuation to the time of the Union, to be contained in four volumes, and had obtained subscriptions for all that could fall within his edition, he was held by the Court of Session not entitled to prevent the author from publishing in a fifth volume a continuation of the history, which embraced part of the period, and also some of the matter contained in the last of the four volumes, this being repeated in order to keep up the connection. (f)

Right of author
to publish a
continuation of
his work.

An arrangement was entered into between Dr. Brewster and Professor Jameson, on the one part, and an Edinburgh publishing firm on the other part, for the publication of a work, to be edited by the former, called *The Edinburgh Philosophical Journal*; the agreement to be binding for five years, or till the termination of the twentieth number of the journal. On the title-page the journal was stated to be interested, it would be inoperative as to them." See also Lindley on Partnership, 869, 870, 2nd edit.

(a) *Cox v. Cox* (11 Hare, 118).

(b) *Ib.*

(c) *Archbold v. Sweet* (1 M. & Rob. 162).

(d) *Cox v. Cox* (11 Hare, 118). (e) *Brook v. Wentworth* (3 Anstr. 381).

(f) *Blackie v. Aikman* (5 Scotch Sess. Cas. 719, 26 May, 1827).

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“conducted by Dr. Brewster and Professor Jameson.” After the twentieth number had appeared, Dr. Brewster, having differed with the firm, published a prospectus of “No. 1 of the New Series of the *Edinburgh Journal*, conducted by Dr. Brewster,” whereupon the firm presented a bill of suspension and interdict of a work under this title, on the ground that they were proprietors of the original journal, the publication of which they intended to continue, and that the proposed work was an invasion of their property. The Lord Ordinary, “in respect the copyright of the publication in question is the property of the complainers,” passed the bill, and granted the interdict. The Court of Session recalled this interlocutor as deciding the question to be discussed on the passed bill; but at the same time remitted to pass the bill and continue the interdict. (a)

Contract not to compose for any other than a particular theatre.

A covenant in articles of partnership, by which a dramatic writer undertakes not to compose pieces for any other than a particular theatre, is a legal covenant. (b) Such a covenant was compared in argument before Lord Eldon to contracts in restraint of trade, which are void on principles of public policy; but his Lordship said, “I cannot perceive any violation of public policy in this provision. The case of trade to which it has been compared, is perfectly distinct. . . . The contract is not unreasonable upon either construction; whether it is that Mr. Colman shall not write for any other theatre without the licence of the proprietors of the Haymarket Theatre, or whether it gives to those proprietors merely a right of pre-emption.”

The court could not compel Colman to write for the Haymarket Theatre; but it did the only thing in its power—it induced him indirectly to do one thing by prohibiting him from doing another. (c)

Contract not to publish a work which would prejudice another work.

In the case of *Barfield v. Nicholson and Kelly*, (d) the defendant Nicholson had sold to the plaintiff his copyright in a work called “The Architectural Dictionary,” and had covenanted for himself, his executors, and administrators, that he would not, by publishing any other work which might be prejudicial to the sale of it, or in any manner, directly or indirectly, prejudice the circulation or publication of the dictionary. The defendant Kelly, according to his affidavit, after this, and in total ignorance of the arrangement between the plaintiff and Nicholson, employed the latter in

(a) *Constable v. Brewster* (3 Scotch Sess. Cas. 215).

(b) *Morris v. Colman* (17 Ves. 437).

(c) *Per Lord Eldon in Clarke v. Price* (2 Wils. 164).

(d) 2 Sim. & St. 1.

the composition of a work called "The Practical Builder," which was published by Kelly. The plaintiff charged that this work was in part pirated from "The Architectural Dictionary," and filed a bill to restrain the publication of it. Sir John Leach, V.C.—being of opinion that the plaintiff had no property in the figures and letter-press of "The Architectural Dictionary," alleged to have been pirated in "The Practical Builder," as they had all been given to the world before either of those works appeared—dissolved an injunction which had been granted against Kelly. But the Lord Chancellor (Eldon), on appeal, ordered that an injunction should be awarded to restrain Kelly from publishing or selling in the name of Nicholson "The Practical Builder," or any portions of it. The grounds on which the order was made are not stated; but the injunction was granted most probably on account of the covenant between Nicholson and the plaintiff, which was considered sufficient to hinder the defendant, though ignorant of its existence, from publishing, through the instrumentality of Nicholson, any book which would be detrimental to the sale of "The Architectural Dictionary."

If an author contracts not to write or edit any other work on the subject treated in a work already written by him, a court of equity will not interfere until there is a violation of the agreement by actual printing and publication. (a)

Where the plaintiff purchased of the defendant the copyright of a treatise written by him upon the criminal law, the defendant undertaking not to write or edit any other work upon that subject, and an advertisement appeared that the defendant was about to edit "Burn's Justice," Lord Brougham refused a motion to restrain him from editing articles on the criminal law in that book, saying that the defendant was at liberty to write in his closet what he pleased. The court interfered only when actual printing and publication took place. (b)

There is nothing analogous to copyright in the name of a newspaper, and a mortgage of a share in a "newspaper and the copyright and right of publication thereof and all profits arising therefrom," is not an assignment of copyright which requires registration at Stationers' Hall, but merely an assignment of a chattel interest in the publishing adventure, which derives no additional efficacy from the registration. Such a registration is quite futile. (c)

Mortgage of a newspaper.

(a) *Brooke v. Chitty* (2 Cowp. 216).

(b) *Ib.*

(c) *Kelly v. Hutton* (L. Rep. 3 Ch. App. 703; 19 L. T. N. S. 228; 38 L. J. 917, Ch.

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The lien on the mortgaged share of any co-adventurer in the undertaking, for capital advanced by him, must first be satisfied before the mortgage can be made available by the mortgagee. (a)

A suit having been instituted between Messrs. Beeton and Hutton as to the proprietorship of the *Sporting Life* newspaper, which ultimately decided that they were entitled in equal shares, Mr Beeton, during the progress of the suit, assigned by way of mortgage his share in the newspaper, "and the copyright and right of publication thereof, and all profits arising therefrom," to Messrs. Wrigley and Son, the assignment containing a recital of the proceedings in the suit, and a power of sale. Beeton subsequently mortgaged the same share to his partner Hutton, to secure two sums due to Hutton of 2000*l.* and 512*l.*, with interest at 7½ per cent.; the former sum being the amount Beeton had been over-paid on a settlement of accounts with Hutton, the latter sum being the balance of Beeton's purchase-money for his moiety of the newspaper. Messrs. Wrigley and Son registered the assignment to them at Stationers' Hall, under the provisions of the Copyright Act, and, subsequently, under their power of sale, sold the mortgaged share to the plaintiff, Kelly, who filed a bill for a declaration that he was entitled to a moiety of the newspaper. Both Wrigley and Son and the plaintiff Kelly had permitted the newspaper to be carried on as formerly by Beeton and Hutton. The Lords Justices of Appeal held that the plaintiff could only take Beeton's share in the newspaper, subject to the equities subsisting between the parties. "Many points have been raised before us," said Lord Hatherley (then Sir W. Page Wood, L.J.), "as regards the property which was the subject of the mortgage to Wrigley and Son, of the 21st April, 1864. It appears to us that Beeton and Hutton the elder were engaged in a joint adventure, namely, the publishing of the paper in question. Capital was required for this adventure, and the co-partners or co-adventurers possessed leasehold premises and type, and other chattels necessary for carrying it on. The mortgage to Wrigley and Son assigned to them Beeton's share in the newspaper, whatever it might be, and all profits belonging thereto or arising therefrom. In the habendum the deed speaks of the copyright of the newspaper, and the right of continuation and publication thereof. Now it appears to us that there is nothing analogous to copyright in the name of

(a) *Kelly v. Hutton* (L. Rep. 3 Ch. App. 703; 19 L. T. N. S. 228; 38 L. J. 917, Ch.).

a newspaper, but that the proprietor has a right to prevent any other person from adopting the same name for any other similar publication; and that this right is a chattel interest capable of assignment was held in *Longman v. Tripp*(a) and *Ex parte Foss*.(b) The mortgage, then, to Wrigley and Son, was that of Beeton's share of a chattel, which formed the principal subject of the co-adventure between Beeton and Hutton the elder. Considerable stress has been laid in argument, on the part of the appellants, on the necessity of notice being given of such an assignment either by direct notice to Hutton the elder, or by an entry at the Inland Revenue Office; and much controversy has arisen in evidence as to whether Hutton the elder had or had not in fact such notice prior to the 9th of March, 1866. The entry of their mortgage by Wrigley and Son at Stationers' Hall was clearly futile; but we do not pause to consider the question further, because it is clear on the face of their mortgage deed that Wrigley and Son were aware of the litigation between Beeton and Hutton the elder. They allowed the joint adventure to be worked jointly, whether with or without notice, and it is impossible that they can now take to themselves the subject of that adventure and the profits arising therefrom without being subject to every equity of the co-adventurer. A judgment creditor in execution against one partner, his debtor, takes only the interest of the debtor, subject to his co-partner's equities; and Wrigley and Son could not claim the asset without satisfying in the first place the lien of £512 for the unpaid purchase-money of Beeton's moiety, nor without satisfying the balance of account due from Beeton to his co-adventurer Hutton the elder. The lien of Hutton the elder as *quasi* partner in the adventure must be satisfied before the subject matter of the adventure can be passed over to any person claiming under an assignment from Beeton; and this lien must continue so long as Wrigley and Son, as the assigns of Beeton by way of mortgage, allow the business to be carried on in co-partnership by Beeton and Hutton the elder. Irrespective of the doctrine of notice, they cannot take the benefit of Hutton's capital in carrying on the concern (whether they have given him notice or not) and then ask to have the share of Beeton in the chattel, and still less in the profits of the concern, handed over to them without first satisfying the lien of the co-adventurer for what may be due to him on taking the accounts of the adventure. The same reasoning applies to

(a) 2 Bos. & P. 67.

(b) 2 De G. F. & J. 230

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the plaintiff as purchaser. His letter of the 27th of December, 1866, to Hutton the elder, set out in the amended bill, shows that he, at least up to that time, acquiesced in the arrangement under which the newspaper was to be carried on. In fact, having acquired the interest of Beeton in the newspaper, his mortgagees allow Beeton to conduct the business, and he must be taken to act as their agent and on their behalf. They do not advance any capital, and ask no question as to how it is to be provided. They must therefore take the business as they found it, at least up to the time of the actual exclusion of the plaintiff by Hutton the elder from the concern, and even after that time profits cannot be claimed without making all just allowances in respect of such moiety. Hutton the elder, therefore, wholly irrespective of his mortgage of the 9th of October, 1866, would be entitled to a lien on Beeton's share in the newspaper for £512, the unpaid purchase-money. He would also, we think, be entitled to the balance on the account settled, on the 9th of March, 1866, with Beeton (which account came down to the 30th of September, 1865), and to the £2000 due to Hutton the elder as the result of that account and the arrangement subsequent on it. We think, also, that interest at the rate of $7\frac{1}{2}$ per cent. per annum must be allowed on those two sums; for Hutton the elder was clearly entitled to decline carrying on the business, whether with or without the knowledge of Wrigley and Son's mortgage, except on the terms of being allowed interest on his capital. It is in fact advanced to the plaintiff. As regards Hutton the elder's alleged sale to Hutton the younger on the 13th of September, 1866, we are of opinion that no such sale has been proved, certainly none that can be upheld against the plaintiff. As to the whole case, therefore, we conclude that the plaintiff has become entitled to the interest of Beeton in the newspaper. We see no reason why that interest should not be dealt with as on former occasions, by directing the defendants to concur in procuring the plaintiff's name to be registered at the Office of Inland Revenue as such owner, subject to the lien before mentioned."

Agreement for use by one newspaper of the matter and type of another.

A novel point came before the Court of Chancery for decision in the case of *Platt v. Walter*.^(a) The defendant's grandfather had established both the *Times* and *Evening Mail* newspapers, the former in 1788, and the latter in 1789. The *Evening Mail*, as described in the answer of the defendant, consisted of "a republication, on the evenings of the Mondays, Wednesdays, and Fridays in each week, of the

(a) 17 L. T. N. S. 157.

matter (other than the advertisements) contained in the two preceding numbers of the *Times*, with such omissions and abridgments as were considered desirable, but with the addition of a postscript containing the latest market intelligence, and also such advertisements as had been separately bespoken and paid for, for the *Evening Mail*." This mode of publishing both newspapers continued down to the year 1864, although in 1820 one fourth share in the *Evening Mail* became, by purchase from a son of the original founder, vested in a stranger, from whom the plaintiffs derived their title. The object of the suit instituted in Chancery was to have it declared that the arrangement which had been so long in existence gave the proprietors of the *Evening Mail* certain rights and interests in and over the *Times*, which the proprietors of the latter newspaper could not at their mere will determine, viz., the right of republishing the matter of the two last preceding numbers of the *Times*, or any selection and abridgment of it, and the right of causing to be edited, printed, and published the *Evening Mail* whenever the *Times* should from time to time be edited, printed, and published. The bill further prayed that, in case a notice given by defendant for the dissolution of the partnership had been properly given, it might be declared to be dissolved, and directions should be given for the sale as a going concern of the *Evening Mail*, and the copyright and goodwill thereof, including particularly the rights and interests in and over the *Times*, and the copyright and goodwill and other property thereof; and in case the proprietors of the *Times* should be unwilling to carry it on subject to such rights and interests of the *Evening Mail*, then that the proprietors of the latter paper should be declared entitled to have the *Times* and the copyright, &c., thereof sold, subject to such rights and interest. The Vice-Chancellor (Stuart) dismissed the plaintiff's bill, except so much of it as prayed a dissolution of the partnership and an account; and the Lord Chancellor (Chelmsford) confirmed this decision.

It was contended for the plaintiffs that, although so long as the original founder continued to be sole proprietor of both newspapers, no rights or interests could be said to belong to the *Evening Mail* either in connection with or independently of the *Times*; yet when the original founder had made a separate grant to one of his sons of one fourth share in the *Evening Mail*, he thereby not only gave birth to rights in that paper, but also created a kind of servitude over the *Times*; i.e., he took upon himself an irrevocable obligation to allow the matter in its columns to be copied into the

Evening Mail, and to permit it to be printed at the same place and with the same types as the *Times*. In reply to this, Lord Chelmsford says: "Suppose a covenant to this effect to be good against the grantor, who was sole proprietor and also printer of the *Times*, how could it bind the future proprietors and printers of that newspaper? The covenant relates not to the property granted, but it imposes what may be properly described as a servitude upon the property, which is of a personal nature. It is at the utmost, therefore, a mere personal covenant, binding upon the covenantor and his personal representatives, but the burthen of it not running with the property of the *Times* against assigns."

In answer to a further argument on behalf of the plaintiffs, based on the length of time during which the arrangement had continued, the Lord Chancellor observed: "The presumption of a grant from long continued usage arises only where the origin of the usage is unknown. But in the present case, if the right claimed by the plaintiffs originated in the grant to William Walter [the founder's son], the usage is not required to establish it; and if it did not so originate, the usage is of no avail. The claim of the plaintiffs makes it necessary for them to prove that, either by the original grant of the shares in the *Evening Mail* to William Walter, or by some subsequent right obtained by the plaintiffs against the proprietors of the *Times*, a perpetual benefit to the *Evening Mail*, and a perpetual burthen on the *Times* were established, however prejudicial it might prove to the interests of the proprietors of the *Times*; and that upon the dissolution of the partnership in the *Evening Mail*, and the consequent sale of the property in that newspaper, the proprietors of the *Times* were bound to give a value to the goodwill by continuing the arrangement for its publication as long as the *Times* should continue to be published. There is certainly no express contract to anything like this effect between John Walter, the grandfather, and his sons, when the separate interests in the *Evening Mail* were first created; and it would be a strong implication to draw from the transaction, that the burthen of such an obligation was intended to be assumed by Mr. Walter for himself and for all future proprietors of the *Times*." Finally, the Lord Chancellor said: "What are called in the bill the rights and interests of the *Evening Mail* over the *Times* appear to me to have begun in will and pleasure, and to have continued throughout upon the same footing. They could, at no time, have been enforced; and upon the dissolution of the

partnership in the *Evening Mail* and its consequent sale, the court has no power to direct that they shall be included in the goodwill and property of that newspaper."

A contract by a printer to print, and find the paper for printing, a number of copies of a work is not a contract for the sale of goods within the 17th section of the Statute of Frauds as extended by the 9 Geo. 4, c. 14, s. 7; and the printer, consequently, may recover the price in an action for work, labour, and materials, where the contract is a verbal one.^(a)

Contract to print is not within 17th section of Statute of Frauds.

"In such cases," said Pollock, C.B., "it seems to me that the true criterion is, whether work is the essence of the contract, or whether it is the materials supplied. . . . I am inclined to think that it is only where the bargain is for *goods* thereafter to be made, and not where it is a mixed contract for work and materials to be found, that Lord Tenterden's Act (9 Geo. 4, c. 14) applies." "The defendant," said Martin, B., "having a manuscript, takes it to a printer to print for him. Then what does he intend shall be done? He intends that the printer shall use his type, shall set it up in a frame and impress it on paper, that the paper shall be submitted to the author, that the author having corrected it shall send it back to the printer, who shall again exercise labour and make it into a complete thing in the shape of a book. That being so, I think that the plaintiff was employed to do work and labour and supply materials, and for that he is entitled to be paid. It seems to me that the true criterion is this: Suppose there was no contract as to payment, and the printer brought an action to recover what by law he was entitled to receive, would that be the value of the book as a book? I apprehend not; for the book might not be worth half the value of the paper on which it was printed, but he would be entitled to recover for his work, labour, and materials supplied; therefore this is in strictness work, labour, and materials done and provided by the plaintiff for the defendant. In the case of *Bensley v. Bignold*,^(b) where the defence was that the printer had not affixed his name to the book as required by the 39 Geo. 3, c. 79, s. 27, it was treated by Abbott, C.J., Bayley, J., and Holroyd, J., as a contract for work, labour, and materials."^(c)

A printer who is employed to print certain numbers, but not all consecutive numbers, of an entire work has a lien

Printer's Lien.

(a) *Clay v. Yates* (1 H. & N. 73).

(b) 5 B. & Ald. 335.

(c) *Clay v. Yates* (*ubi supra*).

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upon the copies not delivered for his general balance due for printing the whole of those numbers. (a)

Where a printer was so employed by one Stratford, and printed 8750 copies, of which he delivered only 5987 to Stratford, the residue remaining in his own warehouse, though Stratford supplied the paper for printing the several numbers from time to time as they were to be printed, and the printer made a separate charge for each number, the assignees of Stratford, who afterwards became bankrupt, were held not entitled to recover from the printer the copies remaining in his possession, on tendering to him so much as was due for the printing of those copies in proportion to his charge for the whole. Lord Ellenborough, C.J., said: "I think the defendant had a lien for the whole balance, the work being an entire work in the course of prosecution, upon the same principle that a tailor, who is employed to make a suit of clothes, has a lien for the whole price upon any part of them. It would be inconvenient if he was obliged to make stops in the course of the work: the nature of the work affords a reason for his general lien." And Le Blanc, J., added: "The supplying the paper from time to time did not make it the less one entire work." (b)

It seems that a stereotype printer has not a general lien on stereotype plates not manufactured by himself, but only put into his hands for the purpose of printing from them. (c)

To establish a general lien in such a case, the stereotype printer must show, according to Tindal, C.J., such a custom of trade that the other party to the transaction must be taken to have contracted with reference to it. "Nothing short of this," said the Chief Justice, "will dispense with an express contract; for generally that is the only mode of creating such a lien as this, which the common law does not recognise. In trades long established such a usage may not improbably have grown up; but it requires strong evidence to show its existence in a new trade like that of stereotype printing, which has sprung up within a short period, (d) and in which it is not very probable that any such general usage has yet been established." (e)

It seems that by the custom of trade a printer cannot recover for the printing of a work before the whole is completed and delivered. (f)

(a) *Blake v. Nicholson* (3 M. & S. 167).

(b) *Ib.*

(c) *Bleaden v. Hancock* (M. & Mal. 465; 4 C. & P. 152. *Per* Tindal, C.J.)

(d) This case was decided in 1829.

(e) *Bleaden v. Hancock* (*ubi supra*).

(f) *Gillett v. Mawman* (1 Taunt. 137). See also *Aillard v. Booth* (7 C. & P. 108).

And it would seem that there is a usage of trade between the printers and proprietors of newspapers, that the latter should give to the former four weeks' notice of an intention to put an end to the employment, or pay them four weeks' wages. (a) But there does not appear to be a reciprocal obligation on the part of the printers. (b)

It would appear that there is no general custom of trade binding printers to insure for booksellers the paper given for works to be printed. (c)

For many years the business of printing in London, as between the master printers and compositors, has been regulated by committees of each body, who have from time to time agreed upon rules, which, so long as they remain unaltered, are treated and acted upon as binding between master and compositor, and are imported into every engagement to which they are applicable. (d)

The following rules, agreed upon in 1839, relating to the payment of compositors for printing advertisements on wrappers, came before the Court of Exchequer in 1858 for interpretation: "Every companionship (which means the compositors) on a magazine or review to be entitled to the first or title page of the wrapper of the magazine or review, but not to the remaining pages of such wrapper, or to the advertising sheets which may accompany the magazine or review. Standing advertisements, or stereo blocks, forming a complete page, or, when collected together, making one or more complete pages in a wrapper or advertising sheet of a magazine or review, not to be chargeable. The compositor only to charge for his time in making them up. The remainder of the matter in such wrappers or advertising sheets, including standing advertisements or stereo blocks, not forming a complete page, to be charged by the compositor and cast up according to the 8th and 20th Articles of the scale as they may respectively apply." The interpretation given by the Court of Exchequer, whose judgment was affirmed by that of the Exchequer Chamber, (e) was as follows: "We think it clear that the paragraph or sentence of the rule beginning 'standing advertisements' has reference to the wrapper or advertisement sheet then about to be composed and printed, and that the master has the right to direct in what manner they shall be printed. He may direct that they all, as far as possible, be put into

Payment of
compositors for
advertisements
on wrappers.

(a) *Cunningham v. Fonblanque* (6 C. & P. 44, Park, J.)

(b) *Ib.* (c) *Mauwan v. Gillett* (2 Taunt. 325).

(d) *Per Watson, B., Hill v. Lerey* (3 H. & N. 8).

(e) 3 H. & N. 702.

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complete pages, or that they may be distributed through the wrappers or advertising sheets, as he may think fit. The first provision of the part of the rule before quoted is for the case of standing advertisements forming a complete page. This seems directed to the case of a page of the former number being reprinted in the succeeding one. The second case is of the standing advertisements collected together, making one or more complete page or pages in the wrappers or advertising sheets. We think this refers to the case when the master shall direct that standing advertisements shall be printed in the same page or pages, so far as they will fill up. In such case, when they completely fill a page or pages, the advertisements are not to be chargeable according to the scale, but the compositor is only entitled to charge for his time in making up. But if any standing advertisements are left over, or if the master thinks fit to direct that they shall be distributed through the other pages of the advertising sheet, so that they do not form a complete page, we think that the latter part of the rule applies, and that the compositor is entitled to charge according to the scale." (a)

Where, therefore, in the November number of a monthly magazine there were composed and printed, on one page, two advertisements which occupied the entire page, and the type of which was left standing, and in the December number the same two advertisements were printed, but on different pages, each advertisement occupying about half a page, the remainder of the page being filled up by other advertisements, it was held that the compositor was entitled, under the latter part of the rule, to charge for the composing, and that the case did not come within the first part of the rule, under which the compositor would be entitled to charge only for his time in making up. (b)

A dispute, similar to that just referred to, having arisen in 1856 between a compositor and a master printer, the matter was referred, in pursuance of certain of the rules agreed upon, to the arbitration of three master printers, three journeymen, and a barrister, whose casting vote was to be decisive; the result being an award in favour of the master, the barrister having given his casting vote in favour of the view taken by the three masters. The plaintiff subsequently entered the defendant's service knowing of that decision, and also that the defendant was one of the three masters; but nothing was said as to the terms of payment, each party understanding that it was to be made according to the rules. It was held

(a) 3 H. & N. 12, 13.

(b) *Ib.*

that the decision of the arbitrators was not, at the time of the employment of the plaintiff, binding between the parties as an interpretation of the rule above set out, and that, notwithstanding their decision, it was competent for the court to entertain the question of its construction. (a)

If there is an express undertaking by the printer to insure the paper given him for a work which he contracts to print within six months, he is liable for a loss by fire which takes place after that time, even though the completion of the work within the specified time has been prevented by the failure of his employer to supply copy fast enough. (b) If he wishes to exonerate himself from all risk after the specified time has elapsed, he must abandon the contract altogether; if, whilst complaining of the delay in supplying copy, he continues to print, his contract to insure continues. (c)

Where certain printers were employed to print a work, of which the impression was to be 750 copies, and a fire broke out on their premises before the whole number of copies had been delivered, in an action to recover the amount to be paid for the work, Tindal, C.J., held that the printers' right to recover depended on the question whether the whole 750 copies had been printed when the fire broke out, or whether the fire took place while the press was set and before the whole was printed off, in which latter case they would not be entitled to recover anything. (d)

In the case of authors, publishers, and printers, as in all other cases, our law refuses to aid any of the parties to a contract of an illegal or immoral character.

No person who has had anything to do with the composition of an immoral or libellous work can maintain an action against the person who employed him, to recover remuneration for his labour. This applies to printers, as well as authors and publishers. (e)

Best, C.J., in dealing with the case of a book which recounted the amours of a courtesan, said: "I have no hesitation in saying that no person who has contributed his assistance to the publication of such a work, can recover in a court of justice any compensation for labour so bestowed. The person who lends himself to the violation of the public morals and laws of the country shall not have the assistance of these laws to carry into execution such a purpose. It would be strange if a man could be fined and

(a) 3 H. & N. 12, 13.

(b) *Mawman v. Gillett* (2 Taunt. 325).

(c) *Ib.*

(d) *Adlard v. Booth* (7 C. & P. 108).

(e) *Poplett v. Stockdale* (Ry. & M. 337).

imprisoned for doing that for which he could maintain an action at law. Every one who gives his aid to such a work, though as a servant, is responsible for the mischief of it.”(a)

A printseller cannot recover the price of libellous or immoral publications sold by him.(b)

Where the plaintiff, a printer, agreed to print for the defendant a certain number of copies of a treatise to which a dedication was to be prefixed, and, after the treatise was printed, and the proof sheet of the dedication was revised by the defendant and returned to the plaintiff, the latter, for the first time, discovered that it contained libellous matter, and on that account refused to complete the printing, it was held that he was justified in so refusing, and was also entitled to recover for printing the treatise. “I told the jury,” said Pollock, C.B., in this case,(c) “that if the plaintiff agreed to print the dedication and the treatise, and so undertook to print that which he knew to be libellous, and afterwards said that he would not print both; in such case he could not recover. I think his right to recover rests entirely on this ground, that he had been furnished with the treatise without the dedication. The dedication was afterwards sent, but he had no opportunity of reading it until after it was printed; he then discovered that it was libellous, and refused to permit the defendant to have it. I think that if a contract is *bonâ fide* entered into by a printer to print a work consisting of two parts, and at the time he enters into the contract he has no means of knowing that one part is unlawful, and he executes both, but afterwards suppresses that which is unlawful, there is an implied undertaking on the part of the person employing him to pay for so much of the work as is lawful.”

Although the illegality or immorality of an intended publication would be a good defence to an action brought against the author for breach of contract to deliver his manuscript for publication, this illegality or immorality is not to be presumed where the work itself is not produced at the trial.(d)

A printer whose name did not appear on the periodical paper printed by him, as was required by 38 Geo. 3, c. 78 (since repealed by 6 & 7 Will. 4, c. 76, s. 32), was held not entitled to maintain an action for work and labour done in printing it.(e) And the proprietor of a newspaper,

(a) *Poplett v. Stockdale* (Ry. & M. 338).

(b) *Fores v. Johnes* (4 Esp. 97). (c) *Clay v. Yates* (1 H. & N. 73)

(d) *Gale v. Leckie* (2 Stark. N. P. 110).

(e) *Marchant v. Evans* (2 B. Moore, 14).