

them. The court, it seems, regarded as a contempt the publication of their proceedings without their authority, and Sir James Burrow, in the preface to his "Reports of Cases decided in the King's Bench," apologises for publishing them without an *imprimatur*, and states that if he gives offence in doing so, he will stop and suppress his work. (a) Since the "Year Books," it seems, no judicial proceedings have been published under authoritative care and inspection, either by the House of Lords or by any court in Westminster Hall, except State trials. (b)

The courts, in treating as a contempt the unauthorized publication of their reports, appear not to have proceeded so much on the ground of a sole right of property in them, as on the expediency, with a view to the due administration of justice, of having careful and accurate reports of the decisions which serve as precedents for future cases. This, at any rate, is the ground on which the House of Lords claims the right of prohibiting the publication, otherwise than as it directs, of the report of any trial on impeachment or indictment that takes place before it. In *Gurney v. Longman*, (c) where an injunction was granted until the hearing, restraining the publication by the defendant of an unauthorised report of Lord Melville's trial, Lord Erskine, C., said: "Upon the case of *Bathurst v. Kearsley*, (d) and the practice of the House of Lords, I may grant the injunction; which I do, not upon anything like literary property, but upon this only, that these plaintiffs are in the same situation as to this particular subject, as the king's printer exercising the right of the Crown as to the prerogative copies. I shall not state anything as to other courts, but shall act upon this precedent." His Lordship desired that it should be understood that he had not delivered any judgment of this case further than by granting the injunction until the hearing, upon the precedent of *Bathurst v. Kearsley*; and that he should therefore consider the questions as open in any future stage. The case was ultimately compromised.

The practice of the House of Lords has been to make an order that the Lord Chancellor or Lord Speaker do cause the trial to be published; and that no other person do pre-

Practice of
House of Lords
on impeach-
ments and
indictments.

Sir Jas. Burrow says, (Preface, p. v.) "I have been assured that some now possessed of judicial offices have declared they never would sign one, because it hangs out false colours, and misleads those that think it gives the least approbation or authority to the work."

(a) Preface, p. v.

(b) *Ibid.*

(c) 13 Ves. 493, 507.

(d) This was a case in Chancery, in 1776. The claim of the plaintiff, who had obtained the order of the House for the publication of the trial of the Duchess of Kingston, was acquiesced in by the defendant, and the case passed without discussion: (13 Ves. 494).

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sume to print or publish the same; and, with the exception of Lord Oxford's case and a few others, such an order appears to have been made in almost every instance of a trial before them, whether upon impeachment or indictment. The Lord Chancellor or Lord Speaker, upon this order, appoints a publisher of the trial. (a)

Present state of
the law as to
judicial reports.

The courts have not for a long time asserted a claim to the exclusive publication of their own reports, and in two modern cases, *Butterworth v. Robinson*, (b) and *Saunders v. Smith*, (c) the plaintiffs were treated by the Court of Chancery as possessing a copyright in certain law reports published by them. In the former case an injunction was granted to restrain the defendant from publishing a colourable abridgment of the Term Reports, of which the plaintiff was proprietor; and in the second case an injunction was refused only because the plaintiff's conduct was such as misled the defendant into publishing the book complained of. The existence of the plaintiffs' property in the reports was not questioned in either case.

Publication of
reports during
progress of a
trial.

The courts have not, however, abandoned their right to restrain the publication of their proceedings in cases where such publication would be likely to hinder an impartial trial, or otherwise defeat the ends of justice. Thus, on the trial of Thistlewood and others for treason in 1820, Abbot, C.J., prohibited, by a public statement in court, the publication of any of the proceedings until the trial of all the prisoners should be concluded. Notwithstanding this prohibition, a report of the trial of the first two prisoners tried was published in the *Observer* newspaper. Its proprietor was fined £500 for the offence, on failing to appear to answer for contemptuously publishing such proceedings. On the argument of the case before the Court in Banc, (d) Bayley, J., after stating the circumstances which rendered it advisable that the publication of the trial should be delayed in the present case, observed: "It is argued that if the court have this power of prohibiting publication, there is no limit to it, and that they may prohibit altogether any publication of the trial. I think that that does not follow. All that has been done in this case is very different, for the prohibition here has only been till the whole trial was completed."

(a) See the case of the Earl of Cardigan, tried before the House of Peers in 1841, and the order made by the House on the 19th February of that year (Lord's Journals, vol. lxxiii., p. 46). Messrs. Gurney were appointed by the Lord Speaker (Shaftesbury) to publish a report of the trial.

(b) 5 Ves. 709.

(c) 3 My. & Cr. 711.

(d) *The King v. Clement* (4 B. & Ald. 218).

And Holroyd, J., added: "I take it to be clear that a court of record has a right to make orders for regulating their proceedings, and for the furtherance of justice in the proceedings before them, which are to continue in force during the time that such proceedings are pending. It appears to me that the arguments as to a further power of continuing such orders in force for a longer period, do not apply. It is sufficient for the present case that the court have that power during the pendency of the proceedings. This order was made to delay publication only so long as it was necessary for the purposes of justice, leaving every person at liberty to publish the report of the proceedings subsequently to their termination. I am, therefore, of opinion that this was an order which the court had the power to make."

We find a recent assertion of the right in the case of *Tichborne v. Tichborne*,^(a) where the reasons for exercising it are fully stated. In this case a motion was made on the part of the plaintiff that the publisher of the *Pall Mall Gazette* might be committed to the Queen's prison, for a contempt of the court in having published in that paper an article containing comments on certain affidavits which had been filed in support of the plaintiff's case, but had not yet been brought before the court. Similar applications were at the same time made to commit the publishers of certain other newspapers, for having published the same article. The Vice-Chancellor (Wood) said: "I have no hesitation in saying that a gross contempt of court has been committed in this case. The first observation I would make is, that, from the time of Lord Hardwicke downwards, the rule which that great judge laid down in *Roach v. Garvan*,^(b) has been the rule which the court has adopted for its guidance, namely, the determination on the part of the court to discountenance any attempt to prejudice mankind against the merits of a case before it has been heard." In reply to an argument made use of on behalf of the publisher, that the comments did not transgress the rules which have been laid down as to fair comments on matters of public interest and public notoriety, the Vice-Chancellor said: "In the first place, let me observe, that rule does not extend to comments of any description on a matter that is pending, waiting for argument, and waiting for decision; and I think this court would be failing extremely in the administration of justice, if it allowed comments of such a description as are here contained to be made on any documents whatever,

(a) 17 L. T. N. S. 5; 15 W. R. 1072; L. Rep. 7 Eq. 55, note.

(b) 2 Atk. 469.

which are before the writer and not before the court, but which are afterwards to come before the court, and which comments have a clear and distinct tendency towards directing and swaying the mind of the court or jury, or whoever may have to determine the cause." The proprietor of the *Pall Mall Gazette* having made a humble submission and apology, the Vice-Chancellor thought it sufficient for the purposes of justice to order him to pay the costs of the motion. A similar order was made with respect to the printer of another paper which had gone beyond a mere insertion of the article from the *Pall Mall Gazette*, and the motions against the other papers were abandoned.^(a)

Copyright of
English and
Scotch univer-
sities, and col-
leges of Eton,
Westminster,
and Winchester.

By 15 Geo. 3, c. 53, the Universities of Oxford and Cambridge, the four Universities in Scotland, and the colleges of Eton, Westminster, and Winchester have granted to them for ever the sole liberty of printing and reprinting at their respective presses, all such books as had been before the year 1775, or should thereafter at any time "be bequeathed or otherwise given by the author or authors of the same respectively, or the representatives of such author or authors, to or in trust for the said universities, or to or in trust for any college or house of learning within the same, or to or in trust for the said four universities in Scotland, or to or in trust for the said colleges of Eton, Westminster, and Winchester, or any of them, for the purposes mentioned,^(b) unless the same should have been bequeathed or given, or should thereafter be bequeathed or given, for any term of years, or other limited term."^(c)

Copyright is given only so long as the books or copies belonging to the universities or colleges are printed at their own printing presses within the said universities or colleges respectively, and for their sole benefit and advantage. If they delegate, grant, lease, or sell their copyrights or exclusive rights of printing the books or any part thereof, or allow, permit, or authorise any person or persons or body corporate to print or reprint the same, then the privileges granted by the Act are to become void and of no effect. They may, however, sell such copies so bequeathed or given in like manner as any author or authors may do.^(d)

Registration.

In order that the penalties for piracy may be enforced, it is necessary that every book be entered in the register book

(a) See further on this subject, the chapter on "Libellous Contempts of Courts of Justice," *post*, and the cases cited there.

(b) *i.e.*, "for the advancement of learning, and other beneficial purposes of education within the said universities and colleges."

(c) Sect. 1.

(d) Sect. 3.

at Stationers' Hall within two months after the bequest or gift of it shall have come to the knowledge of the vice-chancellors of the said universities, or heads of houses and colleges of learning, or of the principal of any of the said four universities respectively. The register book may be inspected without a fee, and the clerk is to give a certificate of any entry on payment of a fee not exceeding sixpence. (a)

If the clerk refuse to make entry or give certificates of entries, the university or college which owns the copyright (notice being first given of such refusal by an advertisement in the *Gazette*) is to have the like benefit as if such entry or certificates had been duly made and given, and the clerk who refuses is for every offence to forfeit £20 to the proprietors of the copyright. (b)

If any one prints, reprints, or imports, or causes to be printed, reprinted, or imported, any such book or books, or, knowing the same to be so printed or reprinted, sells, publishes, or exposes to sale, or causes to be sold, published, or exposed to sale, any such book or books, he is to forfeit the books and every sheet of them, to the proprietor of the copyright, and one penny for every sheet found in his custody either printed or printing, published or exposed to sale contrary to the true intent and meaning of the Act, one-half to go to the Crown, the other half to the prosecutor. (c)

The Act of 41 Geo. 3, c. 107, s. 3, confers on Trinity College, Dublin, a similar copyright and under similar conditions in all books given or bequeathed to it. Trinity College,
Dublin.

5 & 6 Vict. c. 45, which (s. 1) repeals the Act of 41 Geo. 3, c. 107, provides (s. 27) that nothing contained therein shall affect or alter the rights of the two universities of Oxford and Cambridge, the colleges or houses of learning within the same, the four universities in Scotland, Trinity College, Dublin, and the several colleges of Eton, Westminster, and Winchester, in any copyrights theretofore vested or thereafter to be vested in them.

CHAPTER VI.

COPYRIGHT AFTER PUBLICATION.

ON the subject of copyright after publication, widely different views have been entertained by our ablest lawyers living at different times. Some have considered the title of the author to the property in the creations of his intellect as absolute in Older views as
the nature of the
right.

(a) Sect. 4.

(b) Sect. 5.

(c) Sect. 2.

its nature and not only exclusive but also perpetual, giving him the sole right to determine, not only during his life, but for all time after his death, who should enjoy the benefits of his literary works. There have been others who, not doubting the author's title to the property in the products of his mind before he has published them, were yet of opinion that by the act of publication his composition became *publici juris*, and the author's right to a property in them ceased thenceforth for ever. Neither of these two opposite opinions represents the law on the subject as it is now finally determined. The first-mentioned opinion was the prevailing one down to the year 1744. "The general consent of the kingdom for ages," Lord Mansfield considered to be in favour of that view of the question, and the decisions in several cases proceeded on the ground of its correctness. The question took this form—whether copyright in the productions of an author existed at common law previous to and independently of statutory enactment, and if it had an existence previous to statutes, whether the statutes dealing with the subject and conferring on authors a copyright for a certain number of years took away from them all copyright in their works after the time so specified had expired. In other words, had an author copyright in his published works indefinite and unlimited in point of time, or was his right strictly confined to the period marked out in the legislative enactments relating to copyright?

Anne, c. 19.

The first Act of Parliament which deals with the question of copyright after publication is the 8 Anne, c. 19, and it conferred on authors (or their assigns) of works published before the year 1710 a copyright of twenty-one years' duration, "and no longer," and on the authors or assignees of works published after that date a copyright of fourteen years "and no longer," to commence from the day of first publication. Did this Act deprive authors of copyright in their productions after the expiration of the period of twenty-one or fourteen years?

For a long time it was held that it did not; that the author had a general right of property in his works which he did not lose by publication, and of which the statute did not deprive him. In 1735 (more than twenty-one years after the passing of 8 Anne, c. 19), Sir Joseph Jekyll, M.R., granted an injunction to restrain the printing of "The Whole Duty of Man," which had first appeared in 1657.^(a) As the statutory term of copyright had passed, the plaintiff's title to an injunc-

(a) *Eyre v. Walker* (cited 4 Burr. 2325).

tion could only rest on the ground of his general common law right of property independent of and outlasting the statutory period limited by the Act of Anne. In the same year (1735) Lord Talbot granted an injunction to restrain the printing of Pope's and Swift's "Miscellanies," though many of the pieces were published before the statute of Anne (a), and the injunction was submitted to. In 1736 Sir Joseph Jekyll restrained the publication of Nelson's "Festivals and Fasts," though the book was first published in 1703. (b) In 1739 Lord Hardwicke granted an injunction against the publication of Milton's "Paradise Lost," though the title of the plaintiffs was derived from an assignment from the author made in 1667. (c) In 1752 Lord Hardwicke granted a similar injunction with respect to the publication of an annotated edition of the same poem. (d) And all these decisions were acquiesced in.

In 1761 an opportunity occurred for the first time of determining the question by a Court of Error, in the case of *Tonson v Collins* (e), an action relating to the copyright in the *Spectator*, which had been purchased from Addison and Steele. But the action, before its final determination, was discovered to be a collusive one, and it fell to the ground in consequence. An important case (f), however, soon after occurred (in 1769) in which the subject was very fully discussed by the Court of King's Bench, and in which the first of the two opinions referred to at the beginning of this chapter was maintained by the majority of the court. The action was brought to recover damages for the publication of an edition of Thomson's "Seasons," a work which the plaintiff had purchased from its author in 1729, and had continued to publish from that time down to the year 1763, when the defendant Millar published the edition complained of without the plaintiff's license or consent. The term of years during which the statute of Anne secured the copyright to the author had long since expired, and the plaintiff's claim could only rest upon the ground of a perpetual property at common law, independent of statute, in the author or his assignees. The jury found the facts of the case in a special verdict, and also that before the reign of Queen Anne it was usual to purchase from authors the perpetual copyright of their books, and to assign the same from

Millar v. Taylor
(overruled).

(a) *Motte v. Faulkner* (cited *Ib.*) (b) *Walthoe v. Walker* (*Ib.*).

(c) *Tonson v. Walker* (cited 4 Burr. 2326).

(d) *Tonson v. Walker* (3 Swans. 672).

(e) 1 W. Black, 301, 321, 345.

(f) *Millar v. Taylor* (4 Burr. 2303).

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hand to hand for valuable consideration, and to make the same the subject of family settlements. Lord Mansfield, C.J., and Willes and Aston, J.J., gave judgment in favour of the plaintiff and his right at common law, independently of and unaffected by the statute of Anne, Yates, J., being of a contrary opinion. The judgment of the majority of the court was based not only on the decided cases already referred to, but on the broad ground of natural justice and equity. They considered that as every man has an exclusive property in his works before publication, he continues to possess it after publication, publication being no abandonment of his right. And as for the statute of Anne, they were of opinion that it was merely intended to give for a term of years a more efficient protection, where the entry and the other provisions of the Act had been complied with, and not to abridge the duration of the author's exclusive property in his work.

Donaldson v. Beckett.

But this did not long continue to be law. The subject came at last, on appeal, before the House of Lords in 1774, in the case of *Donaldson v. Beckett*,^(a) and the decision in *Millar v. Taylor* was distinctly overruled. The case came on appeal from the Court of Chancery, in which Lord Apsley had followed, as of course, the ruling of the King's Bench in *Millar v. Taylor*. After the question had been fully argued, the judges were called on to deliver their opinions in answer to certain questions put to them. Ten of them, against one, were of opinion that at common law an author of any book or literary composition had the sole right of first printing and publishing it for sale. Eight were of opinion that the author might bring an action against any person who printed, published, or sold the same without his consent; one denied the author's right to do so, and two others considered the action would lie only when the invasion was coupled with fraud or violence. Seven judges against four were of opinion that the law did not take away the author's right after publication, and that no person could reprint and sell for his own benefit the author's work without his consent. Six against five were of opinion that the statute of Anne took away the common law copyright after publication, and that an author is thereby precluded from every remedy except upon the foundation of that statute, and on the terms and conditions prescribed by it. Seven judges against four were of opinion that the author of any literary composition and his assigns had the sole right of printing and publishing the same in perpetuity, by

Opinions of the judges.

(a) 4 Burr. 2408.

the common law. And six judges against five were of opinion that this right in perpetuity is restrained and taken away by the statute of Anne. Lord Mansfield did not deliver his opinion, but it was known that he adhered to the doctrines laid down in his judgment in *Millar v. Taylor*. Lord Camden addressed the House of Lords against the doctrine of a common law copyright, and especially denounced as odious and selfish the doctrine of a *perpetual* copyright after publication. He was followed on the same side by Lord Apsley, C. The House reversed the decree pronounced by the Court of Chancery, and thus finally decided that whether copyright after publication did or did not exist at common law before the statute of Anne, that statute had abrogated the right, and that no author had a property in his works for any longer period than that set out in the statute. Decision.

This decision appears to have caused great alarm amongst the booksellers of London, very many of whom had purchased old copyrights, not within the protection of the statute of Anne, on the faith of the previous decisions and the general opinion that the common law right of property in literary works had not been interfered with by that statute. They petitioned Parliament to relieve them from the consequences of the recent decision of the House of Lords. A committee was appointed by the House of Commons to investigate the matter; evidence was taken, and a Bill was introduced to vest in the purchasers of old books, not protected by the Act of Anne, the sole property in them for a limited time. After debates of a very acrimonious character, and after counsel had been heard at the bar for and against the Bill, it passed the House of Commons, but was thrown out in the House of Lords, owing chiefly to the opposition of Lord Camden.

The universities were more fortunate, for in 1775 they obtained an Act^(a) enabling the two English universities, and the Scotch, together with the colleges of Eton, Westminster, and Winchester to retain the perpetual copyright in books given or bequeathed to them for the advancement of useful learning, and other purposes of education.

On whatever basis of natural right the title of an author to the sole property in the products of his mental faculties may rest in the last resort, it is now clear that the copyright after publication enjoyed by British subjects is not regarded as a property derived from or carved out of any general Foundation of copyright after publication.

(a) 15 Geo. 3, c. 53.

right of property, but it is a territorial monopoly, the creation of our municipal law, and bounded and regulated by the Copyrights Acts.^(a) An author has no right or property in his work after publication other than that which is conferred on him by the different statutes which have been passed from time to time with reference to the subject of copyright. To these, therefore, we must look in order to determine the nature and extent of the author's right, the conditions on the performance of which it is dependent, and the mode in which infringements of his statutory rights are to be dealt with.

HISTORICAL SUMMARY OF THE COPYRIGHT ACTS.

8 Anne, c. 19.

It has already been stated that down to the year 1710 whatever rights authors had in their works were left undefined by any statutory enactments, and in consequence, as the Act of Anne (8 Anne, c. 19) passed in that year tells us in its preamble, "printers, booksellers, and other persons" frequently took "the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families." For the purpose of preventing such practices in future, and for the encouragement of learned men to compose and write useful books, that statute enacted that from and after the 10th day of April, 1710, "the author of any book or books already printed, who hath not transferred to any other the copy or copies^(b) of such book or books, in order to print or reprint the same, shall have sole right and liberty of printing such book and books for the term of *one and twenty years*, to commence from the said 10th day of April, and no longer; and that the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assignees shall have the sole liberty of printing and reprinting such book or books for the term of *fourteen years*, to commence from the day of first publishing the same, and no longer." And the Act inflicted a penalty on those who should, within

(a) See the remarks of Crompton, J., in *Jeffreys v. Boosey* (4 H. L. 847). In the elaborate opinions given by the judges to the House of Lords in this case the arguments for and against the existence of copyright at common law are fully stated.

(b) By the word "copy" in this statute and in the early cases on the subject, is meant what we now call copyright. *Vide ante*, p. 40, note (b).

the time specified in the Act, print, reprint, or import, or cause to be printed, &c., "without the consent of the proprietor or proprietors thereof first had and obtained in writing," or should sell, publish, or expose to sale any book or books so printed, &c., without consent, the penalty being a forfeiture of the book or books to the proprietor of the copy, and one penny for every sheet found in the offender's possession, one moiety to go to the Sovereign, the other to any person suing for it.(a)

The benefit of the preceding enactment was, however, extended only to those books published after the passing of the Act, whose proprietor's title was entered in the register book of the Stationers' Company in the manner usual before the Act.(b)

The Act furthermore empowered every person who considered the price of a book too high to bring the matter before the Archbishop of Canterbury, the Lord Chancellor or Lord Keeper, the Bishop of London, the Chief Judge of the King's Bench, the Chief Judge of the Common Pleas, the Chief Baron of the Exchequer, the Vice-Chancellors of the two English Universities, the Lord President of the Sessions, the Lord Justice General, or the Rector of the College of Edinburgh, one or more of whom might examine into the cause of complaint and settle the price of the book as seemed just, and make the bookseller or printer pay all the costs of the person making the complaint.(c)

Provision was made that nine copies of every book should be given to different libraries, and the rights of the universities were saved(d). With respect to books in other languages, the Act provided that nothing contained in it should extend or be construed to extend "to prohibit the importation, vending, or selling of any books in Greek, Latin, or any other foreign language printed beyond the seas, anything in this Act contained to the contrary notwithstanding."(e)

The next statute dealing with the subject of copyright was the 8 George 2, c. 13. It conferred a copyright of equal duration to that given to the authors of books by the statute of Anne, viz., fourteen years, on every person who should "invent and design, engrave, etch, or work in mezzo-tinto or chiaro oscuro, or from his own works and invention should cause to be designed and engraved, etched, or worked in mezzotinto or chiaro oscuro any historical or other print or prints . . . which shall be truly engraved, with the name

8 Geo. 2, c. 13.
Extension of
copyright to
engravings.

(a) Sect. 1. (b) Sect. 2. (c) Sect. 4. (d) Sect. 5.
(e) Sect. 3.

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of the proprietor on each plate, and printed on every such print or prints;" and it inflicted a penalty of five shillings for every pirated print.

7 Geo. 3, c. 38.

The preceding Act having reference only to those who "invented and designed," or "from their own works and invention" engraved, &c., any prints, was found to be intellectual for the purposes intended. So 7 Geo. 3, c. 38, was passed, extending the benefit and protection of the former Act to every person who should "engrave, etch, or work in mezzotinto or chiaro oscuro, or cause to be engraved, etched, or worked, any print taken from any picture, drawing, model, or sculpture, either ancient or modern . . . in like manner as if such print had been graven or drawn from the original design of such graver, etcher, or draughtsman," and the protection afforded by both Acts is extended to the proprietors for twenty-eight instead of fourteen years.

17 Geo. 3, c. 57.
Further remedy
by action.

The penalties inflicted on pirates by the two preceding Acts being found insufficient to protect the property of artists, the Legislature added an additional security in the Act 17 Geo. 3, c. 57, by giving to the proprietor of historical and other prints, maps, charts, plans, &c., a special action upon the case against any person who should within the time limited by the Acts offend against any of the provisions contained therein, to recover such damages as a jury on the trial of such action, or on the execution of a writ of inquiry thereon, should give or assess, together with double costs of suit.

38 Geo. 3, c. 71.
Models and casts.

38 Geo. 3, c. 71, vests the sole right and property of making models or casts in the original proprietor, for the term of fourteen years, from the time of first publishing the same, and gives to the proprietor an action on the case against all persons offending against his rights during that term; an exception being made in the case of persons who purchase the right from the original proprietors.

41 Geo. 3, c. 107.
Extension of
the term of
copyright.

The 41 Geo. 3, c. 107(a) afforded further protection to the proprietors of books. It increased the penalty in cases of infringement, and furthermore gave to the proprietor an action on the case against every bookseller, printer or other person "in any part of the United Kingdom, or in any part of the British dominions in Europe," who should, after the passing of the Act, print, reprint, or import, or cause to be printed, reprinted, or imported, without the consent of the proprietor first had in writing, signed in the presence of two

(a) Repealed by 5 & 6 Vict., c. 45, s. 1, except as to rights existing or proceedings pending at the time of passing of that Act.

or more credible witnesses, any book or books, or who, knowing them to be printed, reprinted, &c., without the proprietor's consent, should sell, publish, or expose them to sale, or cause them to be sold, &c.; the proprietor to recover such damages as the jury should award or assess with double costs of suit.

Sect. 1 further provided that, if at the expiration of the term of fourteen years the author or authors should still be living, he or they should have the sole right of printing or disposing of copies for another term of fourteen years; but the Act did not extend to books already published, nor indemnify against penalties under former Acts in force at the date of the union of Great Britain and Ireland; and (sec. 7) the importation of pirated copies was prohibited.

Again the Legislature interfered, and with a design similar to that of the preceding statutes, by the Act 54 Geo. 3, c. 156.^(a) It altered the term of copyright in books, enacting that, instead of a copyright for fourteen years in the author and his assignee, and then, if the author were alive at the expiration of that term, for fourteen years more in the author himself, the author and his assignee should have the sole liberty of printing and reprinting his book or books for the full term of twenty-eight years from the day of first publication, to continue during the remainder of the author's natural life, should he outlive the twenty-eight years.

Dramatic literary property which had hitherto been unnoticed by Parliament was next dealt with. 3 & 4 Will. 4, c. 15, enacted that, after the passing of that Act, the author, or his assignee, of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author or his assignee, or which should thereafter be composed, and not printed or published by the author or his assignee, should have as his own property the sole liberty of representing, or causing to be represented, at any place of dramatic entertainment whatsoever, in any part of 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 such production as aforesaid, and should be deemed the proprietor thereof; and the author of any such production, printed and published by him or his assignee within ten years before the passing of the Act, or which should thereafter be so published, should, from the time of passing the Act, or from the

(a) Repealed by 5 & 6 Vict., c. 45, s. 1, except as to rights existing, or proceedings pending at the time of passing of that Act.

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time of such publication, respectively, until the end of twenty-eight years from the publication, or if the author or authors, or the survivor of the authors, was alive at the end of that period, during the residue of his natural life, have, as his own property, the sole liberty of representing it, or causing it to be represented at any place of dramatic entertainment. (a)

5 & 6 Will. 4,
c. 65,
Lectures.

The next subject dealt with by statutory enactment was the publication of lectures without consent. The provisions of 5 & 6 Will. 4, c. 65, on this subject have been already referred to, *ante* pp. 40, 41.

6 & 7 Will. 4,
c. 69
Ireland.

6 & 7 Will. 4, c. 59, extended to Ireland the provisions of 17 Geo. 3, c. 57, relating to the protection of copyright in prints and engravings.

1 & 2 Vict. c. 59.
International
copyright.

The International Copyright Act of 1 & 2 Vict. c. 59, (b) empowered Her Majesty, by Order in Council, to grant a copyright in England, for the same term that English subjects might enjoy it, to foreign authors whose governments should engage to secure the same privilege to British authors.

5 & 6 Vict. c. 45.
Final extension
of the term of
copyright.

Next came the comprehensive statute of 5 & 6 Vict. c. 45, repealing the former Acts of 8 Anne, c. 19; 41 Geo. 3, c. 107, and 54 Geo. 3, c. 156, except as to proceedings then pending at law or in equity, or to causes of action or suit, or rights of contract then subsisting.

This Act extends the term of copyright in every book published in the lifetime of its author to the natural life of the author, and the further term of seven years, commencing at the time of his death; or to the term of forty-two years altogether, from the first publication of the book, should that number of years not have elapsed at the end of seven years from the death of the author; or if the book be published after his death, to the term of forty-two years from the first publication thereof. In cases of subsisting copyright the Act extended the term of enjoyment to that last mentioned, except where it belonged to an assignee for other consideration than that of natural love and affection.

Periodicals.

Sect. 18 of this Act first deals with the question of copyright in productions appearing in encyclopedias, periodicals, and works published in a series, reviews, or magazines.

Musical compositions.

The provisions of 3 & 4 Will. 4, c. 15, relating to dramatic literary property, are by this Act extended to musical compositions, and the extended term of duration of copyright in

(a) Sect. 1.

(b) Repealed by 7 Vict. c. 12.

books provided by the present Act is applied also to the liberty of representing dramatic pieces and musical compositions, the first public representation or performance of any dramatic piece or musical composition being deemed equivalent, in the construction of the Act, to the first publication of any book.(a)

The Act 7 Vict. c. 12, was passed to amend the law relating to International Copyright. It repeals the International Copyright Act of 1 & 2 Vict. c. 59, and enables Her Majesty, by Order in Council, to confer more extended privileges on authors of books, prints, articles of sculpture, and other works of art, first published in foreign countries, by giving them a copyright of not greater duration than that enjoyed in works of a similar character first published in the United Kingdom. It also enables Her Majesty to direct that authors and composers of dramatic pieces first publicly represented and performed in foreign countries shall have similar rights in the British dominions.

7 Vict. c. 12.
Amendment of
International
Copyright.

The law relating to the protection in the colonies of books entitled to copyright in the United Kingdom, was amended by 10 & 11 Vict. c. 95.

10 & 11 Vict.
c. 95.
Colonial
Copyright.

International copyright was again dealt with by 15 & 16 Vict. c. 12, (amended in one particular by 38 Vict. c. 12; vide *post*, chap. on Dramatic and Musical Compositions) which extends and explains the previous Acts, besides enabling Her Majesty to carry into effect a convention with France on the subject.

15 & 16 Vict.
c. 12.
Further
amendment of
International
Copyright.

This Act clears up a previously existing doubt as to prints taken by lithography, by applying to them the provisions contained in the different statutes relating to other prints and engravings.(b)

Lithographs.

The legislature came in the last place to the aid of authors of paintings, drawings, and photographs. In 1858 Lord Lyndhurst presented a petition to the House of Lords from the Society of Arts, the Royal Institute of British Architects, and a number of sculptors, painters, photographers, and others, asking for an extension of the law of copyright to works of fine art. A committee was appointed and a report presented, and a Bill was introduced to give effect to the report. A dissolution of Parliament, however, delayed the matter for a while, but in 1862 the Act 25 & 26 Vict. c. 68, was passed to accomplish the prayer of the petition. Previously to that statute the authors of paintings, drawings, and photographs had no copyright in their works.(c)

25 & 26 Vict.
c. 68.
Paintings,
drawings, and
photographs.

(a) Sect. 20.

(b) Sect. 14.

(c) See the preamble to this statute.

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The foregoing is but a rapid summary of the legislative enactments on the subject of copyright, in their chronological order. The chief provisions of the various Acts will be considered in detail when treating in succeeding chapters of the different subjects in which copyright exists.

CHAPTER VII.

COPYRIGHT IN BOOKS.

Definition of
copyright.

THE Act of 5 & 6 Vict. c. 45, s. 2, defines "copyright" to mean the sole and exclusive liberty of printing or otherwise multiplying(a) copies of any subject to which the said word is in the Act applied.

Meaning of
"book."

The same section provides that the word "book" shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press(b), sheet of music, map, chart, or plan separately published(c).

Maps.

In the opinion of James, L.J., and Mellish, L.J., this enactment alters the law as to maps. "Formerly," said James, L.J., "maps had been considered artistic works, now they were to be brought into their proper place as literary works. And rightly so, in my opinion, for maps are intended to give information in the same way as a book does. A chart, for instance, gives similar information to sailing rules; maps give instruction as to the statistics and history of the country portrayed; they point out the amount of population, the places where battles were fought, the dates when provinces were annexed, as in maps of India, and give other geographical and historical details. It was quite reasonable, therefore, to take them out of the law of artistic works, and to give them greater protection by bringing them under the law of copyright of literary works." Mellish, L.J., added: "It is impossible to read the Act without seeing that, for some purposes at least, there was to be a change in the copyright of maps,

(a) This gives a wider meaning to the term than that given by the Statute of Anne, which was "the sole right and liberty of printing," and thus protects literary works from unauthorised publication by other means than the press: (see *per* Talfourd, J., *Novello v. Sudlow* (12 C. B. 189; 16 Jur. 671.)

(b) A label used in the sale of any article is said by an American Judge (M'Clean) not to be a book within the provisions of the Copyright Act: (*Coffeen v. Brunton*, 4 M'Clean, 516.)

(c) See *Hime v. Dale* (2 Camp. 27 n.); *Clementi v. Goulding* (2 Camp. 25); *Back v. Longman* (Cowp. 623).

and that some maps were to be included under the term "books." So that for some purposes, at least, that Act altered the Acts of Geo. 2 and (Geo. 3.)"^(a)

This is important to all publishers of maps, in view of the statutory requirements as to registration and deposit of copies mentioned *post*.

Malins, V.C.^(b), held that a newspaper is not a book within this section, and does not require to be registered under sect. 13, in order to entitle the proprietor to restrain the piracy of it; but the late Master of the Rolls (Sir Geo. Jessel) refused to follow this decision, which he considered "opposed to the plain reading of the Act of Parliament."^(c)

If prints are published together in a volume, they form a book, whether there is letterpress or not: there may be such things as picture books for those who cannot read letterpress.^(d)

With respect to the duration of copyright in books, sect. 3 enacts "that the copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns: provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns."

In the case of books published before the passing of the Act (1st July, 1842), and in which copyright then subsisted, sect. 4 enacts, "that the copyright which at the time of passing this Act shall subsist in any book theretofore published (except as hereinafter mentioned) shall be extended and endure for the full term provided by this Act in cases of books thereafter published, and shall be the property of the

(a) *Stannard v. Lee*, L.R. 6 Ch. App. 349. The map in this case, published in 1870, was a "Panoramic Bird's-eye view of France and Prussia, and the surrounding countries likely to be involved in the war; with the railways and strategic positions of each army, and the great fortresses of the Rhine provinces,"

(b) *Cox v. Land and Water Journal Company* (L. Rep. 9 Eq. 524; 21 L. T. N. S. 548.)

(c) *Walter v. Howe*, L.R. 17 C. D. 708.

(d) Per Jessel, M.R., in *Maple & Co. v. Junior Army & Navy Stores*, L.R. 21 C. D. 377, 379.

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person who at the time of passing of this Act shall be the proprietor of such copyright: Provided always, that in all cases in which such copyright shall belong in whole or in part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this Act, but shall endure for the term which shall subsist therein at the time of passing of this Act, and no longer, unless the author of such book, if he shall be living, or the personal representative of such author, if he shall be dead, and the proprietor of such copyright shall, before the expiration of such term, consent and agree to accept the benefits of this Act in respect of such book, and shall cause a minute of such consent in the form in that behalf given in the schedule to this Act annexed to be entered in the book of registry hereinafter directed to be kept, in which case such copyright shall endure for the full term by this Act provided in cases of books to be published after the passing of this Act, and shall be the property of such person or persons as in such minute shall be expressed."(a)

The copyright, then, in every book published during the author's lifetime is to last, at least, for forty-two years from the time of its first publication, and may last for any longer period that may be covered by the duration of the author's life, with seven more years added. If the book is published after his death, the copyright lasts for forty-two years from first publication. Copyrights subsisting at the time of the passing of the Act are extended to the same limits, but not in the case of assignees of the copyright for other consideration than that of natural love and affection, unless with the concurrence of the proprietor and author or his personal representative.

The Court of Queen's Bench (Cockburn, C.J., and Mellor, J.) was of opinion that notwithstanding the above enactment as to books published before the Act and sect. 20, extending the provisions of 3 & 4 Will. 4, c. 15, to musical compositions, no title was given to the sole right of representation or performance of musical compositions published before the Act; but this opinion was overruled by the Court of Appeal (Bramwell, Brett and Cotton, L.JJ.)(b)

Whether there
must be a known
author.

With respect to the question whether there must be a known author by whose life and from whose death the statutory period of copyright is to be determined, the observations of Lord Deas in the Scotch case of *Maclean*

(a) See *Marzials v. Gibbons*, L.R. 9 Chy. App. 518.

(b) *Ex pte. Hutchins and Romer*, L.R. 4 Q. B. D. 90, 483.

v. Moody,^(a) in the year 1858, are deserving of attention. In that case an argument was addressed to the court against the title of the claimants to copyright in a shipping list called "The Clyde Bill of Entry," to the following effect:— that the object of the statute 5 & 6 Vict. c. 45, was to encourage literary merit; that intellectual labour constituting authorship is alone thereby protected; that there can be no authorship without an author; that the claimants were not the authors in the present case, nor did they name the authors; that the life of the author affords the only criterion the statute gives for measuring the endurance of the privilege; and that without the statutory means of measuring the privilege, the privilege itself cannot exist. Lord Deas said, "I am humbly of opinion that this argument, although ingenious, is unsound. The Act does not confine the privilege to works of literary merit. . . . Neither does the Act confine the privilege to cases in which there is a known author, whose life shall afford a measure for the endurance of the privilege. A person may find a manuscript in his ancestor's repositories, or get a gift of it and publish it, and he may be entitled to copyright, although he cannot tell who was the author, or whether the author is living or dead. The Crown might, I presume, get up a publication and be entitled to copyright, and yet the Crown never dies. . . . That the first publisher may have copyright in the work, although he cannot point out the author, appears to me implied in sect. 16 of the statute, which requires the defendant 'if the nature of his defence be that the plaintiff in such action was not the author or first publisher of the book' to give notice of 'the name of the person whom he alleges to have been the author or first publisher.' I think it is here assumed that there may be cases in which, if the plaintiff be 'the first publisher' he may be entitled to copyright, although no author has been or can be named upon either side. In all such cases it is obvious that the endurance of the privilege can have no reference to the author's life, but must be for forty-two years after the first publication."

An author may be described as one who, by his own intellectual labour applied to the materials of his composition, produces an arrangement or compilation new in itself.^(b) Author.

Where the incidents of a person's life were furnished by him to another who prepared them for publication, and the copyright was taken out in the name of the person furnishing the facts, it was held in America that he was not the author, and

(a) Cases in Court of Session, vol. xx. p. 1163.

(b) *Atwill v. Ferrett* (2 Blatch. 46).

that a person claiming as his assignee could not maintain an action for infringement. (a)

Assistants employed by the publishers of a shipping list compiled from statistics contained in custom-house books to which the publisher had sole right of access for the purpose of publication, were said by Lord Deas (b) not to be authors in the sense of sect. 18 of 5 & 6 Vict. c. 45, nor in any reasonable sense whatever.

The person who arranges a pianoforte score of an opera is the author or composer of such arrangement, and must be registered as such. (c)

A person who merely procured a drawing or design to be made "of the busses of the Society of British Herring fishery" was held by Lord Hardwicke not entitled to relief under 8 Geo. 2, c. 13, apparently on the ground that he was not the author. (d) But the proprietor of a periodical containing translations made from foreign works by persons employed and paid by him and from works imported by him at considerable expense, obtained an injunction (before 5 & 6 Vict. c. 45, s. 18) to prevent the unauthorised publication of these translations; whether, however, as author or as proprietor of the copyright does not appear. (e)

Where a person, employed as a performer and stage-manager of a theatre, agreed to write a play which was to be performed in the employer's theatre so long as it should continue to draw good audiences, it was held in America that the person who wrote the play was the proper person to take out the copyright. (f)

Two or more persons may jointly be the authors of a play. (g) Where, however, the lessee of a theatre employed one W. to write for him a drama in three acts on a subject suggested by the lessee, and the drama when completed by W. was altered in various ways by the lessee and some members of

(a) *De Witt v. Brooks* (cited Law's American Digest of Patent and Copyright Cases, p. 174).

(b) *Macleay v. Moody* (20 Scotch Sess. Cas. 2nd Ser. 1164.)

(c) *Wood v. Boosey* (L. Rep. 3 Q. B. 223; 18 L. T. N. S. 105).

(d) *Jeffreys v. Baldwin* (Amb. 163); see *Pierpoint v. Fowle* (2 Wood & Min. 46) and *Binns v. Woodruff* (4 Wash. 53), and as to alterations in a musical composition made for another person, *Atwill v. Ferrett* (2 Blatch. 46). See further as to the authorship of musical compositions, *Reed v. Carusi* (8 Amer. L. Rep. O. S. 411).

(e) *Wyatt v. Barnard* (3 Ves. & B. 77).

(f) *Roberts v. Myers* (13 Mo. L. Rep. 400, cited Law's Digest of Patent, Copyright, and Trades Mark Cases, p. 211).

(g) See per Keating, J., in *Levy v. Rutley*, L.R. 6 C. P. 529, and the language of 3 Will. 4 c. 15, s. 1.

his company, one of whom wrote an additional scene, it was held that the lessee was not joint author with W.(a)

"There may be a difficulty in some cases," said Montagu Smith, J., "in determining who are joint authors. But I take it that if two persons agree to write a piece, there being an original joint design, there can be no difficulty in saying that they are joint authors of the work, though one may do a larger share of it than the other. It is not pretended here that there was any original joint design. W. was employed by the plaintiff to write the play. W. invented the plot and wrote the whole dialogue complete. The plaintiff and some members of his company thought the play might be improved. Accordingly the plaintiff, either himself wrote or procured some one else to write for him a new scene and made several other alterations in the incidents and in the dialogue; and the question is whether that constituted the plaintiff a joint author of the play with W. The plot remains; the additions do not disturb the drama composed by W.; they were made for the mere purpose of improving or touching up some of its parts. It would be strange indeed, if not unjust, if the author's rights could be thus merged into a joint authorship with another. There are probably very few instances—at least in modern times—of a play being put upon the stage, without some alteration by the manager. . . . If when the piece was brought to the plaintiff he had said to W., 'This thing requires to be remodelled, and you and I will do it together,' and W. had assented, possibly a case of joint authorship might have been set up. But the evidence here falls very short of that."(b)

A Scotch publisher brought out an edition of the works of Dr. Channing, the American author, which had already been published in America. Various slight alterations and corrections were made with the assistance of Dr. Channing for this edition, and the publisher sent him by way of acknowledgment a sum of money, but not as the result of any contract entered into. Another publisher having published a new edition reprinted from the former, it was held by the Court of Session that the former publisher had no copyright in his edition, and could not prevent the publication of a reprint of it.(c)

On the question who is the "author" of a photograph, see the case of *Nottage v. Jackson*, referred to post in the chapter on Paintings, Drawings, and Photographs.

If an author have composed "any book whatsoever" for

(a) *Levy v. Rutley*, *ubi supra*. (b) L. R., 6 C. P. pp. 530, 531.

(c) *Hedderwick v. Griffin* (3 Scotch Sess. Cas. 2nd Ser. 383).

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How far book
must be original.

any publisher, projector, or proprietor, on the terms that the copyright should belong to such publisher, &c., and the author is paid for it, the copyright is the property of such publisher, &c. (5 & 6 Viet. c. 45, s. 18).

How far a book must be original in order to entitle its author to copyright in it is a question to which only a general answer can be given. It may be expressed thus: the law will secure to a man the property in every genuine product of his own mental labour, whether that product take the form of compilation, abridgment, new arrangement, or wholly original work—if, indeed, there can be any such thing as a wholly original work. On this subject an eminent American Judge (Story) says, with great propriety,^(a) “In truth, in literature, in science, and in art, there are and can be few, if any, things which, in an abstract sense, are strictly new and original throughout. Every book in literature, science, and art borrows, and must necessarily borrow and use, much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known, and used and understood by others. The thoughts of every man are more or less a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copyright which was not new and original in the elements of which it is composed, there could be no ground for any copyright in modern times; and we should be obliged to ascend very high even in antiquity to find a work entitled to such eminence.”

The law requires no such impracticable standard of originality as that alluded to in the extract just made. It requires only that the work should contain something distinctively the property of the author, which gives a character to it. “Something he must show to have been produced by himself; whether it be a purely original thought or principle, unpublished before, or a new combination of old thoughts, and ideas, and sentiments, or a new application or use of known and common materials, or a collection, the result of his industry and skill. In whatever way he claims the exclusive privilege accorded by these laws, he must show something which the law can fix upon as the product of his own and not another’s labours. But in order that the law should do this ample justice to the great variety of claimants it is necessary that its rules

^(a) *Emerson v. Davies* (3 St. 779); see also in *Gray v. Russell* (1 St. 16).

should be capable of adaptation to the objects of their labour. They must include in their range everything that can be justly claimed as the peculiar product of individual efforts; otherwise they would exclude from the benefits of literary property objects which are as clearly the products of individual labour as the most original thoughts ever written, namely, new and important combinations and arrangements, or collections of materials known and common to all mankind."(a)

The test "whether the claimant's book contain any substantive product of his own labour?" has been recognised and applied in several cases. In 1797, one Cary was employed to make a survey of the different roads in Great Britain. Having completed his survey he published a book called "Cary's New Itinerary," which followed the plan and contained much of the materials of an older work called "Patterson's Road Book," but contained also many corrections of and additions to it. A person named Faden having published a book bearing the same relation to Cary's that Cary's did to Patterson's, Cary filed a bill in Chancery to restrain Faden from publishing his book, on the ground that it was not original, but either in whole or part a copy of Cary's. The Lord Chancellor (Loughborough) refused to grant an injunction, thinking the two books very different. He said, "What right had the plaintiff to the original work? If I were to do strict justice I should order the defendants to take out of their book all that they have taken from the plaintiff, and reciprocally the plaintiff to take out of his all he has taken from Patterson. I think the plaintiff may be contented that a bill is not filed against him."(b)

An action was brought in 1801 by the same plaintiff against Messrs. Longman and Rees for publishing a pirated edition of the same or a similar work, the book published by the defendants being professedly a twelfth edition of the original work by Patterson, but containing nine-tenths of Cary's alterations and improvements. The plaintiff was held entitled to recover. Lord Kenyon, C.J., said, "certainly the plaintiff had no title on which he could found an action to that part of his book which he had taken from Mr. Patterson's; but it is as clear that he had a right to his own additions and alterations, many of which were very material and valuable: and the defendants are answerable at least for copying those parts in their book. . . . The courts of justice have been long labouring under an error, if an author

(a) Curtis on Copyright, 171, 172.

(b) *Cary v. Faden* (5 Ves. 23).

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have no copyright in any part of a work unless he have an exclusive right to the whole work." (a)

According to Lord Eldon, (b) if a person collects an account of natural curiosities and such articles, and employs the labour of his mind by giving a description of them, that is as much a literary work as many others that are protected by injunction and by action. It is equally competent to any other person perceiving the success of such a work to set about a similar work, *bond fide* his own; but it must be in substance a new and original work, and must be handed out to the world as such.

Where subject is
common.

The fact that the subject of the work is common does not deprive an author of copyright in the product of the labour which he has *bond fide* spent on it, or render it less necessary for any subsequent author to have recourse to the original sources; as we learn from the case of *Patterson's Road Book*, already referred to (c). So in *Longman v. Winchester* (d) the plaintiffs were held entitled to copyright in the "Court Calendar," a work consisting of lists of members of the Houses of Peers and Commons, &c., and an injunction was granted restraining the defendants from copying and publishing the plaintiffs' work. "The question before me," said Lord Eldon, "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 plaintiffs' work. From the identity of the inaccuracies it is impossible to deny that the one was copied from the other *verbatim et literatim*. To the extent, therefore, in which the defendant's publication has been supplied from the other work the injunction must go; but I have said nothing that has a tendency to prevent any person from giving to the public a work of this kind if it is the fair fruit of original labour; the subject being open to all the world; but if it is a mere copy of an original work this Court will interpose against that invasion of copyright." (e)

A work entitled "The Guide to Science," which laid no

(a) 1 East. 358.

(b) See judgment in *Hogg v. Kirby* (8 Ves. 221).

(c) "Take the instance of a map describing a particular county; and a map of the same county afterwards published by another person; if the description is accurate in both, they must be pretty much the same; but it is clear the latter publisher cannot on that account be justified in sparing himself the labour and expense of actual survey, and copying the map previously published by another:" (*per* Lord Eldon in *Longman v. Winchester*, 16 Ves. 269.) (d) 16 Ves. 269.

(e) And see the remarks of Wood. V.C., in *Kelly v. Morris* (L. Rep. 1 Eq. 702; 14 L. T. N. S. 222; 35 L. J. 423, Ch.; 14 W. R. 496).

claim to any originality with reference to the scientific doctrines treated in it, but contained in the form of questions and answers a scientific exposition of some of the ordinary phenomena of human life, in parts digested from different works, was held to constitute an original work in which the author was entitled to copyright.(a) Wood, V.C., said, "That an author has a copyright in a work of this description is beyond all doubt. If any one by pains and labour collects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions and explanations of those phenomena, whether such explanations and answers are furnished by his own recollection of his former general reading, or out of works consulted by him for the express purpose, the reduction of questions so collected, with such answers under certain heads and in a scientific form, is amply sufficient to constitute an original work of which the copyright will be protected. Therefore, I can have no hesitation in coming to the conclusion that the book now in question is in that sense an original work, and entitled to protection."

"This I hold to be clearly settled," said Lord Jeffrey, in *Alexander v. Mackenzie*,(b) "that even though the materials from which a work is taken be *in medio*, as it is called, yet if those materials be arranged in a new form, the effect of that will be to afford the author the protection of copyright in that form. In all cases, in short, although the materials are expressly *in medio*, and open to everybody, when a particular degree of judgment in the selection of those materials has been used, and when the subject *in medio*, so open to the world at large, has been to a certain extent snatched at and appropriated, such selection is in itself recognized as a certain degree of mental effort, which is entitled to the benefit of copyright." In that case the Court of Session held the pursuer entitled to copyright in certain practical forms or styles of the writs and instruments introduced by the Heritable Securities and Infestment Acts, those Acts giving only general descriptions of the forms to be used.

The same principle was applied to a book of chronology;(c) to the case of maps;(d) to the case of an annotated catalogue of books published by a bookseller;(e) and, in America, to the

(a) *Jarrold v. Houlston* (3 K. & J. 708).

(b) 9 Scotch Sess. Cas. 2nd Ser. 758, 27 Feb. 1847.

(c) *Trusler v. Murray* (cited in note to *Cary v. Longman*, 1 East, 363).

(d) See 17 Ves. 425.

(e) *Hotten v. Arthur* (11 W. R. 934).

case of an elementary book of arithmetic containing an original arrangement and combination of materials,^(a) and a new edition of a Latin grammar containing alterations, additions, and notes.^(b)

The Scotch Court of Session held, in the case of *Black v. Murray*,^(c) that a person may, by publishing a reprint of a work of which the copyright has expired, with notes and illustrations from other works, create a new copyright which will be protected from piracy; and that it is a piratical use of such copyright work to borrow from it any considerable number of those illustrations.

It was contended on behalf of the defenders in this case (an action for infringing the pursuers' copyright in the works of Sir Walter Scott by publishing what purported to be a reprint of the original edition of the "Minstrelsy of the Scottish Border") that the copyright claimed by the pursuers was a copyright of an edition of a work, not of the original text, the copyright in which had admittedly long since expired; that the pursuers' claim to copyright was chiefly based on notes contributed to their alleged copyright edition; that to make notes the subject of copyright, they must in a reasonable sense form a "book," and must constitute the value of the new edition; that that was not the case with the pursuers' edition, the notes added by their edition being 200 in all, many of them unimportant, and not extending to 25 small pages; that only 40 were taken by the defenders, 10 of them being found in editions not copyright; and finally, that it was open to the defenders to quote even from copyright books for the purpose of illustration; but the Court of Session, affirming the interlocutor of the Lord Ordinary, held the defenders liable for piracy.

What is a new edition.

Some valuable observations were made by the court, in this case, on the question—what constitutes a new edition of a book? "Questions of great nicety and difficulty," said the Lord President, "may arise as to how far a new edition of a work is a proper subject of copyright at all; but that must always depend upon circumstances. A new edition of a book may be a mere reprint of an old edition, and plainly that would not entitle the author to a new term of copyright running from the date of the new edition. On the other hand, a new edition of a book may be so enlarged and improved as to constitute in reality a new work, and that

^(a) *Emerson v. Davis* (3 St. 768). See *Baily v. Taylor* (1 Tamlyn, 325), and *Lennie v. Pillans* (5 Scotch Sess. Cas. 2nd Ser. 416).

^(b) *Gray v. Russell* (1 Story, 17).

^(c) 9 Scotch Sess. Cas. 341, 3rd Series.

just as clearly will entitle the author to a copyright running from the date of the new edition. Take for example, in illustration of that, a new edition of a scientific work which is published twenty or thirty years after the date of the first edition. The progress of science in the interval necessarily leads to the new edition being a very different book from the old. That old edition will probably, in the course of these twenty or thirty years, have become comparatively worthless, while the new edition, particularly if it is the production of the original author himself, will be as valuable at the later period as the original edition of the book was at the time when it was published. But there are many cases between these two extremes; and the difficulty will be to lay down any general rule as to what amount of addition or alteration or new matter will entitle a second or a new edition of a book to the privilege of copyright, or whether the copyright extends to the book as amended or improved, or is confined only to the additions or improvements themselves, as distinguished from the rest of the book. I think in the present case that we shall not find that we are in reality much troubled with such difficulties."

"It is not necessary," observed Lord Ardmillan, "that a work shall be entirely a new work in order to be the subject of copyright. A new edition is not necessarily a subject of copyright, but it may be so. There must be some originality in it; it may be in new thought or in new illustration, or in new explanatory and illustrative annotation, or even, in some peculiar instances, in simply new arrangement. If, in any of these respects, there is independent mental effort, then in the result of that mental effort there may be copyright."

Lord Kinloch said: "I think it clear that it will not create copyright in a new edition of a work, of which the copyright has expired, merely to make a few emendations of the text, or to add a few unimportant notes. To create a copyright by alterations of the text, these must be extensive and substantial, practically making a new book. With regard to notes, in like manner, they must exhibit an addition to the work which is not superficial or colourable, but imparts to the book a true and real value, over and above that belonging to the text. This value may, perhaps, be rightly expressed by saying that the book will procure purchasers in the market on special account of these notes. When notes to this extent and of this value are added, I cannot doubt that they attach to the edition the privilege of copyright. The principle of the law of copyright directly applies. There is involved in such annotation, and often in a very eminent

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degree, an exercise of intellect and an application of learning, which place the annotator in the position and character of author, in the most proper sense of the word. The skill and labour of such an annotator have often been procured at a price which cries shame on the miserable dole which formed to the author of the text his only remuneration. In every view, the addition of such notes as I have figured, puts the stamp of copyright on the edition to which they are attached. It will still, of course, remain open to publish the text, which, *ex hypothesi*, is the same as in the original edition; but to take and publish the notes will be a clear infringement of copyright."

Notes need not
be original.

It is not necessary that the notes should be original: if skill and labour are bestowed in their selection and application, the annotator is entitled to copyright in them.

"Of the 200 notes," said the Lord President, in the case just referred to, "the defenders' counsel tells us further that 15 only consist of original matter and are the composition of Mr. Lockhart himself, while the remaining 185 are quotations from other books and authors. Now this seems to be considered also to be a sort of disparagement of the value of the notes, in which I cannot at all agree. It seems to me that notes of this kind are almost chiefly valuable in bringing together, and in combination, the thoughts of the same author in different places, or the thoughts of other authors or of critics bearing upon the point that is under consideration; and nothing could better illustrate it than a number of the notes which we see in these very volumes, and which are exceedingly interesting and valuable as matter of literary and critical taste and judgment. The quotations are in many places most apposite, and highly illustrative of the text, and exceedingly interesting to the reader; and certainly the selection and application of such quotations from other books may exercise as high literary faculties as the composition of original matter. They may be the result both of skill and of labour, and of great literary taste; and, therefore, I think the circumstance that the notes consist to a great extent of quotations is anything but a disparagement of their value." So Lord Kinloch: "It was, perhaps, thought that to repeat quotations from well-known authors was not piracy. If so, I think a great mistake was committed. In the adaptation of the quotation to the ballad which it illustrates—the literary research which discovered it—the critical skill which applied it—there was, I think, an act of authorship performed of which no one was entitled to take the benefit for his own publication, and thereby to save the labour, the

learning, and the expenditure necessary even for this part of the annotation."

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Calendar.

The subject of a work may not in general be a subject of copyright, but still, if a man expends time and labour in producing a work on that subject, he has a copyright in the individual work. Thus, though an "East India Calendar" is not a subject of copyright, still, if a man from his situation having access to the repositories in the India House, has by considerable expense and labour procured with correctness all the names and appointments on the Indian Establishment, he has a copyright in that individual work.^(a)

Lord Romilly, M.R., held in the case of *Cobbett v. Woodward*,^(b) that there was no copyright in the illustrated furnishing guide published by an upholsterer, containing engravings of the articles of furniture sold and descriptive remarks thereon. His lordship regarded it as "little more than an illustrated inventory of the contents of a warehouse," and said: "I know of no law which, while it would not prevent the second advertiser from selling the same articles, would prevent him from using the same advertisement, provided he did not in such advertisement by any device suggest that he was selling the works and designs of the first advertiser." This was not followed in the case of *Grace v. Newman*^(c) by Vice-Chancellor Hall who held that a cemetery stonemason, who employed and paid a person to collect monumental designs (by photographs and drawings from different tombstones in cemeteries), and who published, by way of advertisement, a book containing sketches of these designs, with scarcely any letterpress, had copyright in the volume, and might restrain the publication of designs copied from it.

Illustrated catalogue.

The Court of Appeal in the case of *Maple & Co. v. Junior Army and Navy Stores*^(d) distinctly overruled the decision of Lord Romilly. The Court of Appeal (affirming the decision of Vice-Chancellor Hall) held the plaintiffs, who were upholsterers, entitled to copyright in a catalogue of articles of furniture, containing illustrations engraved from original drawings made by artists employed by them, though the work contained no letterpress. Referring to a phrase of Lord Romilly's, that "there is no copyright in an advertisement," Sir George Jessel, M.R., said: "I think that this is not the law. I am not aware that the use to which a proprietor puts his book makes any difference in his rights. His copyright

^(a) *Matthewson v. Stockdale* (12 Ves. 276).

^(b) L. R. 14 Eq. 40.

^(c) L. R. 19 Eq. 623.

^(d) L. R. 21 C. D. 369.

gives him the exclusive right of multiplying copies, and he may use them as he pleases."

Bacon, V.C., held the following not to be a book within the meaning of the Copyright Act, or the subject matter of copyright at all:—An envelope with the words printed on the outside, "Entered at Stationers' Hall. Key enclosed. The Christograph: the Christian's Puzzle. Suitable for all sects and denominations;" and containing inside (1) a piece of cardboard so cut that when held up to the light it cast a shadow resembling the picture "Ecce Homo," and (2) a slip of paper on which were printed some lines of Longfellow. The Vice-Chancellor considered it merely a child's trick having no pretence to be a literary work or to novelty.^(a)

Degree of originality in cases of copyright and patent.

Whether a greater degree of originality is necessary to sustain a claim to copyright than that which would be sufficient to support a title to a patent does not distinctly appear. In the case of patent inventions, suggestions of servants employed in perfecting a discovery, tending to facilitate its practical application, may be adopted by the employer and incorporated into his design without detracting from his claim to originality. In *Barfield v. Nicholson*,^(b) Sir John Leach suggested the application of a similar principle to copyright.

Chief Justice Jervis, however, leaned to a different opinion in the case of *Shepherd v. Coquest*,^(c) remarking that the enactments upon which literary property and patents for inventions are respectively founded, differ widely in their origin and details; and that in order to show that the position and rights of an author within the Copyright Acts are not to be measured by those of an inventor within the patent laws, it is only necessary to bear in mind that, whilst on the one hand a person who imports from abroad the invention of another previously unknown here, without any further originality or merit in himself, is an inventor entitled to a patent, on the other hand a person who merely reprints for the first time in this country a valuable foreign work, without bestowing upon it any intellectual labour of his own, as by translation, which to some extent must impress a new character, cannot thereby acquire the title of an author within the statutes relating to copyright. The Chief Justice proceeded: "We do not think it necessary in the present case to express any opinion whether, under any circumstances, the copyright in a literary work, or the right

(a) *Cable v. Marks* (52 L. J. C. D. 107; 47 L. T. N. S. 432).

(b) 2 Sim. & St. 1; 2 L. J. 90, 102, Ch.

(c) 17 C. B. 444.

of representation can become invested *ab initio* in an employer other than the person who has actually composed or adapted a literary work. It is enough to say in the present case, that no such effect can be produced where the employer merely suggests the subject, and has no share in the design or execution of the work, the whole of which, so far as any character of originality belongs to it, flowed from the mind of the person employed. It appears to us an abuse of terms to say that in such a case the employer is the author of a work to which his mind has not contributed an idea; and it is upon the author in the first instance that the right is conferred by the statute which creates it."

The question in that case was as to the proprietorship rather than the authorship, the plaintiffs' counsel not insisting on their being authors, but only on their being proprietors (see 17 C. B. 433) of the copyright, a hopeless contention in a case where the only agreement relied on was a verbal one that the plaintiffs should have the right of representing in London the pieces written by the person employed by them, he retaining the sole right of representation out of London.

The addition of words, prelude, and accompaniment to an old air was held to give the adapter a copyright in the whole composition; (a) and where a person adapted words to an old air and procured a friend to compose an accompaniment, his assignee was held entitled to describe himself in an action for piracy, as proprietor of the copyright in the entire composition. (b)

The author of a pianoforte score of an opera, arranged from the full score, is the person who makes the arrangement, not the composer of the opera. (c)

Engravings and prints were deliberately excluded from the operation of 5 & 6 Vict. c. 45. But in *Bogue v. Houlston* (d) Sir James Parker, V.C., was of opinion that where there are designs forming portion of a book in which a person has copyright under that act, such copyright extends to the illustrations and designs of the book as well as to the letter-press. The plaintiff had published a book containing letter-press illustrated by wood-engravings, the engravings being printed on the same paper as the letter-press itself. The defendants published a work with a different title and different letter-press, but containing pirated copies of the

(a) *Lover v. Davidson* (1 C. B. N. S. 182).

(b) *Leuder v. Purday* (7 C. B. 4).

(c) *Wood v. Boosey* (7 B. & S. 869; 9 B. & S. 175; L. Rep. 2 Q. B. 340; L. Rep. 3 Q. B. 223; 18 L. T. N. S. 105).

(d) 5 De G. & Sm. 275.

wood engravings. The plaintiff had complied with the requisitions of 5 & 6 Vict. c. 45, but not with those of the act for the protection of engravings by printing the date of publication and the name of the proprietor on each copy. The Vice-Chancellor granted an injunction, the plaintiff undertaking to bring an action to try the right at law. "It appears to me," said Sir James Parker, "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 that act by that express definition.(a) 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. There is no decision of any court of law, or of this court, either way upon this point."

Sir George Jessel, M.R., remarks(b) of this case as follows: "The view I take of *Boyne v. Houlston* is that there was no copyright in the letter-press. The plaintiff's publication contained the old story of 'Reynard the Fox,' and other stories to which it was not necessary to refer, as the defendant had only copied that one and the illustrations to it. I do not think that the judgment turned on the fact of there being other stories in the volume. The two which are mentioned in the report were certainly old, and there is nothing to show that there were any new ones. I think the decision turned on the meaning of the word 'book.' . . . It had been contended before the Vice-Chancellor that there could only be copyright where there was letter-press, and I think that what he meant to say was that prints forming a book were within the act, though prints published separately were not, and that if published together in a volume they formed a book whether there was letter-press or not." His lordship afterwards added that he had examined the record in *Boyne v. Houlston*, and found that the bill did not claim copyright in any letter-press, and did not state that there were any other stories than 'Reynard the Fox' in the plaintiff's book.

Abridgments and translations.

How far abridgments and translations may be new and original works, and the authors entitled to copyright in them, will be more conveniently treated of when we come to deal with the subject of piracy.(c)

Copyright may be of part of a work.

In *Low v. Ward*(d) it was urged in argument that there could not be copyright as to a part of a work only, but the

(a) Sect. 2 of 5 & 6 Vict. c. 45.

(b) *Maple & Co. Junior Army & Navy Stores* (L. R. 21 C. D. p. 380).

(c) See the chapter on "Piracy," post. (d) L. Rep. 6 Eq. 418.

Court overruled the argument. "There are numerous cases," said Giffard, V.C., "showing that where the parts of a work can be separated, there may be a copyright in any distinct part of it. I may instance the cases of the last canto of Lord Byron's 'Childe Harold,' Croker's Notes to 'Boswell's Life of Johnson,' and of particular articles in cyclopædias. There is no analogy in this respect between a patent and the case of copyright, as it matters not whether the copyright is for the entire work or for a part only."

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STATUTORY REQUISITES TO BE OBSERVED.

The statutory requirements to be observed by the proprietors of copyright are the registration of the work at Stationers' Hall, and the deposit and delivery of a certain number of copies of it; but the existence of copyright is not dependent on either of these. The former is necessary only as a preliminary to bringing an action.

1. *Registration.*

Sect. 11 of 5 & 6 Vict. c. 45 provides as follows with respect to keeping a Book of Registry at Stationers' Hall: "that a book of registry, wherein may be registered, as hereinafter enacted, the proprietorship in the copyright of books, and assignments thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such copyright, shall be kept at the hall of the Stationers' Company, by the officer appointed by the said company for the purposes of this Act, and shall at all convenient times be open to the inspection of any person, on payment of one shilling for every entry which shall be searched for or inspected in the said book; and that such officer shall, whenever thereunto reasonably required, give a copy of any entry in such book, certified under his hand, and impressed with the stamp of the said company, to be provided by them for that purpose, and which they are hereby required to provide, to any person requiring the same, on payment to him of the sum of five shillings; and such copies so certified and impressed shall be received in evidence in all Courts and in all summary proceedings, and shall be *prima facie* proof of the proprietorship or assignment of copyright or licence as therein expressed, but subject to be rebutted by other evidence, and in the case of dramatic or musical pieces shall be *prima facie* proof of the right of representation or performance, subject to be rebutted as aforesaid."

Book of Registry
to be kept at
Stationers' Hall.

Certified copies
to be received in
evidence.

Sect. 12 enacts, "that if any person shall wilfully make

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Making a false entry in the book of registry, a misdemeanor.

Entries of copyright.

or cause to be made any false entry in the registry book of the Stationers' Company' or shall wilfully produce or cause to be tendered in evidence any paper falsely purporting to be a copy of any entry in the said book, he shall be guilty of an indictable misdemeanor, and shall be punished accordingly."

And sect. 13 provides, "that after the passing of this Act it shall be lawful for the proprietor of copyright in any book heretofore published, or in any book hereafter to be published, to make entry in the registry book of the Stationers' Company of (1) the title of such book, (2) the time of the first publication thereof, (3) the name and place of abode of the publisher thereof, and (4) the name and place of abode of the proprietor of the copyright of the said book, or of any portion of such copyright, in the form in that behalf given in the schedule to this Act annexed, upon payment of the sum of five shillings to the officer of the said Company."

The statute authorises any person to make an entry as proprietor. It does not say what such person may have to do in order to satisfy the keeper of the register, before the keeper will make such registration.^(a)

Name of publisher or proprietor.

According to *Kindersley, V.C.*, where the publishers are a firm, it is optional to enter the name of the firm, or the names of the individuals composing it,^(b) and the same, of course, would hold as to the name of the proprietor. It has been expressly laid down that the name of the proprietor of engravings is sufficiently declared by the firm name.^(c)

Effect of registration before publication.

No copyright is acquired by the registration of a book before its actual publication; the protection afforded by the Act not being prospective, but dating only from the time of the first publication of the work.^(d) Nor does it make any difference that the date (registered before publication) is the actual date on which publication subsequently takes place.^(e)

(a) 18 Scotch Sess. Cas. 915.

(b) *Low v. Routledge*, cited, *post*, p. 92.

(c) *Graves v. Ashford* (L. R. 2 C. P. 410; *Rock v. Lazarus* (L. R. 15 Eq. 104).

(d) *The Correspondent Newspaper Company (Limited) v. Saunders* (13 W. R. 80; 12 L. T. N. S. 540; 11 Jur. N. S. 540). In *Platt v. Walter* (17 L. T. N. S. 159) Lord Chelmsford says, "That protection given by common and statute law, which is called copyright, is only in respect of some published or unpublished literary production, and, therefore, there can be no copyright in the prospective series of newspapers. The copyright may attach upon each successive publication, but that which has no present existence cannot be the subject of this species of property."

(e) *Henderson v. Maxwell* (L. R. 5 C. D. 892).

The following is the form requiring entry of proprietorship given in the schedule to 5 & 6 Viet. c. 45 :—

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I *A. B.* of _____ do hereby certify, that I am the proprietor of the copyright of a book, intituled *Y. Z.*, and I hereby require you to make entry in the register book of the Stationer's Company of my proprietorship of such copyright, according to the particulars under-written. Form of requiring entry of proprietorship.

Title of Book.	Name of Publisher and Place of Publication.	Name and Place of Abode of the Proprietor of the Copyright.	Date of First Publication.
<i>Y. Z.</i>		<i>A. B.</i>	

Dated this _____ day of _____ 18____
 Witness, *C. D.* (Signed) *A. B.*

And the form of original entry of proprietorship of copyright of a book (a) given in the same schedule is as follows :— Form of entry.

Time of making the Entry.	Title of Book.	Name of the Publisher, and Place of Publication.	Name and Place of Abode of the Proprietor of the Copyright.	Date of First Publication.
	<i>Y. Z.</i>	<i>A. B.</i>	<i>C. D.</i>	

An author may associate with himself by registry under the Act, any person or persons he pleases, and such persons have a right to sue jointly with him for any infringement of copyright in the work so registered. (b) Entry of several persons as proprietors.

The "directors of, and subscribers to, the Customs Annuity and Benevolent Fund" having published the "Clyde Bill of Entry and Shipping List," registered their individual names as proprietors. Although they did not

(a) As to the mode of registering in the case of a periodical publication, see *post*, p. 102.

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

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state on the register who was the author of the work, nor whether they had acquired the right to it by purchase or assignment, it was held by the Scotch Court of Session that they had sufficiently complied with the provisions of the Act, and had set forth a sufficiently *prima facie* title to try the question of copyright on an application for an interdict.(a)

It must be remembered that registration furnishes only *prima facie* evidence of title, and that it may be rebutted.(b)

Time of first publication.

The day of the month, as well as the month and the year must be stated in the entry; it is not enough to give the month and year only.(c)

In the case of a novel published in successive numbers of a weekly periodical, the date of the number in which the first part appeared was given as the time of first publication of the novel, and this was held good.(d)

And where the first No. of the periodical itself had been duly registered the proprietor was held entitled to restrain the unauthorized republication of a serial story published in it, though neither the serial nor the first No. of the periodical in which it appeared had been registered.(e)

Place of abode.

Field, J., had no doubt, though it was not necessary to decide the point, that the "place of abode" was sufficiently designated by the place where the publishing firm carried on their business, and that it was not necessary to give the private residences of the members of the firm.(f)

Con-sequence of non-registration.

The consequence of non-registration is stated in sect. 24, which enacts, "that no proprietor of copyright in any book which shall be first published after the passing of this Act shall maintain 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, suit, or proceeding*, have caused an entry to be made, in the book of registry of the Stationers' Company, of such book, pursuant to this Act: Provided

(a) *Maclean v. Moody* (Scotch Sess. Cas. 2nd Ser., vol. xx. 1154, June 23, 1858).

(b) See the remarks of Fry, J., in *Lucas v. Cooke* (L. R. 13 Ch. D. 875, 877).

(c) *Mathieson v. Harrod* (L. Rep. 7 Eq. 272; 38 L. J. 129, Ch.; 19 L. T. N. S. 629); and see *Low v. Routledge* (L. Rep. 1 Eq. 42; 3 H. L. Cas. 100; 33 L. J. 717, Ch.); and *per* Blackburn, J., in *Wood v. Boosey* (L. Rep. 2 Q. B. 340) a case decided under sect. 6 of the International Copyright Act (7 Vict. c. 12).

(d) *Dicks v. Yates* (L. R. 18 Ch. D. 76); see *per* Jessel, M.R., p. 88.

(e) *Henderson v. Maxwell* (L. R. 4 Ch. D. 163).

(f) *Nottage v. Jackson* (49 L. T. N. S. 339).

always, that the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof as aforesaid: Provided also, that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the Act passed in the third year of the reign of His late Majesty King William the Fourth, to amend the laws relating to dramatic literary property, or of this Act, although no entry shall be made in the book of registry aforesaid."

A separate article for a periodical publication is not a book within the meaning of the Act, so as to require registration under this section; and, therefore, non-registration does not by force of sect. 24 disentitle the author to proceed for any infringement of his right with respect to it. (a)

According to Malins, V.C., (b) a newspaper proprietor might sue for a piracy of its contents, without registering it. (c) But Sir George Jessel, M.R., declined to follow this decision and held registration necessary. (d)

The enactment contained in sect. 24 of 5 & 6 Vict. c. 45 made an important change in the law as to the bringing of actions in cases where a book has not been registered. Previously to this enactment it was not necessary in order to entitle a plaintiff claiming as owner of copyright to sue, that his work should be registered at Stationers' Hall. Although he was bound to register for certain purposes, (e) it was decided that where there was no registration, the person entitled to copyright might protect his right by action or suit. (f) But now, as to books first published after the Act, although the author has copyright in them, he cannot sue, either at law or in equity, to protect himself against infringement of his copyright, unless he has registered his book at Stationers' Hall pursuant to the statute. (g) This, however, applies only to books first published after the Act; it does not affect any book published before.

(a) *Murray v. Maxwell* (3 L. T. N. S. 466); *Mayhew v. Maxwell* (1 John. & H. 312).

(b) *Cox v. Land and Water Journal Co.* (L. R. 9 Eq. 324).

(c) See the remarks on this case in the chapter on "Newspapers," post.

(d) *Walter v. Howe* (L. R. 17 Ch. D. 708).

(e) Registration was necessary to entitle the proprietor to recover the penalty imposed by statute for the violation of his copyright.

(f) See *Beckford v. Hood* (7 T. R. 620).

(g) 1 Drew. 353; see p. 364.

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Inaccuracy in
registration;

The registration of a book, according to sect. 13, must be strictly accurate in all the particulars mentioned in that section, viz.: "the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright." Errors as to these will, by force of sect. 24, prevent the author or proprietor from proceeding by action, suit, or otherwise, until such errors have been amended. They will also invalidate a subsequent assignment under the Act.(a)

As to time.

Thus, where "the time of the first publication" of a book was entered on the registry as the 25th May, 1864, when, in fact, it was first published on the 23rd May in that year, this was of itself held fatal to the fact of the registry of proprietorship operating by way of assignment.(b)

As to name.

And where the entry on the registry of the name of the publisher was "Sampson Low, Son, and Marston," whereas the name of the firm was "Sampson Low, Son, and Co.," this also was held of itself fatal to the right of the firm to sue.(c). "One almost regrets," said Kindersley, V.C., in the case in which these points were decided, "to be obliged to come to the consideration of points which are so very technical as these which I am obliged to consider; but, at the same time, they are points not only which a defendant or plaintiff has a right to take, but which are of importance with reference to the carrying out of the clearly expressed intention of the Legislature, which has thought fit to require, in order to produce certain effects, that certain strict particulars shall be complied with. It is, in point of fact, a concession of a certain means of assignment upon condition; and, in order to acquire the right to that mode of assignment, you must perform the condition which the Legislature has required."

Name of firm.

With respect to the mistake in the entry of the name of the firm, the Vice-Chancellor said: "Though it is probably optional either to enter the name of the firm of publishers, or the names of the individuals composing that firm, if you profess to enter the real name of the firm you must do so. . . . I am almost ashamed to descend to these minute particulars, but it must be done; and it is sufficient for me to say that in my opinion, either of these inaccuracies is quite sufficient to lead me to hold that the entry of the proprietorship is insufficient, and, upon that ground, that there is no valid assignment effected by the subsequent entry which immediately follows

(a) *Low v. Routledge* (33 L. J. 717, Ch.; 10 L. T. N. S. 838; 10 Jur. N. S. 922; 12 W. R. 1069).

(b) *Ibid.*

(c) *Low v. Routledge, ubi supra.*

that of the assignment," The errors in the entries at Stationers' Hall were corrected after this decision, and a second Bill was filed by the plaintiffs, praying for an injunction to restrain the defendants from printing, publishing, &c., the book in question, and the injunction was granted.(a).

In *Weldon v. Dicks*(b) it was argued that it was not sufficient to register "Newby & Co." as the names of the first publishers, and that the name of every partner in the firm should be inserted; but Malins, V.C., held that this was wholly unnecessary.

The name registered under this head must be the name of the first publisher.(c)

Where, however, the place of abode of the proprietor of copyright in a song was described in the entry at Stationers' Hall as "65, Oxford-street," whereas he was in America at the time of publication, and had no place of abode in England, "65, Oxford-street" being the address of his publishers, the Court of Common Pleas held that this was sufficient to satisfy the requisites of the Act.(d)

As to the mode of registering the place of abode of a firm where the members of the firm do not live at the place where the business of the firm is carried on, see the opinion of Field, J., in the case of *Nottage v. Jackson* (relating to the piracy of photographs), referred to, *ante*, p. 90.

It seems that non-registration, when intended to be set up as a defence to an action for piracy, should be distinctly pleaded.(e)

If the first edition of a book has been published before 5 & 6 Vict. c. 45, although other editions have been published since that Act, and have not been registered pursuant to its provisions, the proprietor is entitled to protect by action or suit his copyright in so much of the work as appeared in the first edition.(f)

But where a second edition of a book printed after July 1, 1842, is not a mere reprint of a first edition published before that date, but contains considerable and material alterations and additions, as to those it is a new work; and in order to enable the proprietor to sue in respect of any infringement of his rights in those portions of the second edition which are new, if those only are infringed, he must register the book in which they are contained.(g) And the extent of

(a) *Low v. Routledge, ubi supra*, p. 92.

(b) L. R. 10 C. D. 252. (c) *Coote v. Judd* (L. R. 23 Ch. D. 727).

(d) *Lover v. Davidson* (1 C. B. N. S. 182).

(e) *Chappell v. Davidson* (18 C. B. 194).

(f) *Murray v. Bogue* (1 Drew. 365, 366). (g) *Ibid.* 365.

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the alterations contained in the second edition is immaterial; to whatever extent a new edition is made a new work, the new part cannot be protected by suit until registration. But that effect of the Act of Victoria has no operation as to the old parts: as to them the copyright is left where it was.^(a)

Effect of neglect
at Stationers'
Hall.

The object of registration being to give notice to all other publishers that the publication is protected by the statute, if there be any neglect on the part of the officials at Stationers' Hall as to the registration, the public is not bound, and the remedy of the publisher must be against the party causing such neglect. It cannot affect those who are thereby kept in ignorance of the existence of the copyright.^(b)

Action for doing
anything in pur-
suance of this
Act.

If any action is 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 in case of a non-suit or discontinuance of the action or of a verdict for the defendant, the defendant is to have his full costs, for which he is to have the same remedy as the defendant in any case by law has. (sect. 26).

Remedy to per-
sons aggrieved
by entries in
register.

Sect. 14 of 5 & 6 Vict. c. 45, enacts, "that if any person shall *deem himself aggrieved*^(c) by any entry made under colour of this Act in the said book of registry, it shall be lawful for such person to apply by motion to the Court of Queen's Bench, Court of Common Pleas, or Court of Exchequer, in term time, or to apply by summons to any judge of either of such courts in vacation, for an order that such entry may be expunged or varied; and that upon any such application by motion or summons to either of the said courts, or to a judge as aforesaid, such court or judge shall make such order for expunging, varying, or confirming such entry, either with or without costs, as to such court or judge shall seem just; and the officer appointed by the Stationers' Company for the purpose of this Act shall, on the production to him of any such order for expunging or varying any such entry, expunge or vary the same according to the requisitions of such order."

There are not many reported cases of application for relief

(a) *Murray v. Bogue*, 306. The case of *Novello v. Sullow* (16 Jur 689) is in no way opposed to the doctrine above laid down, as in that case the work had been duly registered, and the whole argument turned on the construction of sect. 15 of 5 & 6 Vict. c. 45.

(b) *Per Wood*, V. C., in *Cassell v. Stiff* (2 K. & J. 287).

(c) As to the interpretation of these words, *vide post*, p. 96.

under this section of the Act. A rule absolute to "vary or expunge" at the option of the applicant an unauthorised entry in the register at Stationers' Hall, was granted by the Court of Common Pleas in *ex parte Bastow*.^(a)

A rather wide discretion was exercised by the Court of Queen's Bench in *ex parte Davidson*.^(b) Robert Cocks brought an action against Davidson for publishing three pieces of music, in which Cocks claimed the copyright. Two of the pieces were registered in the name of Cocks, and the third in the name of a person who had assigned the copyright to him. A rule *nisi* to expunge or vary the entries was obtained upon an affidavit of Davidson, not asserting a copyright in the airs in himself, but deposing to his belief that the three airs were old, and that the persons who on the entries professed to be the authors were not really the authors. The ground suggested for expunging the entries was that they would be *prima facie* evidence against Davidson on the trial of the action brought against him. The court declined to expunge the entries, but on the refusal of the counsel for Cocks to consent not to use the entries on the trial, an order was made by the court, *proprio vigore*, without consent, that the rule should be enlarged till the trial of an issue to determine the question of copyright, in which Cocks should be plaintiff and Davidson defendant, and on the trial of which the entries should not be used.

The Court of Common Pleas in a subsequent case^(c) in which the same person applied for assistance, distinctly disclaimed the power exercised by the Court of Queen's Bench in the preceding case. The Court of Common Pleas refused to expunge an entry of proprietorship unless it was clearly and unequivocally shown to be false, or to vary it unless satisfied by affidavit that in so doing they would make a true entry. "We can only expunge or vary or confirm the entry:" said Crowder, J., "I think we have no power to do that which was done by the Court of Queen's Bench in *Ex parte Davidson*." The circumstances of the case before the Court of Common Pleas were somewhat peculiar. Mr. Lover, the author of a song called "The Low Back'd Car," being in America, and wishing to secure to himself the copyright in England and in America by a simultaneous publication in both countries, instructed his publishers here to publish it in London, on a certain day. This was done, and the song was registered at Stationers' Hall, but in the entry

(a) 14 C. B. 631.

(b) 2 El. & Bl. 577.

(c) *Ex parte Davidson* (18 C. B. 297).

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the publishers described themselves as the proprietors of the copyright. The song having been published in this country by Davidson, from a copy sent from America, where the publication was alleged to have taken place three days before the publication here, Mr. Lover obtained a judge's order to vary the entry by substituting his name as proprietor, and got an injunction and brought an action for the infringement of his copyright. A rule to expunge or vary the amended entry having been obtained on behalf of Davidson, the Court discharged it with costs, considering that no case had been made out for its interference.

Person
"aggrieved."

Whether under the circumstances of the case last referred to Davidson was a person "aggrieved" within the meaning of sect. 14 of 5 & 6 Vict. c. 45, it was not necessary to decide. Jervis, C.J., was of opinion that he was; Crowder, J., was doubtful, and the language of Willes, J., seems to point to an opposite conclusion. He asks, "Has any right of the applicant been interfered with or injuriously affected? I do not see that it has. This is not the case of a contested title: the applicant does not suppose himself to have been the original author of the composition in question: he claims to publish a thing to which he has no right whatever, merely because the person who is the author, and who therefore ought to have the sole right of publishing " here, has happened (it may be) to publish it in America a little too early, or has made an unintentional mistake in the date on the title-page, or has incorrectly described his place of abode in the entry in the book at Stationers' Hall. I do not think it is a case in which we ought to interfere." In *Graves'* case,^(a) Blackburn, J., used similar language, and Hannen, J., said: "A person to be 'aggrieved' within the meaning of the statute must show that the entry is inconsistent with some right that he sets up in himself or in some other person, or that the entry would really interfere with some intended action on the part of the person making the application."

How application
to expunge must
be made.

An order to expunge a wrongful entry by the defendant cannot, according to Fry, J., be made at the trial of an action in which the plaintiff has not asked for it in his statement of claim. A separate application must be made by motion or summons under sect. 14.^(b)

(a) L. Rep. 4 Q. B. 721, 724; 20 L. T. N. S. 377; 17 W. R. 1018. See also *ex parte Hutchins v. Romer* (L. R. 42 B. D. 90, 483).

(b) *Hole v. Bradbury* (L. R. 12 Ch. D. 899).

2. *Deposit and delivery of copies.*PART I.
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Sect. 6 of 5 & 6 Vict. c. 45 enacts "that a printed copy of the whole of every book which shall be published after the passing of this Act, together with all maps, prints, or other engravings belonging thereto, finished and coloured in the same manner as the best copies of the same shall be published, and also of any second or subsequent edition which shall be so published with any additions or alterations, whether the same shall be in letterpress, or in the maps, prints, or other engravings belonging thereto, and whether the first edition of such book shall have been published before or after the passing of this Act, and also of any second or subsequent edition of every book of which the first or some preceding edition shall not have been delivered for the use of the British Museum, bound, sewed, or stitched together, and upon the best paper on which the same shall be printed, shall within one calendar month after the day on which any such book shall first be sold, published, or offered for sale within the bills of mortality, or within three calendar months if the same shall first be sold, published, or offered for sale in any other part of the United Kingdom, or within twelve calendar months after the same shall first be sold, published, or offered for sale in any other part of the British dominions, be delivered on behalf of the publisher thereof, at the British Museum."

To British
Museum.

Time.

As to the mode of delivering at the British Museum, sect. 7 provides, "that every copy of any book which under the provisions of this Act ought to be delivered as aforesaid, shall be delivered at the British Museum between the hours of ten in the forenoon and four in the afternoon on any day except Sunday, Ash Wednesday, Good Friday, and Christmas Day, to one of the officers of the said Museum, or to some person authorised by the trustees of the said Museum to receive the same, and such officer or other person receiving such copy is hereby required to give a receipt in writing for the same, and such delivery shall to all intents and purposes be deemed to be good and sufficient delivery under the provisions of this Act."

Mode of deliver-
ing at the British
Museum.

Sect. 8 provides, as to the other libraries, "that a copy of the whole of every book, and of any second or subsequent edition of every book containing additions and alterations, together with all maps and prints belonging thereto, which after the passing of this Act shall be published, shall *on demand thereof in writing*, left at the place of abode of the publisher thereof at any time within twelve months next

To other
libraries.

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after the publication thereof, under the hand of the officer of the Company of Stationers who shall from time to time be appointed by the said Company for the purposes of this Act, or under the hand of any other person thereto authorised by the persons or bodies politic and corporate, proprietors and managers of the libraries following, (*videlicet*), the Bodleian library at Oxford, the public library at Cambridge, the library of the faculty of advocates at Edinburgh, the library of the college of the Holy and Undivided Trinity of Queen Elizabeth near Dublin, be delivered, upon the paper of which the largest number of copies of such book or edition shall be printed for sale, in the like condition as the copies prepared for sale by the publisher thereof respectively, within one month after demand made thereof in writing as aforesaid to the said officer of the said Company of Stationers for the time being, which copies the said officer shall and he is hereby required to receive at the hall of the said company, for the use of the library for which such demand shall be made within such twelve months as aforesaid; and the said officer is hereby required to give a receipt in writing for the same, and within one month after any such book shall be so delivered to him as aforesaid to deliver the same for the use of such library."

Time.

Alternative mode of delivery.

By sect. 9, "if any publisher shall be desirous of delivering the copy of such book as shall be demanded on behalf of any of the said libraries at such library, it shall be lawful for him to deliver the same at such library, free of expense, to such librarian or other person authorised to receive the same (who is hereby required in such case to receive and give a receipt in writing for the same), and such delivery shall to all intents and purposes of this Act be held as equivalent to a delivery to the said officer of the Stationers' Company."

Penalty for default in delivering copies.

Sect. 10 defines the penalty for non-compliance with the foregoing provisions. It enacts "that if any publisher of any such book or of any second or subsequent edition of any such book shall neglect to deliver the same pursuant to this Act, he shall for every such default forfeit, besides the value of such copy of such book or edition which he ought to have delivered, a sum not exceeding five pounds, to be recovered by the librarian or other officer (properly authorised) of the library for the use whereof such copy should have been delivered, in a summary way, on conviction before two justices of the peace for the county or place where the publisher making default shall reside, or by action of debt or

other proceeding of the like nature, at the suit of such librarian or other officer, in any court of record in the United Kingdom, in which action, if the plaintiff shall obtain a verdict, he shall recover his costs reasonably incurred, to be taxed as between attorney and client."

These provisions of the Act require the delivery of every book and of every volume thereof; they do not apply to a part of a volume, and the publishers of such part cannot, therefore, be made liable for non-delivery of it.^(a)

It is to be observed that the only consequence of not depositing or delivering the copies is the liability to the penalty imposed by this section. Neglect of the duty does not incapacitate the proprietor of the copyright from proceeding at law or in equity for an infringement of it, as omission to register, so long as it continues, does by force of sect. 24.

The Judicial Committee of the Privy Council has power to license the publication of books which the proprietor refuses to republish after the death of the author. Sect. 5 of 5 & 6 Vict. c. 45, after reciting that "it is expedient to provide against the suppression of books of importance to the public," enacts "that it shall be lawful for the Judicial Committee of Her Majesty's Privy Council, on complaint made to them that the proprietor of the copyright in any book after the death of its author has refused to republish or to allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, to grant a license to such complainant to publish such book, in such manner and subject to such conditions as they may think fit, and that it shall be lawful for such complainant to publish such book according to such license."

For the law relating to the assignment of copyright in books, see the chapter on the "Transfer of Copyright," *post*; and with reference to the infringement of copyright, and the remedies for it, see the chapters on "Infringement of Copyright," and "Remedies for Infringement," *post*.

Consequence of non-delivery.

Power of Privy Council to license publication of books.

Assignment and infringement of copyright.

CHAPTER VIII.

COPYRIGHT IN PERIODICAL PUBLICATIONS.

THE property in reviews, magazines, and other periodicals is in general of the same nature as that in books, commonly

(a) *British Museum v. Payne* (4 Bing. 548).

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so called, of which we have treated in the preceding chapter. There is, however, a modification in the term of enjoyment, and there are some questions which occur with respect to these productions which it has been considered more convenient to discuss by themselves.

The sections of the Copyright Act (5 & 6 Vict. c. 45) which deal with the subjects of our present consideration are the 18th (concerning the nature and duration of the right) and the 19th (as to registration).

Nature of the
right.

Sect. 18 enacts, "that when any publisher or other person shall, before or at the time of the passing of this Act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons 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, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for^(a) by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act;^(b) except only that in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this Act."

Duration of the
right.

(a) With reference to the language of this portion of the section, Shadwell, V.C., says, in *Brown v. Cooke* (16 L. J. 143, Ch.), "It seems to me that there is an inaccuracy in the language; and the only possible way of making it English would be by referring the words 'and paid for' to the former words, 'shall have been or shall hereafter be composed, &c.'"

(b) A similar view of the rights of proprietors of periodicals was taken before the passing of this Act. Sir John Leach said, in *Barfield v. Nicholson* (2 L. J. 90, 102; 2 Sim. & S. 1), "I am of opinion that

It will be observed that the word "encyclopaedia" is omitted from the latter part of this, so that the copyright in articles forming part of an encyclopaedia would not revert to the author after the first term of twenty-eight years. This is probably because those articles, being of a less fugitive and more elaborate character than those supplied to ordinary reviews or magazines, are more highly paid for by the proprietor; and the work, taken as a whole, is of more enduring interest and value than other periodicals.

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Encyclopaedia.

This section also provides, "that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly without the consent previously obtained of the author thereof, or his assigns."

Limitation of right.

It further provides, "that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed as aforesaid to publish any such his composition in a separate form, who by any contract, express or implied, may have reserved or may hereafter reserve to himself such right; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid."

Reservation by authors of right of publishing in a separate form.

It will be seen from sect. 18 that the duration of the copyright in all literary productions appearing in the works therein enumerated is the same as in the case of books; but the enjoyment of that period of copyright is (except in the case of encyclopaedias) divided between the proprietor or projector, &c., of the larger work in which the literary production appears, and the author of the literary production; the former enjoying the right for twenty-eight years, the latter for the remainder of the term given by the Act. It is further to be observed that the right of the proprietor, &c., of the larger work during the twenty-eight years is not of an absolute character, the right to publish any contribution in a separate form without the author's consent not being included in it.

Effect of sec. 18.

under that statute (8 Anne, c. 19) the person who embarks in the speculation of a work, and who employs various persons to compose different parts of it, adapted to their own peculiar acquirements, that he, the person who so forms the plan and scheme of the work, and pays different artists of his own selection, who, upon certain conditions, contribute to it, is the author and proprietor of the work, if not within the literal expression, at least within the equitable meaning of the statute of Anne, which, being a remedial law, is to be construed liberally." And see the prior case of *Wyatt v. Barnard* (3 V. & B. 77).

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 Mode of
 registration.

Sect. 19 enacts, "that the proprietor of the copyright in any encyclopædia, 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 encyclopædia, 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 number 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."

Where a novel entitled "Splendid Misery" had been completely published in successive numbers of a weekly periodical, the proprietor, in order to bring an action for infringement of his copyright, registered at Stationers' Hall, giving as the date of publication of the novel the day of the date of the publication of the particular weekly number of his periodical which contained the first part of the novel. It was argued that this registration was invalid, because at the time when the first part was registered all the subsequent parts had also been published. Jessel, M.R., said: "I am quite unable to follow that argument. The registration informs the public of everything that the public could have any possible desire or right to know. It cannot be less a registration of the first part because the other parts had been then published. Each part may be registered separately, and each part was actually published separately, and each part is, according to the definition in the Act of Parliament, a book."^(a)

Title of
 intended
 periodical.

Registering the title of an intended magazine cannot give a copyright in that name.^(b) It was contended in *Hogg v. Maxwell* that as by sects. 2 and 13 of 5 & 6 Vict. c. 45, every "part" of a book may be registered, and a right to restrain the piracy of it thereby acquired, the registration of the title "Belgravia" by the Messrs. Hogg, in October, 1863, three years before the publication of a magazine bearing that name, gave them a copyright in that title. In reply to this, Cairns, L.J., in giving judgment in that case, observed: "It is said that the word 'Belgravia,' being used upon the title-page of the magazine, was part of a volume. But at the time of making the entry in the register

^(a) *Dicks v. Yates* (L. R. 18 Ch. D. 88).

^(b) *Hogg v. Maxwell* (L. Rep. 2 Ch. App. 316; 16 L. T. N. S. 133; 36 L. J. 433, Ch.).

at Stationers' Hall there was no volume, no part of a volume, no sheet, no separate fraction of a publication of any kind or description. There was nothing in existence except that very entry itself, and the entry of the name of a future publication. It is quite absurd to suppose that the Legislature, in providing for the registration of that which was to be the *indicium* of something outside the registry, in the shape of a volume or part of a volume, meant that by the registration of one word copyright in that one word could be obtained, even although that one word should be registered as what was to be the title of a book or of a magazine.

. . . . I apprehend that, if it were necessary to decide the point, it must be held that there cannot be what is termed copyright in a single word, although the word should be used as a fitting title for a book.(a) The copyright contemplated by the Act must be not in a single word, but in some words in the shape of a volume or part of a volume, which is communicated to the public, by which the public are benefited, and in return for which a certain protection is given to the author of the work." A doubt had previously been expressed by Wood, V.C., in *The Correspondent Newspaper Company v. Saunders*,(b) whether the title of a periodical formed part of the copyright, the object of the Act as to that class of publications being to regulate the rights as between the contributors and the proprietors.

Nor will any amount of expenditure incurred upon a work not yet given to the world, or any outlay in advertisements of the title of the work, give a right to an injunction restraining another person from using the same title.(c) "That expenditure upon a work not given to the world," says Turner, L.J.,(d) "can create, as against the world, an exclusive right to carry on a work of this nature seems to me a proposition quite incapable of being maintained. It never, so far as I am aware, has been thought that any such equity exists. Then, if the expenditure alone will not confer such a right, will the advertisements do so? He, the plaintiff, does not by his advertisements come under any obligation to the public to publish the work, and therefore the effect of holding the advertisements to give him a title would be that, without having given any undertaking or done anything in favour of the public, he would be acquiring a right against every member of the public to prevent their

(a) See *Jollie v. Jaques* (1 Blatch. 627).

(b) 11 Jur. N. S. 541; 12 L. T. N. S. 540; 13 W. R. 804.

(c) *Maxwell v. Hogg* (L. Rep. 2 Ch. App. 307; 16 L. T. N. S. 131 36 L. J. 433, Ch.).

(d) *Ibid.*

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doing that which he himself is under no obligation to do, and may never do. . . . There is a great distinction between the case of advertisement followed by publication and a case resting upon advertisement only. In the case of advertisement followed by publication the party publishing has given something to the world, and there is some consideration for the world's giving him a right; but in the case of mere advertisement he has neither given, nor come under any obligation to give, anything to the world, so that there is a total want of consideration for the right which he claims."

Can there be copyright in a title?

The question of the possibility of the existence of copyright in the title of a work was much discussed in the recent case of *Dicks v. Yates*,^(a) in reference to the novel called "Splendid Misery." James, L.J., was of opinion that "there cannot in general be any copyright in the title or name of a book;" and he understood Jessel, M.R., to have expressed the same opinion.^(b) Lush, L.J., said: "I do not dissent from that view, but I do not wish to decide the point, as in my opinion it does not call for a decision in the present case."

Lush, L.J., was, however, clearly of opinion that there could be no copyright in the title "Splendid Misery." He said: "I take it to be established law that to be the subject of copyright the matter must be original; it must be a composition of the author, something which has grown up in his mind, the product of something which, if applied to patent rights, would be called invention. Nothing short of that would entitle a man to copyright. Now, can it be said there is anything original in these two words? I suppose there is hardly a person who has grown to maturity in this country who has not read them hundreds of times. To my mind 'Splendid Misery' is a hackneyed phrase."^(c)

Misleading imitation of title.

But though two periodicals (as well as two books) may have a similar title, the form, title, and mode of publication of one periodical cannot be imitated by another in such a manner as would necessarily mislead the public and induce them to purchase the latter work as continuing parts of the former one. *Hogg v. Kirby*^(d) was such a case. There the plaintiff had published the *Wonderful Magazine*, which the defendant had agreed to sell upon commission. After five numbers had been published, the agreement between plaintiff and defendant was put an end to. The sixth number was advertised by the plaintiff to appear on the

(a) L. R. 18 C. D. 76, ante p. 102.

(c) *Ibid.* p. 92.

(b) *Ibid.* p. 93.

(d) 8 Ves. 215.

31st December, and was published on that day. On the 1st January a publication was put forth by the defendant under a similar title, described as a *new series improved*. The defendant's publication contained an index to the contents of the five numbers already published, and continued an article not finished in number five, beginning with the word at the bottom of the last page. The execution of the two works was generally similar, and the device on the cover the same, though not exactly similar in the execution. Lord Eldon was of opinion that the defendant had published this work, not as his own original work, but as a continuation of the work of the plaintiff, and intending to represent it as such. His lordship accordingly granted an injunction restraining the defendant from printing, publishing, &c., any copies of the work, but granted the injunction in such terms as to make it clear that it was to operate upon nothing but the publication handed out to the world as the continuation of the plaintiff's work. "I am anxious," said Lord Eldon, "that nothing in the injunction shall imply that reviews, magazines, and other works of this species may not be multiplied."

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The injunction granted in the case before Lord Eldon was extended to all communications from correspondents to the defendant in his capacity as publisher of the plaintiff's work.

Even where the statutory requisites as to registration have been duly observed, the conduct of the proprietor of a periodical may be of such a nature as to disentitle him to aid from a court of equity by means of interlocutory injunction: *e.g.*, if he lie by and knowingly allow another person to incur expense in bringing out a work, which is an infringement of his strict legal right. Thus, in *The Correspondent Newspaper Company v. Saunders*(a), a company was formed in June, 1864, to establish and carry on a weekly paper called *The Correspondent*, but the paper was not brought out until after the appearance of advertisements of the intended publication by the defendants of a paper bearing the same title, which advertisements appeared in the month of April, 1865. The title had been registered by the company in April, 1864, but ineffectually, as the protection afforded by the Copyright Act is not prospective. The defendants registered the same title on the 3rd of March, 1865, in ignorance of the intended publication by the company, and incurred considerable expense in advertisements. This

Conduct
disentitling to
protection.

(a) 12 L. T. N. S. 540; 11 Jur. N. S. 540; 13 W. R. 804.

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becoming known to the company, they brought out the first number of *The Correspondent* on the 3rd of May, 1865, and on the same day registered the title at Stationers' Hall. On that day also, they wrote to the defendants for the first time, telling them that they would insist on their copyright in the name *Correspondent*. On Saturday, the 6th of May, 1865, the defendants published the first number of their paper, under the title of *The Public Correspondent*, whereupon the company applied for an injunction to restrain the publication of this paper, or of any paper of which the word *Correspondent* should form a part. Wood, V.C., after expressing a doubt whether the title is part of the copyright, said: "It is no doubt true that a title may be acquired, as in a trade mark, but it seems that the defendants, prior to May, 1865, had contemplated taking this title for their paper. Then the question is this; there being two persons equally honest, and one of them having given notice that he is about to produce an article with a certain name, and the other contemplating the same thing, whether or not the first, by bringing out his article a day or two sooner than the other, acquires a right by way of trade mark. The plaintiffs' position is this. The defendants in perfect good faith, and not knowing of this rather dormant company, bring out their advertisements. It was incumbent on the plaintiffs then to communicate with them as quickly as possible, because the defendants were incurring great expense, and by their advertisements really playing into the hands of the plaintiffs. The plaintiffs, however, laid by for eight days, and did not give the defendants notice till after they had brought out their own paper, and as it is to be observed, on a Wednesday, either for the purpose of gaining priority, or else having changed their day of publication, thus supplying one of the ingredients of mistake [it was said that the papers were mistaken for each other and that the plaintiffs were thereby damaged]." An interlocutory injunction was refused, and the motion was ordered to stand over till the hearing. This decision, however, was partly grounded on the doubt entertained by the Vice-Chancellor whether there could be copyright in the name of a periodical.^(a)

Rights of contributors.

Although sect. 18 of 5 & 6 Vict. c. 45, enacts that the proprietor, projector, &c., of an encyclopædia or periodical

(a) See the opinion of Lord Cairns in *Hogg v. Maxwell* (*ante*, pp. 102, 103). See also, as to the kind of acquiescence which disentitles to relief, the observations of Hall, V.C., in *Hogg v. Scott* (L. R. 18 Eq. 453, *et seq.*): and see the decision of Bacon, V.C., in *Maxwell v. Somerton* (30 L. T. N. S. 11; 22 W. R. 313).

publication, "composed of articles, essays, &c., shall enjoy the same rights" in articles, &c., composed on the terms that the copyright therein shall belong to him, "as if he were the actual author thereof;" this right, as already pointed out, is limited by the subsequent part of the section which prohibits the proprietor, &c., from publishing any contribution in a separate form without the author's consent. The author's right to prohibit separate publication in such a case is founded on the words of this enactment, which give him a future right of property in his composition, viz., the option of publishing it or not in a separate form at the end of twenty-eight years, a right which would be seriously injured if, being minded at the end of that period to publish his writings separately or in a collected form, he should find that they had already been published separately from the periodical work to which they were contributed. (a)

This right of the author of an article in a periodical to prevent a separate publication is not copyright within the meaning of the 24th section of 5 & 6 Vict. c. 45, and so no registration by the author is necessary to entitle him to an injunction to restrain such separate publication. (b)

Registration by
writer of article
not necessary.

The separate publication of an article contributed to the "Encyclopædia Metropolitana" was restrained by injunction in the case of the *Bishop of Hereford v. Griffin* (c).

What is a "separate publication" within the meaning of this section was considered in *Smith v. Johnson*. (d) In that case the plaintiff had composed certain tales for the *London Journal* which were published in that periodical in the year 1849. In the year 1863 the proprietors proceeded to republish these tales in what they called a supplementary number of the *London Journal* published weekly, which might be had with or without the current number. The plaintiff had not given his consent to this republication, and filed a Bill praying for an injunction to restrain the proprietors of the *London Journal* from continuing the republication. It was contended on behalf of the proprietors that the act complained of was not a violation of the statute, because the author had no copyright and could not publish the stories himself; his only right was to prohibit any publication in a separate or single form of his contributions, i.e.,

Meaning of
publishing
"separately."

(a) See per Wood, V.C., *Mayhew v. Maxwell* (1 John. & H. 315).

(b) *Ibid.* See also *Murray v. Maxwell* (3 L. T. N. S. 466).

(c) 16 Sim. 190.

(d) 4 Giff. 632; 9 L. T. N. S. 437; 33 L. J. 137, Ch.

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a publication out of and unconnected with the work in which they first appeared; the defendants were not attempting to do that; the republication was a republication of their own periodical, with a simple difference in the order, and this case was therefore distinguishable from the cases of the *Bishop of Hereford v. Griffin*, and *Mayhew v. Maxwell*. Sir John Stuart, V.C., was, however, of opinion that the republication was a "publication separately," within the meaning of sect. 18 of 5 & 6 Vict. c. 45, and granted the injunction prayed for. The Vice-Chancellor said:—"Keeping in view the principle of construction that the Act of Parliament was intended to give a licence only(?) to the proprietors of periodical works purchasing and paying for a literary composition to be published as a part or portion of a periodical work—the construction of the words in the proviso which prohibits them from publishing these parts or portions which 'alone' are the property of the author—from publishing these portions 'separately and singly' seems reasonably plain. 'Publishing separately' must mean publishing separately from something. What is that 'publishing' which the Act of Parliament says shall not be separately made? It must be the publishing of the part or portion separately from that which has been before published. That is the view which has been previously taken. . . . The Act of Parliament says the publishers shall not publish these portions separately from those parts for the publication of which they have obtained a licence already. What they [the proprietors of the *London Journal*] have done is to print the portions, already published, of those antecedent parts, in what is called a supplementary number, and which may be purchased with or without the number in which the 'portions' were originally published. That is a separate publication, separate from the 'part' in which it was originally published. To reprint in numbers which may be had with or without the concurrent number of the work is an act not permitted by the legislature."

Effect of words
'and paid for,'
&c.

The words "and paid for by such proprietor, projector," &c., in sect. 18 have received a very strict construction from the Courts of Equity, those courts having refused to recognise the proprietor's copyright in contributions where it is not clearly shown that he has paid the contributors for them.

Thus, where the publishers of the *London Medical Gazette* employed and paid an editor, who employed persons to write articles for the *Gazette* (whether he paid them or not did not sufficiently appear), the Vice-Chancellor of England, Sir L. Shadwell, was of opinion that the publishers had not

made out that sort of derivative copyright which, under the Act of Parliament, would enable them to prevent the publication by others of articles appearing in the *Gazette*.^(a) "The meaning of the Act of Parliament," he said, "as I understand the language of it, is this, that if the publisher of a periodical work employs a person to write articles for him, and pays him for them upon the terms that the copyright shall be the proprietor's—*i.e.*, the proprietor of a periodical work—the proprietor shall have the copyright of the periodical work, containing all the articles, with certain subsequent limitations, upon which nothing turns as far as this case is concerned. . . . If I find the fact to be on the face of the affidavit that A, B and C have composed articles which, by reason of some dealing between them and the editor, who alone has been paid by Messrs. Longman [the publishers], have by the editor been inserted in this *Medical Gazette*, which is published by the plaintiff, it appears to me, if that be the statement of the facts taken altogether, that then the Messrs. Longman have not entitled themselves to the copyright which is given under the terms of the 18th section as the publishers of the periodical work, who pay the composers of the articles inserted in the periodical work upon the terms that the copyright shall belong to them as the publishers."

The same doctrine was laid down by Lord Cranworth, V.C., in *Richardson v. Gilbert*.^(b) He held that *actual payment* for an article originally published in the *Dublin Review* was made by the Act a necessary condition to the vesting of the copyright of that article in the proprietors of the *Review*. In this case, however, his lordship was of opinion, from the averments in the Bill, that the title of the proprietors was made sufficiently clear to entitle them to an injunction restraining the defendant from publishing the article.

A newspaper proprietor must also, in order to entitle himself to sue for a piracy of its contents, show that the pirated articles have been composed on the terms that the copyright in them should belong to him, as well as that the author of them has been paid.^(c)

"On the terms that the copyright," &c.

The words of the 18th section, "on the terms that the copyright therein should belong to the proprietors," do not require that an *express* contract to that effect should be entered into between the proprietor of a periodical publication and the contributors to it. There may be an implied condition, understanding, or arrangement that the copyright in

Contract may be implied.

(a) *Brown v. Cooke* (11 Jur. 77).

(b) 1 Sim. N. S. 336.

(c) *Walter v. Howe* (L. R. 17 Ch. D. 708).

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contributions should vest in the proprietor of the periodical to which they are furnished, and the terms of the arrangement may be inferred from the general nature and character of the employment. Thus, the publisher of a series of law reports, furnished by barristers without any express stipulation that the copyright should belong to the publisher, possesses the copyright in those reports, and is entitled to restrain their publication by any other person.^(a) "I think," said Maule, J., "that where a man employs another to write an article, or to do anything else for him, unless there is something in the surrounding circumstances, or in the course of dealing between the parties, to require a different construction, in the absence of a special agreement to the contrary, it is to be understood that the writing or other thing is produced upon the terms that the copyright therein shall belong to the employer—subject, of course, to the limitation pointed out in the 18th section of the Act."^(b)

CHAPTER IX.

ENGRAVINGS OR PRINTS.

s. Geo. 2, c. 13.

THE first Act passed to secure a property in prints or engravings to the inventors and engravers was the 8 Geo. 2, c. 13. In the preamble it states that "whereas divers persons have by their own genius, industry, pains, and expense, invented and engraved, or worked in mezzotinto, or chiaro oscuro, sets of historical and other prints, in hopes to have reaped the sole benefit of their labours, printsellers and other persons have of late, without the consent of the inventors, designers, and proprietors of such prints, frequently taken the liberty of copying, engraving, and publishing, or causing to be copied, engraved, and published, base^(c) copies of such works, designs, and prints, to the very

^(a) *Sweet v. Beming* (16 C. B. 459, 481, 489). ^(b) *Ibid.* 484.

Meaning of
"base copy."

^(c) The meaning of the expression "base copy" in this statute is "anything which is not the genuine work of the author:" (*Per Kelly, C.B., delivering the judgment of the Court of Exchequer Chamber in Graves v. Ashford* (L. Rep. 2 C. P. 419; 16 L. T. N. S. 98; 36 L. J. 139, C. P.) In that case it had been suggested in argument that a thing would not be a "base copy" which was avowed to be a copy, and did not profess to be the original from which it was taken. "It seems to us," said the Chief Baron, "that to put that construction upon the word 'base' would be cutting down the meaning of the legislature to a most mischievous extent, and working great injustice to the author."

great prejudice and detriment of the inventors, designers, and proprietors thereof." To prevent this for the future, the statute enacted (sect. 1) that from and after the 24th of June, 1735, every person who should *invent and design*, engrave, etch, or work in mezzotinto or chiaro oscuro, or *from his own works and inventions*, should cause to be designed and engraved, &c., any historical or other print or prints, should have the sole right and liberty of printing and reprinting the same for the term of fourteen years [since extended to twenty-eight^(a)] "to commence from the day of first publishing thereof, which should be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints." The section then inflicts a penalty on printsellers or other persons guilty of piracy.^(b)

Date of publishing and proprietor's name to be affixed to each print.

Sect. 2 exempts from the penalties any person or persons who should, after the passing of the Act, purchase any plate or plates, for printing, from the original proprietors thereof.

This Act vested the property in prints only in those who should "invent and design, engrave, &c.," or who, "from his own works and inventions," should cause to be designed and engraved, &c., such prints. No provision was made for the protection of the property in prints which were not designed by the person who engraved them.

This defect was, however, supplied by 7 Geo. 3, c. 38, the first section of which enacted that the benefit and protection of the preceding Act of Geo. 2 should be extended to all and every person who should "engrave, etch, or work in mezzotinto or chiaro oscuro, or cause to be engraved, etched, or worked, any print *taken from any picture, drawing, model or sculpture, either ancient or modern . . .* in like manner as if such print had been graven or drawn from the original design of such graver, etcher, or draftsman."

7 Geo. 3, c. 38.
Duration of copyright.

This Act also enlarged the term of enjoyment of the right from fourteen to twenty-eight years. Sect. 7 enacts, "that the sole right and liberty of printing and reprinting, intended to be secured and protected by the said former Act [8 Geo. 2, c. 13] and this Act, shall be extended, continued, and be vested in the respective proprietors, for the space of twenty-eight years, to commence from the day of the first publishing of any of the works respectively hereinbefore and in the said former Act mentioned."

(a) By 7 Geo. 3, c. 38, s. 7.

(b) See the chapters on "Infringement of Copyright" and the "Remedies for Infringement," *post*.

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The nature of the right given, where the engraving is taken from a picture, drawing, &c., is thus explained by James, L.J., in *Dicks v. Brooks*:(a)—“It appears to me that the protection given by the subsequent Acts to the mere engraver was intended to be, and was, commensurate with that which the engraver did; that the engraver did not acquire against anybody in the world any right to that which was the work of the original painter, did not acquire any right to the design, did not acquire any right to the grouping or composition, because that was not his work, but the work of the original painter. What, as it seems to me, the Act gave him and intended to give him, was protection for that which was his own meritorious work.”

17 Geo. 3, c. 57.

The last Act on the subject, 17 Geo. 3, c. 57, was passed, as the title indicates, “for more effectually securing the property of prints to inventors and engravers by enabling them to sue for and recover penalties in certain cases.” It recites the two former Acts and proceeds: “Whereas the said Acts have not effectually answered the purposes for which they were intended, and it is necessary for the encouragement of artists, and for securing to them the property of and in their works, and for the advancement and improvement of the aforesaid arts, that such further provisions should be made as are hereinafter mentioned and contained.” It then gives to the proprietor of prints an action on the case against any offender by piracy, in which damages and double costs may be obtained.(b)

Action on the case.

Ireland.

The provisions of 17 Geo. 3, c. 57, which applied to Great Britain only, were extended to Ireland by 6 & 7 Will. 4, c. 59; sect. 2 of which refers to engravings or prints “of any description whatever published in any part of Great Britain or Ireland.” The action on the case may be brought against the person offending “in any court of law in Great Britain or Ireland.”(c)

Lithographs, &c.

Doubts having been entertained whether the provisions of the preceding statutes extended to lithographs and other impressions taken by mechanical processes, sect. 14 of 15 & 16 Vict. c. 12, declares “that the provisions of the said Acts are intended to include prints taken by lithography or any other process by which prints or impress-

(a) L. R. 15 C. D. 34.

(b) See the chapter on “Remedies for Infringement,” *post*.

(c) “I think that in *Gambart v. Ball* (14 C. B. N. S. 306) the object of the Acts was well pointed out as being of two-fold character, (1) the protection of the reputation of the engraver, and (2) his protection against any invasion of his commercial property in the print.” (*Per Baggallay, L.J., Dicks v. Brooks, L. R. 15 Ch. D. 36*).

ions of drawings or designs are capable of being multiplied indefinitely, and the said Acts shall be construed accordingly."

The protection given by the statutes has been applied to the case of prints not published alone, but appearing along with letterpress which they illustrate.^(a) Lord Ellenborough, however, was of opinion that if an artist should, merely from reading the letterpress of another's work, sketch designs similar to illustrations appearing in that work, this would not be a piracy of such illustrations.^(b)

Prints accompanying letterpress.

As to maps, charts, and plans, see the observations of James, L.J., and Mellish, L.J., *quod ante* p. 70.^(c)

Maps, Charts, and plans.

A person who employs another to make a drawing or design is not the author of it.^(d)

A person may, however, be the inventor or designer, though himself unable to engrave or make a drawing.

In *Stannard v. Harrison*,^(e) the plaintiff, a lithographer and publisher, being desirous of bringing out a bird's-eye view of Paris and its environs, took to an artist named Concanen a rough sketch or draft (a drawing of the same size as the stone on which it was to be engraved) showing the forts, a large French map and other maps, and a picture published in the *Illustrated London News*, and gave information from day to day of the earthworks that were made. Vice-Chancellor Bacon held that the plaintiff was the designer and inventor of the bird's-eye view executed from these materials by the artist. His lordship said: "There is nothing in the circumstance that Mr. Stannard cannot draw. Mr. Stannard can invent, which is more valuable, and as happens in [the case of] ninety-nine out of every hundred inventors, the inventor is generally a man who cannot perfect the machinery by which the invention is to be carried out."

Vice-Chancellor Bacon appears to have regarded the bird's-eye view of the seat of war as a "design" or "print" within the meaning of the Acts of 8 Geo. 2, c. 13, and 7 Geo. 3, c. 38, and not as a "map" separately published. This was a question of fact for his determination. It would obviously be very unsafe for publishers of maps in the form of bird's-eye views of countries to rely on this determination as finally settling the question, in view of the language used by

(a) *Roworth v. Wilkes* (1 Camp. N. P. 94); *Wilkins v. Aikin* (17 Ves. 422).

(b) See *Roworth v. Wilkes* (1 Camp. 99).

(c) See 7 Geo. 3, c. 38, s. 1, and 17 Geo. 3, c. 57.

(d) *Jeffreys v. Baldwin*, Amb. 163.

(e) 24 L. T. N. S. 570.

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Where subject
is common.

Lords Justices James and Mellish, in *Stannard v. Lee*, as to all maps separately published, *ante* p. 70. Publishers of such bird's-eye maps would act prudently in registering before suing.

Where the subject from which an engraving is taken is common and open to all, the first engraver of a print of it is not entitled to restrain any one else from making an engraving of the same subject, provided it be made from the original subject and is not a copy of the first engraving; but he is entitled to prevent another from copying his own engraving. Thus, before the Act 25 & 26 Vict. c. 68, gave a copyright in paintings, drawings, and photographs, the engraver of a print of any such painting, drawing, or photograph, though he could not claim a monopoly of the *use of the picture, &c.*, from which the engraving was made, was entitled to say to any other person wishing to copy the picture, "Take the trouble of going to the picture yourself, but do not avail yourself of my labour, who have been to the picture, and have executed the engraving."^(a)

In *Wyatt v. Barnard*,^(b) Lord Eldon said, with reference to specifications of patents, that a person who chose to go to the office, copy a specification and publish it, could not by so doing acquire a right to restrain another from copying it. It is not clear from the meagre report whether Lord Eldon intended merely to assert the right of every one to copy the original specification, or to deny altogether the existence of copyright in productions copied from specifications. The reporters, judging from their marginal note, seem to have understood him in the latter sense, but the former was most probably what he intended.

At any rate, if an engraving is made from a drawing taken from the specification of a patent, the engraver has a right to prevent any other person from pirating his engraving. "The engraver," said Best, C.J., in *Newton v. Cowie*,^(c) "although a copyist, produces the resemblance by means very different from those employed by the painter or draftsman from whom he copies—means which require great labour and talent. The engraver produces his effects by the management of light and shade, or as the term of his art expresses it, the *chiaro oscuro*. The due degrees of light and shade are produced by different lines and dots: he who is the engraver must decide on the choice of the different lines or dots for himself, and on his choice depends the suc-

(a) See *per Best, C.J.*, in *Newton v. Cowie* (4 Bing. 246).

(b) 3 Ves. & B. 78.

(c) 4 Bing. 246.

cess of his print. If he copies from another engraving, he may see how the person who engraved that has produced the desired effect, and so without skill or attention become a successful rival. . . . Without the introduction of express words, I should have thought therefore, that a case of this kind fell within the spirit of the Act. But the 7 Geo. 3, c. 38, extends the protection of the first statute to any print of any 'map, chart, or *plan*, or any other print or prints whatsoever.' The same words are used in 17 Geo. 3, c. 57, and nothing is said as to the place in which the original is to be found." In this case the engraving had been executed from a drawing made by an apprentice of the engraver's, from a patent specification.

The words in sect. 1 of 8 Geo. 2, c. 13, requiring the proprietor's name to be affixed to each print, have given rise to considerable discussion, and to some diversity of opinion, amongst the judges. That Act confers a copyright, and inflicts a penalty for the infringement of it, in historical and other prints—to commence from the day of the first publishing thereof—"which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints." This would seem to confer a copyright property only in prints so marked with the proprietor's name; and since the decision of *Donaldson v. Beckett* [in the year 1774] put an end to the notion of a copyright at common law, independent of statutory enactment, it should seem that no property can now exist in published engravings other than what springs from a strict compliance with the requisites of the statute.

Requisites to
copyright in
engravings.

A different opinion, indeed, appears to have been entertained by Lord Hardwicke in the case of *Blackwell v. Harper*.^(a) That eminent judge expressed an opinion, but somewhat doubtfully, that the words of the Act requiring the insertion of the date of publication on prints were directory only, and not descriptive; and, therefore, that the day was necessary to be inserted on prints only where the penalty of the Act was intended to be taken advantage of. The injunction prayed for by the plaintiff in that case was granted, though the date of publication did not appear on the engravings. And Lord Ellenborough, in *Rouworth v. Wilkes*,^(b) was of opinion that a plaintiff could recover for piracy of his prints, though his name was not engraved upon them; that the interest being vested, the common law gave

(a) 2 Atk. 95; Barn. Chanc. Rep. 210.

(b) 1 Camp. N. P. 97.

the remedy. His lordship, however, reserved the point for the consideration of the full court, but it was not brought before them.

Lord Alvanley was of a contrary opinion in *Harrison v. Hogg*,^(a) He considered it "essential to the plaintiff's right to insert the date, &c., many good reasons requiring that the date should be upon the plate."

The reason for requiring the name and the date to appear on the print is, according to Lord Kenyon, "that they might convey some useful intelligence to the public. The date is of importance, that the public may know the period of the monopoly. The name of the proprietor should appear, in order that those who wish to copy it might know to whom to apply for consent. It seems, therefore, necessary that the date should remain, but that the name of the proprietor should be altered as often as the property is changed."^(b)

The view taken by Lord Alvanley, in *Harrison v. Hogg*, was adopted by the Court of Common Pleas in *Newton v. Cowie*,^(c) after a review of all the cases. They held that in order to maintain an action for pirating prints, the proprietor's name and the date of publication must both appear on the original print, pursuant to 8 Geo. 2, c. 13. Speaking of the statutes 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57, Best, C.J., delivering the judgment of the court, said: "Neither of these two Acts repeats the qualifications of name and date [contained in 8 Geo. 2, c. 7], and the last has, after enumerating different sorts of prints, the words 'any print or prints whatsoever.' But these Acts are in *pari materia*, and must be taken together, and it was not necessary to repeat in the last the qualifications contained in the first. The right of action given in 17 Geo. 3 is for the piracy of plates, the monopoly of which is secured by the 8 Geo. 2. It is impossible to suppose the legislature intended that the public should not have the protection afforded them by the first Act against a fraudulent continuance of the monopoly beyond the term prescribed by that Act." This case was followed by the Court of King's Bench in *Brooks v. Cook*,^(d) Littledale, J., remarking, that the words "which shall be truly engraved on each plate" are not merely directory, but *make such engraving part of the thing to be protected*. And in reply to an argument of counsel that 17 Geo. 3, c. 57, passed for the purpose of enlarging the privileges of the artist, gave him a

(a) 2 Ves. 327. See also *Bonner v. Field* (cited 5 T. R. 44).

(b) *Thompson v. Symonds* (5 T. R. 45).

(c) 4 Bing. 234.

(d) 3 Ad. & El. 138.

right of action for injuries to his copyright, without any such restriction or condition as is supposed to attach under the previous statute of Geo. 2, Lord Denman, C.J., remarked: "The statutes are evidently connected with each other;" and Littledale, J., added: "the Stat. 17 Geo. 3, c. 57, was intended only to give the proprietors of plates a further remedy. Before that Act, the person infringing the copyright was liable only to forfeit his plate and prints, and five shillings for each print. As many engravings are published at a great expense, this was an insufficient remedy for their being pirated, and, therefore, the Act of 17 Geo. 3, c. 57, was passed enabling the proprietor to recover damages in an action on the case."^(a)

All the cases agree that the penalties at least cannot be recovered, unless the conditions laid down in the Act of Geo. 2 are complied with.

The statute requires that the "name of the proprietor" shall be truly engraved on each plate, as well as "the day of the first publishing thereof." The name of the publisher is not required, but only that of the proprietor. The Act does not, however, say that he shall be called the proprietor on the plate; he may even be described on the plate as the publisher, provided he be in fact the proprietor. Thus, where the publication line contained the words—"London: Published by Henry Graves & Co., May 1, 1861, Printsellers to the Queen, 6, Pall Mall," Henry Graves & Co. being the actual proprietors of the engraving, it was held to be a sufficient compliance with the requisites of the Act. In that case^(b) Kelly, C.B., delivering the judgment of the Court of Exchequer Chamber, said, "The question is, whether the Legislature, when they required the name of the proprietor to appear, required that he should be expressly described as being the proprietor. They certainly have not said so in terms, and we must put a reasonable construction upon the words they have used. Every one who is at all conversant with these things looks at what is called the 'publication line' for the name of the proprietor. The name which appears on the face of the print must be assumed to be that of the proprietor, and it cannot alter the effect or be less a compliance with the Act because he is called the publisher. I think the statute has been substantially and literally complied with."

Publication line.
What is sufficient disclosure
of proprietorship.

(a) Cf. *Colnaghi v. Ward* (6 Jur. 970).

(b) *Graves v. Ashford* (L. Rep. 2 C. P. 421; 16 L. T. N. S. 98; 36 L. J. 139, C. P.).

—that the words “Henry Graves and Company” imported that Henry Graves had a partner, who *prima facie* would be a part proprietor of the engraving, and that, as his name was not given the Act was not complied with. It appeared, however, from the evidence, that the person indicated by the words “and company” was a person to whom Mr. Graves paid a fixed sum per month out of his business; and the court held that the payment to a person of a fixed sum periodically did not constitute that person a partner or part proprietor; that Henry Graves, therefore, was the sole proprietor of the engravings in question, and that as his name appeared thereon, the requirement of the statute had been sufficiently complied with.

Malins, V.C., held that “Rock & Co., London,” was a sufficient description of the proprietors, and that it was not necessary to state the names of all the partners.(a) “I think,” he said, “that the trading name of the firm is a sufficient designation, inasmuch as it enables parties to know whom to apply to for information, and whom they must sue.”

In *Blackwell v. Harper*(b) Lord Hardwicke held the words “Elizabeth Blackwell, sculpsit et delineavit” to be a sufficient disclosure of proprietorship.

In the case just referred to only one name appeared on the print, and so no mistake could arise. But even where more than one name appears on the engraving, if one of them is the name of the proprietor, the requirement of the statute is sufficiently complied with. Thus, where the publication line ran “Newton, del., 1st May, 1826; Gladwin, sculp.,” the Court of Common Pleas held it to be sufficient.(c) “The words on these prints,” said Best, C.J., “do not directly designate that the plaintiff is the proprietor, nor do I believe that it has ever been stated on any print that was ever published who was the proprietor. Nor in any one of the cases which have been decided in favour of engravers has the word proprietor ever appeared upon the print. . . . The words of the Act are satisfied by the disclosure of the proprietor’s name; this is a sufficient indication of the person who is to be applied to for leave to copy the print; coupled with the date, it shows how long the designer has had the monopoly, and fully accomplishes the two objects of the Act.”(d)

(a) *Rock v. Lazarus* (L. R. 15 Eq. 104).

(b) 2 Atk. 93; Barn. 210 s. c.

(c) *Newton v. Cowie* (4 Bing. 234). See also *Stannard v. Lee* (23 L. T. N. S. 306).

(d) *Ibid.* 240.

Prints engraved and struck off abroad, but published here, are not within the protection of the Copyright Acts.(a)

PART I.
CHAPTER IX.
Engravings.

It is not necessary to register engravings or prints under the Act of 5 & 6 Vict. c. 45, in order to sue for piracy.

The proprietor of copyright in a map, whether it forms part of a book or is published separately, must register it before he can sue for an infringement of his copyright.(b)

For the law relating to the assignment of copyright in prints, see the chapter on the "Transfer of Copyright," *post*; and as to the piracy of prints, and the remedies for piracy, see the chapters on "Infringement of Copyright," and "Remedies for Infringement," *post*.

CHAPTER X.

DRAMATIC AND MUSICAL COMPOSITIONS.

THE property in a dramatic or musical composition is of a twofold nature. It embraces the copyright in the composition itself, considered simply as a literary production (in other words, a "book" within the Act 5 & 6 Vict. c. 45), and also the right of representing the drama or performing the musical composition at any place of dramatic entertainment in the British dominions. Of the two rights the latter, which is the more valuable, was secured to authors and composers at a later period than the former.

Property
twofold.

From the passing of the Copyright Act of Anne, the authors of dramatic, as well as other literary productions, have enjoyed a copyright in their works; but it was not till the statute of 3 & 4 Will. 4, c. 15, that the right of controlling the representation of their dramas in any part of the British dominions was conferred on the authors of dramatic compositions. Before the passing of that Act the author could not prevent any one that liked to do so from publicly performing on the stage a drama in which the author possessed the copyright. He could only prevent the publication of his work by multiplication of copies of it; and it was held that repeating the piece from memory on the stage was no publication of it.(c) The author's composition

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

(b) *Stannard v. Lee* (L. R. 6 Chy. App. 346), reversing the decision of Malins, V.C.

(c) *Coleman v. Wathen* (5 T. R. 245); *Macklin v. Richardson* (Amb. 694).

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3 & 4 Will. 4,
c. 15.

might also be altered and abridged to make it more suitable for theatrical representation, and might be so represented for profit by whoever pleased.^(a)

The legislature at length intervened to remedy this defect in the law. 3 & 4 Will. 4, c. 15, commonly called Sir Bulwer Lytton's Act, gave to the author or his assignee of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment composed, and not printed and published, the sole right of having it represented in any part of the British dominions, and to the author or his assignee of any such dramatic production, printed and published within ten years before the passing of the Act, or which might be printed and published after the passing of the Act, the sole liberty of representing or causing to be represented the same at any place of dramatic entertainment in the British dominions during the same period of time that copyright then subsisted in books. A proviso was added saving the rights of parties to whom before the passing of the Act the author or his assignee had given authority to represent his piece.^(b)

As to the meaning of the words "place of dramatic entertainment," see *post*, the chapter on "Infringement of Copyright."

Sect. 2.

The right of the author is further secured by sect. 2, which inflicts a penalty on persons performing pieces contrary to the Act.

The foregoing provisions were extended to musical compositions by sect. 20 of 5 & 6 Vict. c. 45.

This Act has been held by the Court of Appeal, overruling the decision of the Court of the Queen's Bench, to apply retrospectively to musical compositions published within ten years before it was passed.^(c)

Musical
compositions,
45 & 46 Vict.
c. 40.

An important alteration in the law relating to copyright in musical compositions has been made by 45 & 46 Vict. c. 40, passed "to protect the public from vexatious proceedings for the recovery of penalties for the unauthorized performance" of such compositions.

Notice that right
of performance
is reserved.

Sect. 1 provides that "the proprietor of the copyright in any musical composition first published after the passing of this Act, or his assignee, who shall be entitled to, and be desirous of, retaining in his own hands exclusively the right of public representation or performance of the same, shall print or cause to be printed upon the title-page of every

(a) *Murray v. Elliston* (5 Bar. and Ald. 657). (b) Sect. 1.

(c) *Ex pte. Hutchins and Romer* (L. R. 4 Q. B. D. 90, 483, and *ante* p. 72).

published copy of such musical composition a notice to the effect that the right of public representation or performance is reserved."

Sect. 2 enacts that "in case, after the passing of this Act, the right of public representation or performance of, and the copyright in, any musical composition shall be or become vested, *before publication of any copy thereof*, in different owners, then if the owner of the right of public representation or performance shall desire to retain the same, he shall before any such publication of any copy of such musical composition give to the owner of the copyright therein notice in writing requiring him to print upon every copy of such musical composition a notice to the effect that the right of public representation or performance is reserved."

Where right of performance and copyright are vested in different owners.

"In case the right of public representation or performance of, and the copyright in, any musical composition shall, *after publication of any copy thereof*, subsequently to the passing of this Act, first become vested in different owners, and such notice as aforesaid shall have been duly printed on all copies published after the passing of this Act previously to such vesting, then if the owner of the right of performance or representation shall desire to retain the same he shall before the publication of any further copies of such musical composition, give notice in writing to the person in whom the copyright shall be then vested, requiring him to print such notice as aforesaid on every copy of such musical composition to be thereafter published." (*Id.*)

By sect. 3 "if the owner for the time being of the copyright in any musical composition shall, after due notice being given to him or his predecessor in title at the time, and generally in accordance with the last preceding section, neglect or fail to print legibly and conspicuously upon every copy of such composition published by him or by his authority, or by any person lawfully entitled to publish the same, and claiming through or under him, a note or memorandum stating that the right of public representation or performance is reserved, then and in such case the owner of the copyright at the time of the happening of such neglect or default shall forfeit and pay to the owner of the right of public representation or performance of such composition the sum of £20 to be recovered in any court of competent jurisdiction."

Penalty on owner of copyright for non-compliance with notice from owner of right of performance.

Sect. 4 provides that notwithstanding the provisions of Sects. 3 & 4 Will. 4, c. 15, or any other Act in which those provisions are incorporated, "the costs of any action or proceeding for penalties or damages in respect of the unauthorized

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representation or performance of any musical composition published before the passing of this Act, shall, in cases in which the plaintiff shall not recover more than forty shillings as penalty or damages, be in the discretion of the court or judge before whom such action or proceeding shall be tried."

Duration of the right

The duration of the author's right to restrain or authorise the performance of his dramatic or musical compositions is by sect. 20 of 5 & 6 Vict. c. 45, made of equal length with the term of an author's copyright in books, *i.e.*, the author's lifetime, and seven years more if they together amount to or exceed forty-two years: if they do not, the right endures for the term of forty-two years from the period of first publication in the case of books, or of first public representation or performance in the case of dramatic pieces or musical compositions.

The section enacts that "the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof, and his assigns, for the term in this Act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this Act, to the first publication of any book."

If there are joint owners of the right, the consent of all must be obtained to a representation of the piece.(a)

Mode of registration.

As to the manner of registration, the same section provides "that in case of any dramatic piece or musical composition in manuscript, it shall be sufficient for the person having the sole liberty of representing or performing or causing to be represented or performed the same, to register only (1) the title thereof, (2) the name and place of abode of the author or composer thereof, (3) the name and place of abode of the proprietor thereof, and (4) the time and place of its first representation or performance."

Author.

A person who employs another to write a play for him, suggests the subject and even makes some alterations, is not a joint author of the play.(b)

(a) *Powell v. Head* (L. R. 12 C. D. 688).

(b) *Levy v. Ruttley* (L. R. 6 C. P. 523).

As to remedies for infringement of the rights, sect. 21 enacts "that the person who shall at any time have the sole liberty of representing such dramatic piece or musical composition shall have and enjoy the remedies given and provided in the said Acts of the third and fourth years of the reign of his late Majesty King William the Fourth, passed to amend the laws relating to dramatic literary property, during the whole of his interest therein, as fully as if the same were re-enacted in this Act." See the chapter on "Remedies for Infringement," *post*.

The right of representation is now so distinct from the copyright in a dramatic or musical piece, that the assignment of the latter does not convey the former without an express assertion on the register of an intention to do so. Assignment of copyright does not convey right to represent or perform.

Sect. 22 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 should pass by such assignment."

Where, however, the composer of two songs assigned for value "all his present and future vested and contingent copyright in the musical compositions and . . . all other the estate, right, title, interest, property, contingency, possibility, benefit, claim, and demand whatsoever," this was held by the Court of Appeal to convey the exclusive right of performing.^(a) The court considered the words "property" and "benefit" as sufficiently large to include all the rights of the original proprietor.

A "dramatic piece" is defined by sect. 2 "to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment." Definition of "dramatic piece."

From the preceding statutory definition of "dramatic piece," it will be seen that musical compositions are embraced under that head, and that the statutory provisions relating to the performance of ordinary plays apply also to musical entertainments. Sec. 20, indeed, after reciting that it is expedient to extend to musical compositions the benefits of the Act 3 & 4 Will. 4, c. 15, enacts that the provisions of the said Act, as well as of the Act of 5 & 6 Viet. c. 45, shall apply to musical compositions, and then proceeds to confer on the authors the sole right of representing or performing them in the terms already cited, p. 122. Musical compositions.

(a) *Ex pte. Hutchins and Romer* (L. R. 4 Q B. D. 483).

Long before this enactment it had been held that written music was within the Copyright Act of Anne;(a) but up to the time of the passing of 5 & 6 Vict. c. 45, the author was unable to restrain the unauthorised public performance of his compositions by others. Lord Mansfield, in the very case which decided that music was within the Act of Anne, said: "A person may use the copy by playing it; but he has no right to rob the author of the profit by multiplying copies and disposing of them to his own use." The author is now placed on a level, in this respect, with the author of dramatic pieces commonly so-called.

An introduction to a pantomime, which is the only *written* part of such an entertainment, is a dramatic piece within the protection of this Act.(b) It is not correct to say that such an introduction is not an entire and complete piece.(c)

Musical composition necessary to a play.

Where a person is employed by another to write for reward paid to him a musical composition, to be used as part of the representation of a dramatic piece, and as a mere accessory to such dramatic piece, the composer of the musical accessory has no copyright therein. The property in music so composed becomes vested in the employer, and he does not require the consent of the composer in order to represent it. This was decided by the Court of Common Pleas in the case of *Hutton v. Kean*,(d) where the plaintiff had been employed by the defendant to compose certain music to be performed during and as part of the representation of three of Shakespeare's plays. The musical composition was held to have become the property of Mr. Kean, and the plaintiff was held never to have been, within the language of the statute, the owner or proprietor thereof. This case was followed and approved in *Wallerstein v. Herbert*,(e) where the composer of the musical accessories was employed

(a) *Bach v. Longman* (Cowp. 623).

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

(c) 3 C. B. 881, 882. As to what is a dramatic entertainment within 6 & 7 Vict. c. 68, see *Day v. Simpson* (18 C. B. N. S. 680).

(d) 7 C. B. N. S. 268; 29 L. J. 20. C. P.; 1 L. T. N. S. 10.

(e) 16 L. T. N. S. 453; 15 W. R. 838. See *Keene v. Wheatley* (9 Amer. Law Reg. 47), where A, in the general theatrical employment of B, was engaged in the office of assisting in the adaptation of a play for representation, and B was held to be the proprietor of the additions so made, as products of his intellectual exertions in a particular service in his employment; on the principle that where an inventor in the course of his experimental essays employs an assistant, who suggests and adapts a subordinate improvement, it is in law an incident or part of the employer's main invention.

to find an orchestral band, to procure and pay all the musical performers, and furnish all the musical instruments, to provide, lead, and perform overtures and *entr'acte* music, and the music incidental to the dramatic performances. In performance of his duties under this engagement he composed the music for a drama called "Lady Audley's Secret," and it was held that he had no copyright in such music.

A pianoforte score of an opera is an independent musical composition separate and distinct from the opera itself; and where such pianoforte score has been arranged by a person other than the composer of the opera, it is incorrect to register the score as the composition of the composer of the opera.^(a) "It seems impossible," says Cockburn, C.J., "to believe that any musician, however great his talent, whether as a composer or as an executant, from the mere circumstance of having the opera in its entirety before him, that is to say, with all the score for all the instruments, which neither eye nor mind could take in at the same time, could be able to play the accompaniment while singing the music of the opera at the piano. It requires time, reflection, skill and mind so to condense the opera score as to compose the pianoforte accompaniment. I cannot therefore bring myself to think that the pianoforte arrangement of the music of an opera, which originally consisted of vocal music and instrumentation to be executed by some half-hundred instruments can be said to be anything else than a specific, separate, and distinct work from the opera itself."^(b)

Whether a pianoforte arrangement of the score of an opera executed without the consent of the composer of the opera would be an infringement of his copyright therein, has not been expressly decided. In *Wood v. Boosey*,^(c) Cockburn, C.J., carefully guarded himself against being understood to decide that it would not, and Blackburn, J., was of opinion that it would. Kelly, C.B., on appeal^(d) says, "No doubt it is a piracy of the opera, and the composer may maintain an action against the adapter or the publisher of the

^(a) *Wood v. Boosey* (L. Rep. 2 Q. B. 340; 7 B. & S. 869; 15 L. T. N. S. 530; 36 L. J. 103, Q. B.; affirmed on appeal, L. Rep. 3 Q. B. 223; 9 B. & S. 175; 37 L. J. 84, Q. B.; 18 L. T. N. S. 105).

^(b) L. Rep. 2 Q. B. 350; 15 L. T. N. S. 530; 36 L. J. 103, Q. B.; 15 W. R. 309.

^(c) L. Rep. 2 Q. B. 350, 354. See the remarks of Lord Abinger, C.B., in *D'Almaine v. Boosey* (1 Y. & C. 288).

^(d) 18 L. T. N. S. 108; L. Rep. 3, Q. B. 223; 37 L. J. 84, Q. B.; 16 W. R. 485.

adaptation;" but it was not necessary to decide the point in that case.

Though the pianoforte arrangement may, on account of incorrect registration, be unprotected, still any one who should, even by independent labour expended upon it, reproduce a substantial part of the music of the original opera could be restrained from publicly performing it.(a)

As to the assignment of the rights treated of in this chapter, the infringement thereof, and the remedies for infringement, see the chapters on "Transfer," "Infringement of Copyright," and "Remedies for Infringement," *post*.

CHAPTER XI.

PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.

Origin of
copyright.

THE copyright in paintings, drawings, and photographs dates from, and is altogether dependent on, the statute 25 & 26 Vict. c. 68. The preamble to that Act states that "the authors of paintings, drawings, and photographs have no copyright in such their works,(b) and it is expedient that the law should in that respect be amended."

Nature and
duration of the
right.

Sect. 1 enacts that "the author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, or photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns shall have 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, for the term of the natural life of such author and seven years after his death.*"(c)

Who is author
of photograph.

The question who is the *author* of a photograph which several persons take part in producing, was considered by the Court of Appeal in the recent case of *Nottage v. Jackson*.(d) The case, however, only decided that the proprietors of photographic studios who carry on their business through managers and a large staff of photographic artists and assistants, but

(a) See the judgment in *Boosey v. Fairlie*, L. R. 7, C. D. p. 317.

(b) See the opinion of Abbott, C.J., in *De Berenger v. Whoble* (2 St. N. P. 549).

(c) The Act says nothing as to the *place of first publication*. Compare Sect. 12 of the Act with Sect. 19 of 7 Vict. c. 12.

(d) L. R. 11 Q. B. D. 627; 49 L. T. N. S. 339.

who do not take a personal part in the production of photographs are not authors within the meaning of the section; the result of which is, in the language of the Master of the Rolls (since the copyright is to endure for the life of the author) that the great photographers of London must "either superintend the work themselves," or when they choose an artist to do it, have regard to "not only his skill but his state of health." (a)

It was unnecessary to give a definition of the actual author in a case where the various processes are managed by different persons. "The nearest I can come to is," said Brett, M.R., "that it is the person who effectively is, as near as he can be, the cause of the picture which is produced—that is, the person who has superintended the arrangement, who has actually formed the picture by putting the people into position, and arranging the place in which the people are to be—the man who is the effective cause of that;" a definition substantially adopted by Bowen, L.J. (b)

Brett, M.R., in this case seemed to doubt whether the author must not be a single person. He asked: "Can two persons be the author of a photograph? It is difficult to say; but if they are, for whose life is it to last? For the life of one of them, or for the life of the longest liver, or what?" The opinion of Bowen, L.J., seems to have been different. After pointing out that the section does not confer a copyright during the life of the author "or authors," he said: "I do not mean to say that you must not construe the section as if it did, and that if there had been two authors and one of them survived the other the copyright would not, perhaps, last during the life of the survivor; but I do say that the person who drew this section evidently thought that in ninety-nine cases out of a hundred there would be only one." Field, J., in the Court below, was clearly of opinion that several persons might constitute an author within the meaning of the statute. (c) It was unnecessary to decide the point in the Court of Appeal.

Can more than one person be author.

A photograph of an engraving or a picture is a photograph in which copyright is given in this section. In a recent case, (d) it was contended in argument that photographs taken from engravings or pictures are not "original" photographs within the meaning of the statute, and therefore that no copyright existed in them, to which Blackburn, J., replies: "It does not appear from the language of the

What is an original photograph.

(a) L. R. 11 Q. B. D. p. 633.

(b) *Ibid.* p. 637.

(c) See the report in the Court below, 49 L. T. N. S. 339.

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

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Act that the word 'original' was intended to apply at all to photographs; but if it does, what photograph can be original if a photograph from a picture of an artist is not so?"

Where work is
sold to or made
for another.

Sect. 1 contains a proviso "that when any painting or drawing, or the negative of any photograph, shall for the first time after the passing of this Act [29th July, 1862] be sold or disposed of, or shall be made or executed for or on behalf of any other person for a good or valuable consideration, the person so selling or disposing of or making or executing the same shall not retain the copyright thereof, unless it be expressly reserved to him by agreement in writing, signed, at or before the time of such sale or disposition, by the vendee or assignee of such painting or drawing, or of such negative of a photograph, or by the person for or on whose behalf the same shall be so made or executed, but the copyright shall belong to the vendee or assignee of such painting or drawing, or of such negative of a photograph, or to the person for or on whose behalf the same shall have been made or executed; nor shall the vendee or assignee thereof be entitled to any such copyright, unless, at or before the time of such sale or disposition, an agreement in writing, signed by the person so selling or disposing of the same, or by his agent duly authorised, shall have been made to that effect."

By force of this section the copyright in a painting, drawing, or photograph is, in case of a sale or assignment of the painting, drawing, or negative of the photograph, altogether gone, unless (1) it be either expressly reserved to the author by the vendee or assignee "by agreement in writing signed at or before the time" of sale or disposition, or (2) it be conferred on the vendee or assignee "at or before the time of sale or disposition" by "an agreement in writing by the person so selling or disposing, or by his agent duly authorised." (3) If the painting, drawing, or negative of a photograph be made or executed for or on behalf of any other person for a good or valuable consideration, the copyright belongs to the person for or on whose behalf it has been made or executed.

Copyright not
to prevent other
persons copying
original object.

Sect. 2 provides that nothing contained in the Act "shall prejudice the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding that there may be copyright in some representation of such scene or object." This means that, though the owner of a particular photograph, &c., may have the sole right of multiplying copies of

it, nobody else shall be prevented from taking a fresh photograph, &c., of the same object or place.^(a)

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Registration.

Sect. 4 provides as to registration that "there shall be kept at the Hall of the Stationers' Company, by the officer appointed by the said company for the purposes of the Act 5 & 6 Viet. c. 45, a book or books called "The Register of Proprietors of Copyright in Paintings, Drawings, and Photographs," wherein 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 works."

This section also provides that "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."

No action for anything done before registration.

This renders registration necessary on the part of an assignee before he can sue for the penalties imposed by the Act in case of infringement; but it does not make it necessary that all or any previous assignments should also be registered, or that the copyright of the original author should be registered. It is enough that the assignment to the person suing has been registered.^(b)

The Act requires that the memorandum of registration should contain amongst other things "a short description of the nature and subject of the work, and in addition thereto, if the person registering shall so desire, a sketch, outline, or photograph" of the work. The question has been raised in two cases, what is a sufficient "description of the nature and subject" of the work within the meaning of this section?

Sufficiency of description.

In *Ex parte Beal*^(c) it was contended that the entry of the

(a) *Per* Blackburn, J., *Graves's case* (20 L. T. N. S. 881; L. Rep. 4 Q. B. 722).

(b) *Graves's case, ubi supra.*

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

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name "Ordered on Foreign Service" was not a sufficient description of a picture of a young officer in a railway carriage taking leave of a lady, nor the entry of the names "My First Sermon" and "My Second Sermon" a sufficient description of a picture and a photograph representing respectively a child looking with eyes wide open at its first sermon, and fast asleep at its second. The Court of Queen's Bench, however, thought that the requirements of the statute had been sufficiently complied with.

"Is not the object of the Legislature," said Blackburn, J., "that enough be stated to identify the production, and that the registration must be *bonâ fide*? that a man shall not first claim one thing, and then sue for another? The description must be such as shall earmark the subject." In answer to an argument that the object of the registration was like that of the registration of a patent, viz., to give notice to everyone of certain things which he is not to do, Blackburn, J., said, "That is not the object. Penalties are imposed on persons who copy the work of others. The person who does so must in most cases know that he is pirating from some one. No doubt there is the conceivable case where he does this because he is told by another person who has no authority that he may do so; and if he does this with *bonâ fides* the penalty should be reduced to a nominal sum. Then, in the case where a man sells copies of a work not made by himself but by others, the statute says this must be done *knowingly*. The object of the Legislature was that there should be such a description of the subject as will be sufficient to *identify* it. For this purpose the conventional name applied to it will in general hardly be sufficient; there should be description of the subject; and whether there is or not is a question of fact for the tribunal. Taking that as the question which was before the justice in this case, and importing our own knowledge of these pictures, which we have all seen, the description of the subject of the first is evidently that of an officer ordered abroad, and taking leave of his friends. So of the second and third: who could reasonably doubt that what was intended to be represented was a child with its eyes wide open looking at its first sermon and fast asleep at the second? Some cases were suggested in the argument in which I do not say there might not be some difficulty, as, for instance, the figure of a dog described as 'A distinguished Member of the Humane Society.' So also a bullfinch and a couple of squirrels, described as 'A Piper and a Pair of Nutcrackers.' There it would be right to put a short description of the subject, or at all events wise to

give more than the name. But the question here is, does what is given earmark the picture?"

In *Re Walker and Graves*(a) the sufficiency of the description of the picture last referred to, "A Piper and a Pair of Nutcrackers," was questioned, but the Court did not find it necessary to pronounce an opinion on the subject.

The several enactments in the Act 5 & 6 Vict. c. 45,(b) with relation to keeping the register book thereby required, 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 such entries, the application to the courts and judges by persons aggrieved(c) by entries in the said book, and the expunging and varying such entries, are to apply to the book or books to be kept by virtue of the present Act, and to the entries and assignments of copyright and proprietorship therein under this Act, except that the forms of entry prescribed by 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 Company of Stationers for making any entry required by this Act shall be one shilling only.(d)

A person who has been convicted of infringing the copyright in certain paintings and photographs of the registered proprietor, but who sets up no title in himself or adduces any evidence to rebut the *prima facie* evidence of proprietorship afforded by the book of registry, is not a person "aggrieved" within the meaning of this section or of sect. 14 of 5 & 6 Vict. c. 45.

Person
"aggrieved."

"A person," said Hannen, J.,(e) "to be 'aggrieved' within the meaning of the statute must show that the entry is inconsistent with some right that he sets up in himself or in some other person, or that the entry would really interfere with some intended action on the part of the person making the application." "It seems," said Blackburn, J., in the same case,(f) "that to make a person aggrieved within the meaning of the statute, the applicant must have some substantial objection, and one going to the

(a) 20 L. T. N. S. 877; L. Rep. 4 Q. B. 715.

(b) *Vide ante*, pp. 87-89.

(c) The words in 5 & 6 Vict. c. 45, s. 14, are "if any person shall deem himself aggrieved," &c.

(d) 25 & 26 Vict. c. 68, s. 5.

(e) *Graves's case* (L. Rep. 4 Q. B. 724; 20 L. T. N. S. 877).

(f) *Ibid.*

merits of the registered proprietor's title; then the Court may direct an issue, or have the question otherwise disposed of, or, if they think this the proper course, may set aside or expunge the entry. But I do not think it is enough to entitle a person to say that he is aggrieved, and that the entry ought to be expunged, that, although the registered proprietor has a complete title in equity and in good sense, yet there is some slip either in the signing of the memorandum or in the spelling of a name; this would be my view if it were necessary to decide this question." Compare the language of Willes, J., in *Ex parte Davidson*, cited *ante*, p. 96.

The wholesome provision of sect. 16 of the Act of 5 & 6 Vict. c. 45, requiring the defendant in an action for infringement to give notice of the objections to the plaintiff's title on which he intends to rely, is not made applicable to the case of paintings, drawings, or photographs.

Copyright in paintings, drawings, or photographs is personal property, and assignable as such.^(a)

As to the infringement of this copyright, and the remedies for infringement, see the chapters on "Infringement of Copyright" and "Remedies for Infringement," *post*.

CHAPTER XII.

SCULPTURE, MODELS, AND BUSTS.

Origin of right. THE copyright in sculpture, models, and casts is dependent solely on the Act 54 Geo. 3, c. 56; the former Act on the subject (38 Geo. 3, c. 71),^(b) being now repealed.^(c)

Subjects in which copyright exists.

Sect. 1 of 54 Geo. 3, c. 56, enacts "that from and after the passing of this Act every person or persons who shall make or cause to be made any new and original sculpture, or model, or copy or cast of the human figure or human figures, or of any bust or busts, or of any part or parts of the human figure, clothed in drapery or otherwise, or of any animal or animals, or of any part or parts of any animal combined with the human figure or otherwise, or of any subject being matter of invention in sculpture, or of any

^(a) 25 & 26 Vict. c. 68, s. 3. See the chapter on "Transfer of Copyright," *post*.

^(b) For the opinion of Lord Ellenborough on the inefficient character of this Act, see *Gahagan v. Cooper* (3 Camp. 111, 114).

^(c) By 24 & 25 Vict. c. 101.

alto or basso rilievo representing any of the matters or things hereinbefore mentioned, or any cast from nature of the human figure, or of any part or parts of the human figure, or of any cast from nature of any animal, or of any part or parts of any animal, or of any such subject containing or representing any of the matters and things hereinbefore mentioned, whether separate or combined, shall have the sole right and property of all and in every such new and original sculpture, model, copy, and cast of the human figure or human figures, and of all and in every such bust or busts, and of all and in every such part or parts of the human figure, clothed in drapery or otherwise, and of all and in every such new and original sculpture, model, copy and cast, representing any animal or animals, and of all and in every such work representing any part or parts of any animal combined with the human figure or otherwise, and of all and in every such new and original sculpture, model, copy and cast of any subject, being matter of invention in sculpture, and of all and in every such new and original sculpture, model, copy and cast in alto or basso rilievo, representing any of the matters or things hereinbefore mentioned, and of every such cast from nature, for the term of fourteen years from first putting forth or publishing the same; provided, in all and in every case, the proprietor or proprietors do cause his, her, or their name or names, with the date, to be put on all and every such new and original sculpture, model, copy or cast, and on every such cast from nature, before the same shall be put forth or published."

Condition to be observed.

The term of enjoyment is, by the above section, to be "fourteen years from first *putting forth or publishing*" (a) the work; but an additional term of fourteen years is granted if the maker of the original sculpture, &c., is living at the expiration of the former term.

Duration.

Sect. 6 provides "that from and immediately after the expiration of the said term of fourteen years, the sole right of making and disposing of such new and original sculpture, or model, or copy, or cast of any of the matters or things hereinbefore mentioned, shall return to the person or persons who originally made or caused to be made the same, if he or they shall be then living, for the further term of fourteen years [excepting in the case or cases where such person or persons shall by sale or otherwise have divested himself, herself, or themselves, of such right of making or disposing of

(a) See the remarks of Brady, L.C., in *Turner v. Robinson* (10 Ir. Ch. 516).

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any new and original sculpture, or model, or copy, or cast of any of the matters or things hereinbefore mentioned, previous to the passing of this Act].”(a)

Registration.

Permission was given to register any of the works in which copyright is given by the foregoing enactments under the Designs Act, 1850 (13 & 14 Vict. c. 104 sect. 6); and sect. 7 of that Act inflicted a penalty on persons making, importing, &c., pirated copies or casts of works registered in accordance with the provisions of the Act. Little use, however, was made of the permission, and it has now been abolished.(b)

Sculpture first published abroad.

If the article of sculpture, model, copy, or cast is first published out of Her Majesty's dominions, the maker has no copyright in it other than such copyright as may be obtained

(a) The part within brackets was repealed in 1873 by 36 & 37 Vic. c. 91.

Most persons who have dealt with the subject of copyright in Sculpture, Models and Casts, have fallen into a curious error as to the duration of the right. In the ordinary text-books (see Phillips on Copyright, p. 226; Copinger on Copyright, 2nd. edit., p. 382), and the Digest of Copyright Law, prepared for the Copyright Commissioners, Article 20, it is laid down that the second period of fourteen years is given only where the author has not divested himself of his copyright. All assume that where the author has, by sale or otherwise, divested himself of his copyright, the copyright endures only for the term of fourteen years from the date of first publication; whereas the section (6) of the Act says only that such second period of fourteen years shall be denied, the author being alive at the expiration of the first period, only when he has, by sale or otherwise, divested himself of the right “previous to the passing of this Act,” *i.e.* the 18th of May, 1814. And this exception, having long ceased to possess any practical value, was, as above stated, repealed by the Statute Law Revision Act, 1873. That an author may, *after* the passing of the Act, divest himself of the original term of copyright, and nevertheless, if alive at its expiration, enjoy the second term, is shown by a comparison of sect. 4. providing a mode of transferring the copyright by deed, with the enactment in sect. 6 that, at the expiration of fourteen years, the copyright shall “return” to the author if then alive. If the enactments are read carefully, it will appear that the author may, by deed, transfer his copyright for the whole of the original term of fourteen years, and yet, if alive at the expiration of that term, acquire copyright for a further term of fourteen years, which he may alienate in like manner. Further, there seems no reason why he should not transfer his copyright for the first period by deed, and likewise bind himself by contract to transfer his copyright for the second period also, in case he should live to acquire it.

(b) See the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57, s. 113, sched. 3). Only three objects a year had been registered on an average of five years previously to 1883, and on conferring with leading sculptors it was found that they did not value the permission at all. (Speech of Mr. Chamberlain on the second reading of the Bill).

under the International Copyright Acts, and on a strict compliance with the requirements of those Acts. See the chapter on International Copyright, *post*, and especially sect. 19 of 7 Vict. c. 12, *post*, p. 145.

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COLONIAL COPYRIGHT.

THE provisions of the General Copyright Act of 5 & 6 Vict. c. 45, apply to "every part of the British dominions," a term which includes "all the colonies, settlements, and possessions of the Crown which now are or hereafter may be acquired." (a) The Acts relating to copyright in works of the fine arts also apply to all the British dominions.

The only enactment peculiarly relating to the colonies is the Act of 10 & 11 Vict. c. 95, commonly known as the Foreign Reprints Act, passed to amend the law relating to the protection in the colonies of works entitled to copyright in the United Kingdom. Previously to the passing of that Act it was absolutely prohibited to import into any part of the British dominions books in which copyright subsisted, first composed, written, or printed in the United Kingdom and printed or reprinted in any other country. (b) But the first section of that Act provides "that in case the Legislature or proper legislative authorities in any British possession shall be disposed to make due provision for securing or protecting the rights of British authors in such possession, and shall pass an Act or make an ordinance for that purpose, and shall transmit the same in the proper manner to the Secretary of State, in order that it may be submitted to Her Majesty, and in case her Majesty shall be of opinion that such Act or ordinance is sufficient for the purpose of securing to British authors reasonable protection within such possession, it shall be lawful for her Majesty, if she think fit so to do, to express her royal approval of such Act or ordinance, and thereupon to issue an Order in Council declaring that so long as the provisions of such Act or ordinance continue in force within such colony the prohibi-

Foreign Reprints Act.

Power to suspend, in certain cases, prohibition against admission of pirated books into colonies.

(a) Sect. 2 and 29.

(b) See 5 & 6 Vict. c. 45, s. 17, and 8 & 9 Vict. c. 93.

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tions contained in the aforesaid Acts, and hereinbefore recited, and any prohibitions contained in the said Acts or in any other Acts against the importing, selling, letting out to hire, exposing for sale or hire, or possessing foreign reprints of books first composed, written, printed, or published in the United Kingdom, and entitled to copyright therein, shall be suspended so far as regards such colony; and thereupon such Act or ordinance shall come into operation, except so far as may be otherwise provided therein, or as may be otherwise directed by such Order in Council, anything in the said last-recited Act or in any other Act to the contrary notwithstanding."

The Orders in Council are to be published in the *Gazette*, and laid before Parliament, as well as the Colonial Acts or ordinances. Sect. 2 enacts "that every such Order in Council shall, within one week after the issuing thereof, be published in the *London Gazette*, and that a copy thereof, and of every such Colonial Act or ordinance so approved as aforesaid by her Majesty, shall be laid before both Houses of Parliament within six weeks after the issuing of such Order, if Parliament be then sitting, or if Parliament be not then sitting, then within six weeks after the opening of the next Session of Parliament."

Colonies within
the Act.

The following colonies have brought themselves within the provisions of this Act: New Brunswick, Nova Scotia, Prince Edward's Island, Bermuda, Bahamas, Barbadoes, Canada,^(a) St. Lucia, St. Vincent, British Guiana, Mauritius, Jamaica, Newfoundland, Grenada, St. Christopher, Antigua, Nevis, Cape of Good Hope, and Natal.

Canada.

By sect. 91 of the Act 30 Vict. c. 3, which joins Canada, Nova Scotia, and New Brunswick into one dominion, under the name of Canada, all matters coming under the head of

(a) The provision made by the Canadian Legislature was, that American reprints of English copyright works might be imported into the colony on payment of a Customs duty of 12½ per cent. which was to be collected by the Canadian Government and paid to the British Government for the benefit of the authors interested. Like provisions were made in other colonies. ("Report of Copyright Commissioners," paragraph 192.) So far as British authors and owners of copyright are concerned, the Act has proved a complete failure. Foreign reprints of copyright works have been largely introduced into the colonies, and notably American reprints into the Dominion of Canada; but no returns, or returns of an absurdly small amount, have been made to the authors and owners. (*Ibid.*, paragraph 193.) Strong efforts have in consequence been made to repeal the Foreign Reprints Act; but hitherto unsuccessfully.

copyrights in those three provinces are to be within the exclusive legislative authority of the Parliament of Canada, and not within that of the legislatures of the provinces.

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An Act was passed by the Dominion Legislature in 1875, which was sent over in the form of a Bill reserved for Her Majesty's assent; but, as doubts were entertained whether the Act was not repugnant to Imperial legislation and to the Order in Council made in 1868, by which the prohibition against importing foreign reprints into Canada had been suspended, an Imperial Act (38 & 39 Vict. c. 53) was passed in 1875, empowering Her Majesty to assent to the Canadian Bill, which Her Majesty subsequently did.(a)

Under this Act, a copyright for the time allowed by the Act may be obtained by *republication* or *reproduction* in Canada, or by a production or publication there at the same time as in the United Kingdom.

Copyright by republication or simultaneous publication in Canada.

By sects. 4 and 7 of the Canadian Act, any person domiciled in Canada or in any part of the British possessions, or being a citizen of any country having an international copyright treaty with the United Kingdom, is to have the sole liberty of printing, publishing, and selling his work, and of allowing translations to be printed or sold, for the term of twenty-eight years from the time of recording it in the book to be kept for the purpose by the Minister of Agriculture; on condition that the work (if literary, scientific, or artistic) be printed and published, or reprinted *or republished* in Canada, or, in case of a work of art, that it be produced *or reproduced* in Canada, whether they be so published or produced for the first time or *contemporaneously with or subsequently to publication or production elsewhere*; provided that in no case shall the exclusive privilege in Canada continue to exist after it has expired anywhere else.

For 28 years.

If at the expiration of the twenty-eight years, the author, or any of the authors is still living, or being dead has left a widow or a child or children living, the same exclusive right shall be continued to such author, or, if dead, then to such widow and child or children (as the case may be) for the further term of fourteen years; but in such case within one year after the expiration of the first term the title of the work secured is to be a second time recorded.(b)

Further term of 14 years.

In all cases of renewal of copyright under the Act, the author or proprietor is, within two months from the date of

(a) "Report of Copyright Commissioners," paragraph, 198.

(b) Sect. 5.

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Requirements
to be observed.

such renewal, to cause a copy of the record thereof to be published once in the *Canada Gazette*.(a)

No person is to be entitled to the benefit of the Act unless he has deposited in the office of the Minister of Agriculture two copies of such book, map, chart, musical composition, photograph, print, cut, or engraving, and in case of paintings, drawings, statuary, and sculpture, unless he has furnished a written description of such works of art; and the Minister of Agriculture is to cause the copyright of the same to be recorded forthwith in a book to be kept for that purpose,(b) and to cause one of the two copies of such book, map, chart, musical composition, photograph, print, cut, or engraving aforesaid, to be deposited in the Library of the Parliament of Canada.(c)

No person is to be entitled to the benefit of the Act unless he gives information of the copyright being secured, by causing to be inserted in the several copies of every edition published during the term secured, on the title-page, or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, or photograph, by causing to be impressed on the face thereof; or if a volume of maps, charts, music, engravings, or photographs, upon the title-page or frontispiece thereof, the following words, that is to say: "Entered according to Act of Parliament of Canada, in the year _____, by A.B., in the office of the Minister of Agriculture." But as regards paintings, drawings, statuary, and sculptures, the signature of the artist is to be deemed a sufficient notice of such proprietorship.(d)

Interim copy-
right.

An interim copyright pending publication or republication in Canada, may be obtained by depositing in the office of the Minister of Agriculture a copy of the title, or a designation of the work, which is to be registered in an interim copyright register; such interim registration not to endure for more than a month from the date of the original publication elsewhere, within which period the work must be printed or reprinted and published in Canada.(e)

In all cases of interim registration under this Act, the author or proprietor must cause notice of such registration to be inserted once in the *Canada Gazette*.(f)

A literary work intended to be published in pamphlet or book form, but which is first published in separate articles in

(a) Sect. 6.

(d) Sect. 9.

(b) Sect. 7.

(c) Sect. 10.

(e) Sect. 8.

(f) *Ibid.*

a newspaper or periodical, may be the subject of registration within the meaning of this Act while it is so preliminarily published, provided that the title of the manuscript and a short analysis of the work are deposited in the office of the Minister of Agriculture, and that every separate article so published is preceded by the words "Registered in accordance with the Copyright Act of 1875;" but the work when published in book or pamphlet form shall be subject, besides, to the other requirements of the Act. (a)

But the importation of newspapers and magazines published in foreign countries, and containing, together with foreign original matter, portions of British copyright works republished with the consent of the author or his assigns, or under the law of the country where such copyright exists, is permitted. (b)

Failure to print and publish or reprint and republish within the time prescribed, after interim registration, subjects the offender to a penalty not exceeding one hundred dollars. (c)

The application for the registration of an interim copyright, of a temporary copyright, and of a copyright may be made in the name of the author or of his legal representative by any person purporting to be the agent of the said author, and any fraudulent assumption of such authority is a misdemeanor, punishable by fine and imprisonment; and any damage caused by a fraudulent or an erroneous assumption of such authority is made recoverable before any court of competent jurisdiction. (d)

How registration obtained.

If, during the term of copyright or interim copyright in a book, a piracy is committed, the offender is to forfeit every piratical copy to the copyright owner, and for every copy found in his possession is to pay such sum, not less than ten cents, nor more than one dollar, as the Court shall determine, half to go to Her Majesty and half to the copyright owner. (e)

Penalty for infringement.

In case of piracy of a painting, drawing, statue or other work of art, the plate or plates are to be forfeited, and every sheet copied; and for every sheet published or exposed for sale contrary to the Act, the offender is to pay a similar fine, which is to be similarly divided. (f)

A similar provision applies in case of piracy of any print, cut, engraving, map, chart, musical composition or photograph. (g)

(a) Sect. 10
(e) Sect. 11.

(b) *Ibid.*

(c) Sect. 17.
(f) Sect. 12.

(d) Sect. 23.
(g) Sect. 13.

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By section 15 of the Act, "works of which the copyright has been granted and is subsisting in the United Kingdom, and copyright of which is not secured or subsisting in Canada under any Canadian or Provincial Act, shall, upon being printed and published or reprinted or republished in Canada, be entitled to copyright under this Act; but nothing in this Act shall be held to prohibit the importation from the United Kingdom of copies of such works legally printed there. In the case of the reprinting of any such copyright work subsequent to its publication in the United Kingdom, any person who may have previous to the date of entry of such work upon the registers of copyright imported any foreign reprints, shall have the privilege of disposing of such reprints by sale or otherwise; the burden of proof, however, in such a case will lie with such person to establish the extent and regularity of the transaction."

The false assertion by impression on or insertion in any work, of the existence of a Canadian copyright renders the offender liable to a penalty not exceeding 300 dollars.(a)

If any work is executed for or sold to another, the copyright goes with it, unless expressly reserved by deed to the author or artist.(b)

Assignment of
copyright.

The right of an author of a literary, scientific, or artistic work to obtain a copyright, and the copyright when obtained, is assignable in law, either as to the whole interest or any part thereof, by an instrument in writing made in duplicate, and to be recorded in the office of the Minister of Agriculture, on production of both duplicates and payment of the fee provided by the Act. One of the duplicates is to be retained in the office of the Minister of Agriculture, and the other returned, with the certificate of registration, to the party depositing it.(c)

Other sections deal with cancelling or altering registrations;(d) making copies or certified extracts evidence;(e) the wilfully making a false entry in the register, or giving in evidence any false copy of an entry therein;(f) the registration of books published anonymously,(g) second editions of books;(h) limiting the time for actions and prosecutions for the recovery of penalties to two years;(i) and settling the scale of fees payable on registration.

Book out of
print.

By sect. 22, "Should a work copyrighted in Canada become out of print, a complaint may be lodged by any

(a) Sect. 17.

(d) Sect. 19.

(g) Sect. 25.

(b) Sect. 16.

(e) Sect. 21.

(h) Sect. 26.

(c) Sect. 18.

(f) Sect. 24.

(i) Sect. 27.

person with the Minister of Agriculture, who, on the fact being ascertained to his satisfaction, shall notify the copyright owner of the complaint and of the fact; and if, within a reasonable time, no remedy is applied by such owner, the Minister of Agriculture may grant a licence to any person to publish a new edition or to import the work, specifying the number of copies, and the royalty to be paid on each to the copyright owner."

An Act of the Legislative Council of India was passed on the subject of copyright in the year 1847. After reciting in the preamble that doubts might exist whether copyright could be enforced by the common law, or by virtue of the principles of equity, in the territories subject to the government of the East India Company, and whether the Act of 5 & 6 Vict. c. 45, had made provision for the enforcement of the right against persons not being British subjects, it enacts that copyright in every book published in India in the author's lifetime, after the 28th August, 1833, shall endure for the natural life of the author, and seven years after, or for forty-two years, if the seven years sooner expire; and copyright in any book published after the death of the author shall endure for forty-two years, and shall be the property of the proprietor of the author's manuscript.(a)

A book of registry is to be kept in the office of the Secretary to the Government of India for the Home Department, and to be open at all convenient times to the inspection of any person on payment of eight annas for every entry searched for or inspected; and certified copies are to be given on payment of two rupees, such copies to be received in evidence in all Courts, and to be *primâ facie* proof of proprietorship.(b) The wilful making of a false entry, or producing a false copy in evidence, was made a misdemeanor punishable with imprisonment to the extent of three years;(c) but this enactment has since been repealed.(d)

In order to sue for an infringement of copyright, an entry must be made in the registry book of the title of the book, the time of the first publication, the name and place of abode of the publisher and of the proprietor either of the whole or any part of the copyright, in a form given in a schedule to the Act. A sum of two rupees is to be paid on registering.(e)

Every registered proprietor may assign his interest, or a

(a) Sect. 1.

(b) Sect. 3.

(c) Sect. 4.

(d) By Act xvii. of 1862.

(e) Sect. 5. The form of entry is exactly the same as that given in the schedule to 5 & 6 Vict. c. 45. *Vide ante*, p. 89.

part of it, by making entry in the registry book of the assignment, and of the name and place of abode of the assignee, in a form given in the schedule to the Act.(a) A like sum is to be paid on making an entry of assignment.(b) Any person deeming himself aggrieved by any entry in the registry book may apply to the supreme court or any judge of it; and the judge may make such order for expunging, varying, or confirming it as he may consider just, with or without costs, and the Secretary of the Government shall carry out such order.(c)

The enactment as to the copyright in encyclopedias, reviews, magazines, and other periodical works is in all respects the same as that contained in sect. 18 of 5 & 6 Vict. c. 45.(d) The proprietor is entitled to all the benefits of registration by making entry in the registry book of the title, the time of first publication of the first volume, number, or part, and the name and place of abode of the proprietor and publisher.(e)

A special action on the case lies for infringement of copyright by printing or causing to be printed for sale or exportation without the proprietor's consent in writing, or by having in one's possession for sale or hire without such consent, any book so unlawfully printed.(f) The defendant in such an action, if it be tried in the superior courts, must give notice in writing of the objections to the plaintiff's title on which he means to rely,(g) and if it be tried in a local court, he must state the same matters in his answer.(h) In actions in the superior courts the defendant may plead the general issue and give the special matter in evidence.(i)

All copies of registered books which have been unlawfully printed are to belong to the registered proprietor, who, after demand in writing, may sue for them in detinue or trover.(j)

All proceedings under the Act for offences committed against it must be commenced within twelve calendar months after the offence has been committed.(k)

A provision is made against the possible suppression of books of importance to the public. Sect. 2 enacts that it shall be lawful for the Governor-General in Council, on complaint made to them that the proprietor of the copyright in any book published after the passing of the Act has, after the

(a) Sect. 5. The form is the same as that given in the schedule to 5 & 6 Vict. c. 45. (b) *Ibid.*

(c) Sect. 6.

(d) *Vide ante*, pp. 100, 101.

(e) Sect. 11.

(f) Sect. 7.

(g) Sect. 8.

(h) Sect. 9.

(i) Sect. 15.

(j) Sects. 12, 13.

(k) Sect. 16.

death of its author, refused to republish it, or allow the republication of it, and that by reason of such refusal, such book may be withheld from the public, to grant a licence to such complainant to publish the book in such manner, and subject to such conditions as they may think fit, and it shall be lawful for such complainant to publish such book according to such licence.

If a work of any sort is published in a colony, no copyright can be acquired in it under the Copyright Act of 5 & 6 Vict. c. 45. It stands in all respects on the same footing as any other foreign work; and the only rights which can be acquired here in respect of it are those which may be acquired by the author of any other work published abroad, under the International Copyright Acts.^(a)

Works published in a colony are foreign works.

We have already seen (*ante*, p. 21) that the residence of the author in any British colony at the time of the publication of his work in the United Kingdom, is sufficient to entitle him to a copyright in it under 5 & 6 Vict. c. 45.

The Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), sect. 104, enacts that where it is made to appear to Her Majesty that the legislature of any British possession has made satisfactory provision for the protection of designs registered in this country, it shall be lawful for Her Majesty from time to time, by Order in Council, to apply the provisions of sect. 103 of that Act, with such variations or additions, if any, as to Her Majesty in Council may seem fit, to such British possession.

Copyright in designs.

Sect. 103 deals with the subject of international arrangements for the protection of designs, and its provisions are set forth *post*, p. 162.

(a) On this the "Report of the Royal Commissioners on Copyright" observes: "It is obvious that if by Imperial law copyright is to be enforced in the colonies, while at the same time first publication in the United Kingdom is a condition of obtaining it, the colonies are not treated on fair and equal terms, and that there is just ground of complaint on the part of colonial authors and publishers. In truth, a colonial author is placed even in a worse position than a foreign author who is the subject of a country with which we have an international copyright convention. For example, a French author can publish in France, and subsequently, upon the performance of certain conditions, such as registration, secure himself against piracy of his work throughout the British Empire, while the colonial author can neither secure his property in the United Kingdom nor France, unless he first publishes in the United Kingdom" (paragraphs 52, 53). The Commissioners recommend that where a work has been first published in any of Her Majesty's possessions, the proprietor should be entitled to the same copyright as he would have been entitled to if the work had been first published in the United Kingdom (paragraph 58).

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An Order in Council under this Act, is, from a date to be mentioned for the purpose in the Order, to take effect as if its provisions had been contained in the Act; but it shall be lawful for Her Majesty in Council to revoke any Order in Council made under the Act.(a)

CHAPTER XIV.

INTERNATIONAL COPYRIGHT.

Wholly
statutory.

COPYRIGHT of an international character is altogether dependent on statutory enactments of the present reign. Three Acts have been passed, of which the first (1 & 2 Vict. c. 59), relating to books only, was repealed by the second (7 & 8 Vict. c. 12), the latter being amended and partly repealed by 15 Vict. c. 12.

Reciprocal
protection to be
secured.

In order to secure the rights of home authors, it is enacted by the same statute which empowers Her Majesty by Order in Council to grant copyright to foreigners, "that no such Order in Council shall have any effect unless it shall be therein stated, as the ground for issuing the same, that due protection has been secured by the foreign Power so named in such Order in Council for the benefit of parties interested in works first published in the dominions of Her Majesty similar to those comprised in such order."(b)

General power
to grant
copyright to
foreigners.

Sect. 2 of 7 & 8 Vict. c. 12, gives a general power to Her Majesty to grant copyright to foreigners by such Order in Council as has been named. It enacts "that it shall be lawful for Her Majesty, by any Order of Her Majesty in Council, to direct that, as respects all or any particular class or classes of the following works, namely, books, prints, articles of sculpture, and other works of art, to be defined in such order, which shall after a future time, to be specified in such order, be first published in any foreign country to be named in such order, the authors, inventors, designers, engravers, and makers thereof respectively, their respective executors, administrators, and assigns, shall have the privilege of copyright therein during such period or respective periods as shall be defined in such order, not exceeding, however, as to any of the above-mentioned works, the term of copyright which authors, inventors, designers, engravers, and makers of the like works respectively first published in

In what works.

Duration.

(a) Sect. 104.

(b) 7 & 8 Vict. c. 12, s. 14.

the United Kingdom may be then entitled to under the here-
inbefore recited Acts respectively, or under any Acts which
may hereafter be passed in that behalf."

The Orders in Council are to be published in the *London Gazette*, and to take effect from the date of such publica-
tion.(a) They are, further, to be laid before both Houses of
Parliament within six weeks after issuing them if Parliament
is then sitting, and if it is not sitting, then within six weeks
after the commencement of the next session.(b)

Orders to be
published in
Gazette and laid
before Parlia-
ment.

Different periods of duration for foreign copyright, and
different times for registration, and for delivery of books and
other articles at Stationers' Hall, may be specified by the
Order in Council for different countries and classes of
works.(c)

Term of enjoy-
ment and time
for registration
may vary.

No right of property is recognised in any of the above-
mentioned works except what this Act confers. Sect. 19
enacts "that neither the author of any book, nor the author
or composer of any dramatic piece or musical composition,
nor the inventor, designer, or engraver of any print, nor the
maker of any article of sculpture, or of such other work of
art as aforesaid, which shall after the passing of this Act be
first published out of her Majesty's dominions, shall have any
copyright therein respectively, or any exclusive right to the
public representation or performance thereof, otherwise than
such (if any) as he may become entitled to under this Act."

No right to
exist independ-
ently of the
Act.

This enactment applies equally to British and to foreign
authors who first publish their books or publicly represent
their dramatic compositions abroad. And though no conven-
tion has been made with the foreign country in which a dra-
matic piece has been performed, and so a compliance with
the requisites of 7 & 8 Vict. c. 12, is impossible, the author,
though a British subject, is not entitled in this country to
any copyright in his drama if it has been first represented
abroad.

British authors
first publishing
abroad.

In *Boucicault v. Delafield*,(d) where the plaintiff sought to
restrain the unauthorised representation of a dramatic piece—
"The Colleen Bawn"—composed by him, and first per-
formed in New York, but duly registered at Stationers'
Hall on the day of its first representation in England, it
was contended, in support of his alleged exclusive right
of representation, that the former Copyright Acts were
intended to confer a right upon British subjects at all
events, and that the International Copyright Act of 7 & 8

(a) Sect. 15.

(b) Sect. 16.

(c) Sect. 13.

(d) 9 Jur. N. S. 1282; 33 L. J. 38, Ch.; 12 W. R. 101.

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Vict. c. 12, being intended to extend to foreigners, under certain circumstances mentioned in it, the advantages which British authors had in this country with regard to literary works and dramatic performances, could not be construed to take away the privilege already conferred upon British subjects; and that *Jeffreys v. Boosey* (*ante*, pp. 14 *seq.*), not having been determined when the 7 & 8 Vict. c. 12 passed, could not be presumed to have been in the purview of the Legislature. The Vice-Chancellor (Wood) was of a different opinion. After pointing out that a foreigner residing here, and first publishing his work here, is entitled, just as much as any British subject, to the benefit of the copyright which applies to dramatic performances, but not if he first publish his work abroad, his Honour proceeded: "Now, that being so, how would the law stand when the Act 7 & 8 Vict. c. 12 was passed? If Mr. Boucicault had been 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."

The same point was again raised and similarly decided by the Court of Appeal in *Boucicault v. Chatterton*.(a)

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, print, article of sculpture, or other work of art, shall have been so registered, and such copy thereof shall have been so registered 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 "(1) the title to the copy thereof, (2) the name and place of abode of the author or composer thereof, (3) the name and place of abode of the proprietor of the copyright thereof, (4) 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."

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.(b)

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

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

Registration of books, dramatic and musical compositions.

Registration of pianoforte arrangement of operatic score.

(a) L. R. 5, C. D. 267.

(b) *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).

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." (a)

Where, however, the infringement complained of is of the sole right of dramatic or musical representation of a work, still, as a whole, remaining in manuscript, it is sufficient to register the title of the work, the name and place of abode of the author or composer, the name and place of abode of the proprietor of the right of performing or representing, and the time and place of the first representation or performance in the foreign country. (b)

If the opera, as a whole, remains in manuscript, and the above requisites are complied with, its unauthorised performance may be restrained, notwithstanding the publication and non-registration or wrong registration of a pianoforte arrangement of the opera by a person other than the composer. Nor will the right to restrain an unauthorised performance be taken away by the publication and non-registration of certain instrumental parts of the opera, not constituting the whole of it. (c)

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."

Of dramatic and musical compositions in manuscript it is necessary to register at Stationers' Hall "(1) the title to the same, (2) the name and place of abode of the author or composer thereof, (3) the name and place of abode of the proprietor of the right of representing or performing the same, and (4) 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." (d)

(a) *Wood v. Boosey, ubi supra.*

(b) *Boosey v. Fairlie* (L. R. 7, C. D. 301).

(c) *Ibid.*

(d) Sect. 6.

Mode of registration where book is published anonymously.

Registration of dramatic and musical compositions in manuscript.

Of prints, it is necessary to register at Stationers' Hall "(1) the title thereof, (2) the name and place of abode of the inventor, designer, or engraver thereof, (3) the name of the proprietor of the copyright therein, and (4) 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."(*a*)

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Registration of
prints.

Of articles of sculpture, and other such works of art, it is necessary to register at Stationers' Hall "(1) a descriptive title thereof, (2) the name and place of abode of the maker thereof, (3) the name of the proprietor of the copyright therein, and (4) 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."(*b*)

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."(*c*)

Deposit of copies
of books,
dramas, and
musical com-
positions.

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."(*d*) It is not stated within what time the deposit should be made.

Deposit of
prints.

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.(*e*)

Sect. 11 enacts "that the officer of the Stationers' Company shall, within one calendar month after receiving such

Deposit in
British Museum.

(a) Sect. 6.
(c) *Ibid.*

(b) *Ibid.*
(d) *Ibid.*

(e) *Ibid.*

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

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 of newspaper articles.

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, be republished or translated in like manner, unless the author has signified his intention of preserving the copyright therein,

(a) See *post*, p. 155.

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 proprietors 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)

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.

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

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

Right of representing dramatic and musical pieces.

Unauthorised translations of dramatic pieces.

translation of such dramatic pieces for a period not exceeding 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.

Sect. 6 provided 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."

This limitation of the rights of foreign authors may now be done away with by Order in Council. 38 Vict. c. 12, after reciting sects. 4, 5, & 6 of 15 Vict. c. 12, enacts that "in any case in which, by virtue of the enactments hereinbefore recited, any Order in Council has been or may hereafter be made for the purpose of extending protection to the translations of dramatic pieces first publicly represented in any foreign country, it shall be lawful for Her Majesty, by Order in Council, to direct that the 6th section of the said Act shall not apply to the dramatic pieces to which protection is so extended; and thereupon the said recited Act shall take effect with respect to such dramatic pieces and to the translations thereof as if the said 6th section of the said Act were hereby repealed."

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 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 Act 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.^(b)

This enactment contemplates and requires that the whole of the foreign work shall be translated; and it would not be

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

Translation
must be of
whole work.

(a) *Vide ante*, pp. 147-149.

(b) *Ibid.*

a compliance with it for the author or his assignee to translate a portion only of it, and claim protection for that as the authorized translation.(a)

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.(b)

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 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.(c)

"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.

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

(b) *Ibid.*

(c) *Wood v. Chart, ubi supra.*

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 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

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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."

Keeping,
inspecting, Ac.,
register.

All the provisions of 5 & 6 Viet. c. 45, relating to the subject of registration are to apply to entries under this Act. Sect. 8 of 7 Viet. 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, 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.”

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 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. (b)

Importation of pirated copies prohibited.

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

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 importation of works of art, and unauthorised translations.

Sec. 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 autho-

(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 Copyright 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). (b) Sect. 10. (c) *Ibid.*

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

French works.

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 the 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

Subjects of
copyright.

Duration.

Conditions.

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.

“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 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.”

Right of representation or performance.

By the terms of the Convention of 3rd of 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 copyright 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 Page Wood, V.C. (afterwards Lord Hatherley, C.),^(b) 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

Work published in parts.

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

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

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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.

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.^(a)

Conventions
with other
countries.

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 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) terminated by notice in 1880; Sardinia (1860) same time for registration and delivery; Hesse Darmstadt (1862) registration and delivery to be made within twelve months.

Power to reduce
duties on books
imported.

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.

International
arrangements
for protection
of designs.

The Patents, Designs and Trades Marks Act, 1883 (46 & 47 Vict. c. 57, s. 103) enacts that if Her Majesty is pleased to make any arrangement with the Government or Governments of any foreign State or States for mutual protection of designs, then any person who has applied for protection for any design in any such State, shall be entitled to registration of his design, &c., under this Act, in priority to other applicants; and such registration shall have the same date as the date of

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

the protection obtained in such foreign State; provided that his application is made within four months from his applying for protection in the foreign State with which the arrangement is in force.

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But nothing in this section contained is to entitle the proprietor of the design to recover damages for infringements happening prior to the actual registration of his design in this country.

The exhibition or use in the United Kingdom, or the Isle of Man, during the period aforesaid of the design, or the publication therein during such period of a description or representation of the design, shall not invalidate the registration of the design.(a)

The application for the registration of a design under this section must be made in the same manner as an ordinary application under the Act.(b)

The provisions of this section are to apply only in the case of those foreign States with respect to which Her Majesty shall from time to time by Order in Council declare them to be applicable, and so long only in the case of each State as the Order in Council shall continue in force with respect to that state.(c)

CHAPTER XV.

TRANSFER OF COPYRIGHT.

I. BY OPERATION OF LAW.

Of the two kinds of property recognised by our law, real—Copyright is personal property. which descends in cases of intestacy to 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

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

(b) *Ibid.* For the manner in which this must be done, see the chapter on Copyright in Designs.

(c) *Ibid.*

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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.

Intestacy.

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.

Bequest.

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.

Execution and bankruptcy.

Whether the right of publishing an *unpublished* work of an author passes to the trustee 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. (a) The copyright in published works undoubtedly passes to the trustee in bankruptcy. (b)

It has been held by the Supreme Court of the United States, (c) that copyright in a published print is not 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

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

(b) *Ibid.* See also *Longman v. Tripp* (2 Bos. & Pull. N.R. 67), and *Stevens v. Gladding* (17 How. 447).

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

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."^(a)

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

II. ASSIGNMENT OF COPYRIGHT.

No assignment is necessary where an author has been employed by the publisher, proprietor, and projector or conductor of any encyclopædia, review, magazine, periodical work, or any work published in a series of books or parts, or any book whatsoever to compose such encyclopædia, review, &c., or any volumes, parts, essays, articles, or portions thereof, on the terms that the copyright therein shall belong to such publisher, &c., if the author has been paid for his composition.^(e)

Where assignment is not necessary.

The word "assigns" with reference to literary 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."

Definition of "assigns."

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.

Unpublished works.

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.^(f)

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 Domi-

Copyright—how far divisible.

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

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

(c) See sect. 4 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).

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

(e) 5 & 6 Vict. c. 45, s. 18; and see the decision in *Grace v. Newman* (L. R. 19 Eq. 623).

(f) *Jeffreys v. Boosey* (4 H. L. Cas. 815; ante, pp. 14-19).

nions—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 abode 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 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,

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

(b) *Ibid.* 933.

(c) *Ibid.* 992.

(d) See also *per* Pollock, C.B. (*Ibid.* 940).

but this Act has made no change as to the extent of copyright. And Maule, J., in *Davidson v. Bohn*,^(a) 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."

In the case, however, of the sole right of dramatical or musical representation, a licence by the proprietor may be locally limited.^(b)

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 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.^(c) Copyright may be assigned in two ways.

Writing is indispensable to a valid assignment of literary copyright; a parol assignment is not sufficient.^(d) By writing.

This was decided under the former statute by the Court of King's Bench in *Power v. Walker*.^(e) 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 statute 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 licence, 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*,^(f) and by the Court of Common Pleas in *Davidson*

(a) 6 C. B. 458.

(b) See *Taylor v. Neville* (38 L. T. N. S. 50; 47 L. J. Q. B. 254).

(c) *Vide post*, p. 172.

(d) *Layland v. Stewart* (L. R. 4 C. D. 419).

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

(f) 2 Bar. & Cres. 861.

v. *Bohn* ;(a) and, though disapproved in other cases, its binding authority has been recognised.(b)

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.(c)

Tindal, C.J., in *De Pinna v. Polhill*,(d) 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 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 *Jefferys v. Boosey*,(e) 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. Jefferys*(f) seems to be decisive of the question. In that case Jefferys 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. Jefferys had registered himself as proprietor at Stationers' Hall, and a certified copy of the registry, which is by statute *primâ facie* proof of proprietorship, was produced at the trial; but his title

Writing need
not be under
seal.

(a) 6 C. B. 456.

(b) See per Bramwell and Channell, BB., in *Cumberland v. Copeland* (7 H. & N. 118).

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

(d) 8 Car. & P. 79.

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

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

being impeached by Kyle, other evidence was offered, consisting of a receipt by Miss Cook for a sum of money paid her by Jefferys, "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 Jefferys. 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.

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

(a) 3 M. & Sel. 7.

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made unattested licences valid, the inferences 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*,^(a) 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 *Jefferys v. Boosey*,^(b) 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 any intendment repeal the former. But of these judges, Alderson, B., appears to have considered himself bound^(c) by the decision in *Davidson v. Bohn*, and Parke, B., afterwards changed his opinion.^(d)

The question was again distinctly raised in 1861 in the case of *Cumberland v. Copeland*.^(e) 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, J.J.), holding that an assignment of copyright made after the passing of 54 Geo. 3, c. 156, requires no attestation.^(f) 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) 6 C. B. 456. See also *Latour v. Bland* (2 Stark. 384).

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

(c) See p. 915.

(d) See the judgment of Lord Wensleydale in *Kyle v. Jefferys* (3 Macq. 611): "I think that the opinion of the six judges in the case of *Jefferys v. Boosey* was correct; that since the stat. of 54 Geo. 3, c. 156, there is no occasion to have an assignment in writing of a copyright executed in the presence of two witnesses."

(e) 7 H. & N. 118.

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

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.(a) 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."

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

Assignment by
entry in registry
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:—

(a) 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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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>

Name and abode of assignee.

It is a curious discrepancy that while sect. 13 requires the entry in the form given in the schedule of "the name and place of abode of the assignee," 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.

Must an assignee register before he can sue?

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

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

summary proceedings, 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, J.J., 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.(a) 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 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

(a) As to the necessity of a deed, *vide ante*, pp. 168, 169.

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.

Sale of copies
printed before
assignment.

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)

Sale of copies
after expiration
of limited period
of copyright.

The purchaser of the copyright for a limited period was held by Wood, V.C., entitled to continue to sell after the expiration of that period copies printed before its expiration, where there was no actual fraud.(b)

Equitable
assignment.

Courts of equity used to give relief and enforce contracts in many cases where there was no remedy at law. Amongst other maxims which they acted on was 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. Thus an agreement to assign was 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. We have, happily, no longer Courts of Law, as distinguished from Courts of Equity. There is one Supreme Court of Judicature, all the sub-divisions of which are empowered to administer equity as well as law,(c) and are bound, in case of any conflict between the two, to see that the rules of equity shall prevail.(d) The three cases next referred to possess, therefore, now only an historical interest.

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

(b) *Howitt v. Hall* (10 W. R. 381; 6 L. T. N. S. 348).

(c) 36 & 37 Vict. c. 66, s. 24.

(d) *Ibid.* sect. 25, subsect. 11.

Lord Mansfield was of opinion, 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;^(e) 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 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."^(f) The same judge else-

(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.

(e) But see the language of 5 & 6 Vict. c. 45, s. 18, referred to *ante*, p. 165.

(f) See also *Sweet v. Maughan* (4 Jur. 456).

where (a) 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. (b)

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. (c)

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. (d) The firm with whom the agreement was made having been changed, and its 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) *Bohn v. Bogue* (10 Jur. 421).

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

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

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

This was followed by Fry, J., in the recent case of *Hole v. Bradbury*(a), where the joint authors were held entitled to restrain the further publication of their work by a firm of publishers which had succeeded to the business of the original firm. One of the joint authors in this case had sketched on blocks (which were ultimately paid for out of the proceeds of the sale of the book) certain drawings from which the illustrations of the book were engraved. These drawings remained, in the opinion of the learned judge, the property of the joint authors, and the blocks were not the property of the publishers. Bearing in mind the small value of the wood in comparison with that of the drawings, and that an injury had been done to the authors by the use which had been made of the blocks for a publication not authorised by them, the learned judge ordered the blocks to be delivered up to the authors.(b)

A case similar was *Reade v. Bentley*,(c) 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."

(a) L. R. 12 C. D. 886.

(b) P. 899.

(c) 3 K. & J. 271.

When the case of *Readle 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: (a) "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. Cater*, the plaintiff will be precluded from asserting a right to publish any competing edition. The defendant could compel the 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 transla-

(a) 4 K. & J. 664.

tion 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 statute 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.

Where the owner of the copyright in a picture signed the following memorandum addressed to an art publisher: "I assign to you, for the purpose of producing an engraving of one size, the copyright of the picture painted by," &c., Fry, J., held that this was not an assignment of the whole copyright in the picture; that the assignor still remained owner of the copyright in the picture, and was at liberty to make and publish copies of it.^(d)

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,^(e) or, secondly,

Dramatic
and musical
compositions.

(a) *Hazlitt v. Templeman* (13 L. T. N. S. 593).

(b) *Ibid.*

(c) *Strahan v. Graham* (15 L. T. N. S. 87).

(d) *Lucas v. Cooke* (L. R. 13 C. D. 872).

(e) See the cases quoted *ante*, pp. 167 *seq.*

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by entry in the book of registry at Stationers' Hall in the form above given (p. 172) for the assignment of books.

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."

Right of
representation or
performance.

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."

This section was in all probability passed to obviate the effect of the decision in *Cumberland v. Planché*,^(a) that when an author simply assigned the copyright, he also parted with the right of representation.^(b)

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*^(c) 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 plaintiff's had engaged by word of mouth one Courtney to visit Paris for

(a) 1 A. & E. 580.

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

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

the purpose of adapting a piece there in vogue for representation upon the English stage, the terms being that the plaintiff's 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 plaintiff's 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 plaintiff's, 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's either of the copyright in the piece or of the sole right of representation, and consequently that they must fail in their action.

An assignment by the composer of two songs of all his "copyright" in the songs, and "all other the estate, right, title, interest, property . . . benefit, claim and demand whatsoever" of and in them, was held to carry the exclusive right of performance.(a)

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.(b)

A document acknowledging the receipt by T. from Messrs. R. and E., of a sum of money "for the London right" of a dramatic piece, was held to be (not technically an assignment but) a licence or consent, for the whole period of T.'s own right, to R. and E.'s enjoyment of the sole right of representing in London.(c)

It was held also (after evidence received on the point) that such licence or consent was assignable by R. and E.(d)

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.(e)

(a) *Ex pte. Hutchins and Romer* (L. R. 4, Q. B. D. 483).

(b) *Lacy v. Toole* (15 L. T. N. S. 512). See *Levy v. Rutley* (L. R. 6, C. P. 523). The *semble* in the former 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.

(c) *Taylor v. Neville* (38 L. T. N. S. 50; 47 L. J. Q. B. 254).

(d) *Ibid.*

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

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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 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)

Published
engravings.

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*,^(c) 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 plaintiff, the latter had every right that the engraver had before."

The assignee may maintain an action for penalties in his

(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) *Ibid.*

(c) 5 T. R. 46.

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 contain 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.

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.

Drawings,
paintings, or
photographs.

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

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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 of Proprietors of Copyrights 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)

All previous enactments, including those referring to transfer, relating to the copyright in designs, have been repealed by the Patents, Designs, and Trade Marks Act, 1883,(d) which itself contains no provisions as to the mode in which an assignment may be made.

(a) *Graves's case* (L. Rep. 4 Q. B. 715; 26 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*.

(d) 46 & 47 Vict. c. 57.

Sculpture
models and
busts.

Designs.

The repealed Act 5 & 6 Vict., c. 100, s. 6 provided that any writing purporting to be a transfer of the design, and signed by the proprietor, should operate as an effectual transfer; and Jessel, M.R., held^(a) that a partial assignment of, or licence to use, a design, must also, under that Act, have been in writing.

The same learned judge also considered the question whether an assignment or licence could be registered by the assignee or licensee before the proprietor himself had registered, and was strongly of opinion that it could not.^(b) No doubt can exist under the new Act, which allows assignees, &c. of the copyright in a "registered design" only to have themselves entered as proprietors.^(c)

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

^(a) *Jewitt v. Eckhardt* (L. R. 8 C. D. 404).

^(b) *Ibid.*

^(c) Sect. 87.

^(d) Sect. 10 of 15 Vict. c. 12.

CHAPTER XVI.

INFRINGEMENT OF COPYRIGHT.

Piracy in
general.

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. (a) Yet everything that does this by 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.

Only by multi-
plication of
copies.

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. (b)

(a) "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 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.)

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

So long ago as 1793(a) 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 Anno, 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*(b) in 1822, the Court of King's 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*(c) 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*(d) 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.(e)

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.(f)

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

(b) 5 B. & Ald. 657.

(c) 9 C. B. N. S. 755; 30 L. J. 209, C. P. The plaintiff afterwards successfully maintained an action for infringement of his sole right of dramatic representation. *Reade v. Conquest* (11 C. B. N. S. 479).

(d) 5 T. R. 245.

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

(f) *Ibid.*

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 Gratuitous
 distribution of
 copies.

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.(a)

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

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 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.(c)

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

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 exists 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?

Tests of piracy.

The answers to the question, what amounts to piracy? given by different judges, have been variously expressed;

(a) *Novello v. Sudlow* (12 C. B. 177).

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

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

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.^(a) 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.

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.”^(b)

According to Vice-Chancellor Kindersley, an illegitimate or unfair use of another’s work is that which amounts to “such an extraction from it as comes up to an extraction of the vital part.”^(c)

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*?”^(d) 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.”^(e)

Lord Jeffrey, in the Scotch case of *Alexander v. Mackenzie*,^(f) 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

(a) 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. As to piracy of a drama, see *Chatterton v. Cave* (L. R. 10, C. P. 572; 2 C. P. D. 42; 3 App. Cas. 483).

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

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

(d) *Cary v. Kearsley* (4 Esp. 169). As to the necessity of an *animus furandi*, see *post*, pp. 199, 200.

(e) *Jarrold v. Houlston* (3 K. & J. 716).

(f) 9 Scotch Ses. Cas. 2nd Ser. 758.

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?"

Lord Hatherley (when Wood, V.C.), in dealing with a work in the form of question and answer on a variety of scientific subjects, thus lays down the rule: (a) "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."

An American judge (Story, J.) says: (b) "I think it may be laid down as the clear result of the authorities in cases of this nature, (c) 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, (d)

(a) *Jarrold v. Houlston* (*ubi supra*).

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

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

(d) *Branwell v. Halcomb* (3 My. & Cr. 738). Similarly Story, J. (1 St. Rep. 20), "In many cases the question may naturally turn upon

"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*,^(a) 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."^(b)

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 any one to gain a copyright in any arrangement of them which he chooses to make. "In all cases," says Lord Jeffrey,^(c) "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."

Where materials are common.

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.^(d)

The different arrangements of common materials must, however, be independent. A later arrangement must not be

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.' " See *Chatterton v. Cave* (L. R. 3 App. Cas. 482; 2 C. P. D. 42; 10 C. P. 572).

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

(b) 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).

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

(d) Compare the cases of *Jarrold v. Houlston* (3 K. & J. 708), and *Jarrold v. Heywood* (18 W. R. 279).

a servile imitation or reproduction of an earlier one; otherwise it subjects its author to the charge of piracy.

The case of *Kelly v. Morris*(a) 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 of 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 information 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 the 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

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

contained in the defendant's, and the manuscript of the latter work was produced. The Vice-Chancellor, Sir W. Page Wood, 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, 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. (d)

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*, (e) 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

(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).

(d) *Ibid.*

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

persons on whom it would be worth his while to call." After referring to the passage from the judgment in *Kelly v. Morris*, above cited,^(a) 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*.^(b) 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 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*,^(c) 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 Giffard, 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

(a) *Ante* p. 193.

(b) L. R. 5 Ch. App. 251.

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

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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*(a) 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.

Lists of hounds
published in
newspapers.

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;(b) 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.

Dictionaries,
calendars, &c.

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, 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.(c)

Dictionaries.

As to dictionaries, Vice-Chancellor Wood, after remarking 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 position. 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 illustrations which were the best exponents of the sense in which

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

(b) *Coe 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*.

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

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 translated 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 predecessors. . . . Of course there could be no copyright in much of the information contained in the numerous dictionaries published, each necessarily having a large number of words identically similar." In the case before him the Vice-Chancellor applied the test "whether there was a legitimate use of the plaintiff's publication in the fair exercise 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 defendant 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 defendant 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 doubtfulness of the case, without costs.(a)

Where the works are of such a nature that the information contained in them must of necessity, if it be correct, 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*,(b) 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,

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

(b) 16 Ves. 271, 272.

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."^(a)

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 any one 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,^(b) "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*^(c) 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 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. Chetwood*,^(d) 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

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

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

(c) 3 Ves. & B. 77.

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

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.(a)

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.(b)

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

Lord Ellenborough has been considered to have laid down the rule, in *Cary v. Kearsley*,(d) 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*.(e)

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,(f) "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*,(g) with reference to a

(a) 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).

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

(c) *Vide ante*, pp. 150, 151.

(d) 4 Esp. 169.

(e) See *per Wood*, V.C., in *Reade v. Lacy* (1 J. & H. 527).

(f) 1 Camp. 98.

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

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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."^(a) Thus in *Scott v. Stanford*^(b) 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 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*,^(c) the class of cases to which the *animus furandi* test properly applies is that difficult one 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.

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

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

(c) 1 J. & H. 527.

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, 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 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)

Where, however, the author wrote and published his novel

(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).

first and afterwards dramatised it, the drama not having been printed, published, or represented on the stage, the defendant who dramatised the novel in ignorance of the previous dramatization, was held not liable to an action for infringing the stage-right of the author of the first drama.^(a) "When," said Cockburn, C.J., "an author has once given his novel to the world, he cannot take away from other persons the right to dramatised it by himself transforming it into a drama; subject to this, that they must not borrow from his drama, but only from his novel."

Blackburn, J., considered that the first and the second dramatist was each the author of his own drama, and each entitled to restrain the piracy of it. "I think," added his lordship, "as at present advised, that if Mr. H.'s [the author of the novel and first drama] drama had been plagiarised, the defendant would have been liable to an action; and in the present case, *if Mr. H.'s drama had been produced upon the stage, a jury would have found that Mr. G. [the second dramatist], having the means of knowing of Mr. H.'s drama, had, as a matter of fact, plagiarised from it;*^(b) but Mr. H.'s drama never having been represented, Mr. G. did not plagiarise, and therefore the defendant is entitled to keep the nonsuit."

Archibald, J., after pointing out that the action was not for infringement of the plaintiff's book copyright in his novel, but only for infringement of his stage-right, said: "There is a clear and intelligible distinction between this case and the second case of *Beade v. Conquest*.^(c) The grounds of that decision appear to be, that there the drama was first composed and afterwards the novel; and if there had been a direct copying by the defendant from the drama, that clearly would have been a violation of the Act. The novel being composed after the drama, was regarded by the Court of Common Pleas as in some sense a copy of the drama, so that in copying from the novel, and using the novel for the purpose of dramatising it, the defendant was treated as copying indirectly from the published drama; a drama produced under these circumstances might be a reproduction of a drama composed by the plaintiff. But the present case is different. The novel is first composed, and then the drama is composed from the novel, and the defendant in copying from the novel, or in using the novel for the purpose of his drama, cannot be said in any way to have made an indirect

(a) *Toole v. Young* (L. R. 9 Q. B. 523).

(b) The words italicized are found only in the Law Reports. They are not in the *Law Journal* or *Law Times* report of the same cases.

(c) 11 C. B. N. S. 479.

use of the plaintiff's drama, the more especially as it is admitted that he was wholly unaware of Mr. H.'s drama."

Before this decision it appears to have been thought that a previous dramatisation by the author of the novel would entitle him to prevent any subsequent dramatisation, an opinion in support of which was cited the language of Erle, C.J., in the first case of *Reade v. Conquest*,^(a) "Perhaps the only way in which the author of a novel can protect himself from this sort of infringement is by dramatizing it himself;" and that of Wood, V.C., in *Tinsley v. Lucy*:^(b) "I suppose if this lady [the author of the novel] wished to protect herself in the matter, as the law now stands, all she would have to do would be to take a pair of scissors and cut out certain scenes and publish a little drama of her own; because if she first published a work like this in the shape of a drama, she would come within the protection of the Dramatic Authors' Copyright Act."

In *Toole v. Young*,^(c) Blackburn, J., expressly dissented from these two dicta, and said he could not think that the mere fact that the author of the novel and the first drama were the same person made any difference; and Quain, J.,^(d) considered them not in the least necessary for the decision of the cases in which they were uttered.

Blackburn, J., has been supposed by some to have laid down in this case, as a proposition of law, that if the author of the novel and first drama has the drama once performed, any subsequent dramatisation of the novel can be prevented as necessarily a piracy of the first drama. This, however, cannot have been that learned judge's intention. For a novel once published becomes, in the language of Cockburn, C.J.,^(e) "common property," and any number of persons may dramatise it, provided they do so by independent effort expended upon the novel, and do not simply plagiarise from each other's works. All are, according to Blackburn, J.,^(f) equally "authors," and each is entitled to restrain the piracy of his own work. If so, no action would lie, even by the author of the novel who has himself dramatised and published or caused to be represented his drama, in respect of the performance of a second drama which its author could prove as a fact was not copied in any way from the former drama, but was the result of independent labour *bonâ fide* bestowed by him upon the novel. It is obvious that it would, at any rate, be possible for the second dramatist to convince the jury of this as

(a) 9 C. B. N. S. 759.

(b) 32 L. J. Ch. 537; 1 H. & M. 747.

(c) L. R. 9 Q. B. 529.

(d) See 43 L. J. Q. B. 176.

(e) L. R. 9 Q. B. 527.

(f) *Ibid.* p. 528.

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a fact, notwithstanding a public performance (given perhaps in a distant place, and of which he probably had never heard) of the novelist's own drama. There is no effectual remedy short of that recommended by the Royal Commissioners on Copyright—viz., "that the right of dramatising a novel or other work should be reserved to the author;" assimilating, in this respect, our law to that of France and the United States.^(a)

Publication of drama may be infringement of copyright in novel.

The distinction, alluded to by Archibald, J., between infringement of stage-right and infringement of copyright in the novel, is important. Any one may dramatise the novel of another person and perform the drama; but if, in addition, he publishes the drama, he may thereby infringe the copyright in the novel. In *Tinsley v. Lucy*,^(b) Wood, V.C., granted an injunction to restrain the printing, publishing, and selling of a drama founded on a novel in which the plaintiff had copyright. The Vice-Chancellor, after referring to the fact that the author of the drama had taken one-quarter at least of his publication out of the plaintiff's publication, said: "That, for the purpose of narration, for the purpose of dramatising, or anything else except printing, he is at liberty to do; but if he chooses to put into print that one quarter, which is bodily taken out of some publication which is protected by copyright, he cannot escape from the consequences of so doing. He reprints in a book which he calls his own (I have the book alone to deal with; I have nothing to do with the drama) he reprints in that book, to the extent of one-quarter of the work, the most stirring passages, what Lord Cottenham describes as 'the vital parts' of this novel in the identical language in which the original author composed it. No doubt that is an infringement of the Copyright Act."

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*.^(c) 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.^(d)

"Quotation," says Lord Eldon,^(e) "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 quota-

(a) Report, par. 80.

(b) 32 L. J. Chy. 535; 1 H. & M. 747.

(c) 4 Esp. 169.

(d) See the judgment in *Bohn v. Bogue* (10 Jur. 420); *Scott v. Stanford* (L. Rep. 3 Eq. 718; 16 L. T. N. S. 51), and *Maxwell v. Somerton* (22 W. R. 313; 30 L. T. N. S. 11). (e) *Mawman v. Tegg* (2 Rus. 393).

tion may be carried to the extent of manifesting piratical intention." To the same effect Lord Ellenborough, in *Roworth v. Wilkes*,^(a) "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 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*,^(b) 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*,^(c) 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 in every case."^(d)

(a) 1 Camp. 97.

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

(c) 10 Jur. 421.

(d) The Vice-Chancellor's distinction is verbal rather than substantial. The imperfect "Liddell and Scott," in the hypothetical case, is intended to be and is a substitute (though not a complete one) for the perfect work, and is bought to serve the same purpose. See further, on the subject of extracts, *Sweet v. Cater* (11 Sim. 580), and *Bradbury v. Hotten* (L. R. 8 Exch. 1).

"No one can doubt," says Justice Story,^(a) "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."^(b)

In *Whittingham v. Wooler*^(c) 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 Plummer, M.R., said: "It may, perhaps, be far enough to say that if the defendant had inserted in one number a criticism and in a following number mere specimens, that would be the case of an unprotected plagiarism; but here the defendant has given no entire act or scene, but only broken and detached fragments of the piece in question."^(d)

In *Dodsley v. Kinnersley*,^(e) 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*."^(f)

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

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

(b) See *Smith v. Chatto* (31 L. T. N. S. 775).

(c) 2 Swanst. 428. See also *Bell v. Whitehead* (17 L. J. Chy. 141; 3 Jur. 68).

(d) See the observations of Wood, V.C., on this decision in *Tinsley v. Lacy* (32 L. J. Chy. 539).

(e) Amb. 402.

(f) *Ibid.* 405.

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*,^(a) "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*,^(b) 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 fact 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*,^(c) the decision in that case against the proprietor of the original reports proceeding on the ground of his acquiescence in the labours of the defendant. Lord Cottenham said:^(d) "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

(a) 6 Sim. 298.

(b) 4 Esp. 169.

(c) 3 M. & Cr. 711.

(d) *Ibid.* 728.

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 *Cary v. Kearsley*,^(a) 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 any one 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 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.^(b) "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*.^(c)

Addition of
plates.

The addition of plates to the copyright letter-press of

(a) 4 Esp. 169.

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

(c) 3 Swanst. 672.

another would not, according to Sir L. Kenyon, M.R.,^(a) 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.

The writers of abridgments have in general been favourably regarded by the courts of law and equity.^(b) "Abridgments," said Lord Hardwicke,^(c) "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*,^(d) "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,

(a) *Carnan v. Bowles* (2 Br. C. C. 85).

(b) Lord Hatherley was an exception. In *Tinsley v. Lacy* (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 jackal 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). The Royal Commissioners on Copyright are also of opinion that abridgments may do great harm to the author of the original work by interfering with his market; and they recommend "that no abridgments of copyright works should be allowed during the term of copyright, without the consent of the owner of the copyright" (Report, paragraph 69).

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

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

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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.(a)

Colourable
abridgments.

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."(b) 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 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."(c)

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

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

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

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

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.^(a)

The case in which the preceding opinion was expressed was one in which the plaintiffs complained of an infringement of the copyright of 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 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 transcription 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,

(a) *Story's Executors v. Holcombe* (4 M'Clean, 311-314).

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 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 volumes, 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)

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 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.(b)

It was contended in this case, on a motion to dissolve an injunction which had been granted, that the defendant's 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*;(c) 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

(a) *Folsom v. Marsh* (2 St. 100). (b) *Dickens v. Lee* (8 Jur. 183).

(c) 4 Esp. 169. *Ante*, p. 206.

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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.'^(a) 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 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

(a) 17 Ves. 426.

solely as a question of property, which is the only point of view in which it is my duty or business to consider it."

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 *Street 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 portion 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 com-

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(a) 16 C. B. 484.

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piler 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, J.J., took the same view as the Chief Justice, but the latter somewhat doubtfully. 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 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*(*b*) to be within the protection afforded to books

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

(*b*) *Bogue v. Houlston* (5 De G. & Sm. 267). See the view taken of this decision by Jessel, M.R., in *Maple v. Junior Army and Navy Stores* (L. R. 52 L. J. Chy. 71, ante p. 86).

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 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.

Where a work called "The Man of his Time" consisting (1) of "The Story of the Life of Napoleon III., by James M. Haswell," and (2) of "The Same Story as told by Popular Caricaturists of the last Thirty Years," contained in part 2 (without authority) copies in a reduced form of nine cartoons previously published in *Punch*, sometimes with and sometimes without the accompanying letter-press, the proprietors of *Punch* were held entitled to maintain an action for infringement of their copyright in the several books or sheets of letter-press containing the cartoons.(a)

The name or title of a work may be considered as a kind of trade mark which no person other 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)

The term "copyright" has sometimes been applied to the title of a work, as by Malins, V.C., in *Weldon v. Dicks*;(d) but Lush, L.J., in a subsequent case,(e) remarked that what the learned Vice-Chancellor had in his mind was that the title of the defendant's work was proved (to his satisfaction) to

Copying name
of work.

(a) *Bradbury v. Hotten* (L. R. 8 Exch. 1).

(b) See *Seely v. Fisher* (11 Sm. 582); *Spottiswoode v. Clark* (2 Ph. 154); *Mack v. Petter* (L. R. 14 Eq. 431).

(c) *Per Wood*, V.C., in *Chappell v. Davidson* (2 K. & J. 126). See *Ward v. Beeton* (L. R. 19 Eq. 207).

(d) L. R. 10, C. D. 247. See also *per Romilly*, M.R., in *Mack v. Petter* (L. R. 14 Eq. 431).

(e) *Dicks v. Yates* (L. R. 18, C. D. 92).

have been adapted for the very purpose of inducing persons to believe that the book was the same book as that which belonged to the plaintiff, and that he did not distinguish between an infringement of a common law right and an infringement of copyright.

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 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."^(a)

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*.^(b) 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.^(c)

The case of *Ingram v. Stiff*,^(d) 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.

The proprietors of *Punch* were held not entitled to restrain

(a) *Per* Lord Eldon in *Longman v. Winchester* (16 Ves. 271), referring to and distinguishing *Hogg v. Kirby* (8 Ves. 215).

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

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

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

the publication of a publication entitled *Punch and Judy*, with a different frontispiece, and sold for a penny, the Vice-Chancellor (Malins) considering that persons of ordinary intelligence would not be misled.(a)

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-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 encoored) 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.(b) "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,

(a) *Bradbury v. Beeton* (18 W. R. 33).

(b) *Chappell v. Sheard* (2 K. & J. 117).

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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 for that of the plaintiff. It was urged on the part of the defendant in this case that he had cautioned his shopboys 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)

In this case it was held also that the words "written by George Linley" (who was chiefly known as a musical composer) on the title-page of the plaintiff's song did not so clearly manifest an intention to mislead the public into the belief that the music was composed by him as to deprive the plaintiffs (his assignees) of their right to an injunction. The Vice-Chancellor was of the same opinion with respect to the entry at Stationers' Hall of [as I gather from the Report] George Linley as proprietor of the entire composition (i.e., of both music and words): however this might go to the question of copyright, it did not amount to a wilful or fraudulent misrepresentation to the public of the rights of Mr. Linley.(b)

The Vice-Chancellor had pointed out, at the beginning of his judgment, that the case bore rather upon the question whether the defendant had a right to sell, as his own, that in which another had acquired a description of property, than upon the question of copyright; in truth, that there had been no infringement at all of what is strictly called copyright.(c)

Where the similarity of title is from other circumstances not calculated to deceive the public, an injunction will be refused.(d)

In the recent case of *Dicks v. Yates*,(e) Jessel, M.R., referred to the existence of "a certain amount of confusion in the minds of some counsel, and perhaps of some judges,

(a) *Chappell v. Davidson* (2 K. & J. 123). Cf. *Sykes v. Sykes* (3 B. & C. 541).

(b) 2 K. & J. 131.

(c) *Ibid.* 126.

(d) *Kelly v. Byles* (L. R. 13 C. D. 682).

(e) L. R. 18 C. D. 90.

between copyright and trade mark." And Lord Justice James said: "Literary property can be invaded in three modes, and, as I believe, in three modes only. First, where a publisher in this country publishes an unauthorised edition of a work in which copyright exists, or where a man introduces and sells a foreign reprint of such work; that is open piracy. The second mode is where a man, pretending to be the author of a book, illegitimately appropriates the fruit of a previous author's literary labour; and that is literary larceny. Those are the two modes of invasion against which the Copyright Acts have protected an author. There is another mode which to my mind is wholly irrespective of any copyright legislation, and that is where a man sells a work under the name or title of another man or another man's work; that is not an invasion of copyright. It is common law fraud and can be redressed by ordinary common law remedies, wholly irrespective of any of the conditions or restrictions imposed by the Copyrights Acts."

A tale entitled "Splendid Misery: or East End and West End," had been published by the plaintiff in six consecutive numbers, ending in Feb. 1875, of a weekly periodical called *Every Week*, these weekly issues being afterwards bound up with others and sold in a volume. The title "Splendid Misery" was not a new one, a novel under that name having been published in 1801. In July, 1879, the defendant began publishing in his weekly periodical, called *The World*, a new novel under the same title, by Miss Braddon. An action having been brought by the plaintiff to restrain the defendant's publication, and also claiming damages for the infringement of the plaintiff's copyright in the book called "Splendid Misery" and the title thereof, the action was dismissed with costs, the Court being convinced that the public could not be misled into purchasing the defendant's tale under the belief that it was the same as that of the plaintiff. "The publications," said Jessel, M.R., "are of a totally distinct character and published at very different prices, the price of the plaintiff's serial being a penny and that of the defendant being sixpence. They are totally different publications. The plaintiff's serial is a collection of novels: the defendant's is a newspaper with a *feuilleton*, or a chapter of a novel in it. Indeed, no two publications, each of which contained portions of a novel, could well be more different."(a)

The case of *Lord Byron v. Johnston*(b) stands on a peculiar

(a) *Dicks v. Yates* (L. R. 18 C. D. 77, 87).

(b) 2 Meriv. 29.

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footnote. 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.

Importation of
printed copy.

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 for every offence, and double the value of every copy imported, beside the forfeiture of such copy.

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 exposed for 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."

"Importing for sale," though innocently, is an offence; but to "sell, publish, or expose to sale or let to hire," or to

"have" in one's "possession for sale or hire" is not an offence, unless done "knowingly." (a)

In the case of "importing for sale," an injunction may be obtained without previous notice to the defendant. (b)

"People who import for sale or hire must," according to Jessel, M.R., "carry on business at their own peril. Such persons are not like ordinary people who import for their own private use and reading, but are people engaged in business, who are bound to be on the look out and see that the books they import for sale are not piracies." And as to English agents of American publishers they must, according to the same learned judge, "be taken to know that Americans are in the habit of printing and exporting piratical works, and they must therefore know that they import books from America at the risk of their containing what is piratical, and of thus committing an unlawful act, and of being liable to be sued without notice." (c)

Section 102 of the Customs Laws Consolidation Act of 1876 (39 & 40 Vic. c. 36) prohibits the importation or bringing into the United Kingdom of "books wherein the copyright shall be subsisting, first composed or written or printed, in the United Kingdom, and printed or reprinted in any other country, as to which the proprietor of such copyright, or his agents, shall have given to the Commissioners of Customs a notice in writing, duly declared, that such copyright exists, such notice also stating when such copyright will expire."

Prohibited books, if imported, are, by the same enactment, to be forfeited, and may be destroyed or otherwise disposed of, as the Commissioners of Customs may direct.

Lists of such prohibited books are to be put up at the different ports in Her Majesty's dominions. Sect. 44 of 16 & 17 Viet. c. 107, enacts that "the Commissioners of Customs shall cause to be made, and to be publicly exposed at the Custom Houses in the several ports in the United Kingdom, 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, accompanied by a declaration made and submitted before a Collector of Customs or a justice of the peace, that the contents of such notice are true."

Lists of prohibited books notified to Customs.

(a) *Per* Jessel, M.R., in *Cooper v. Whittingham* (L. R. 15 C. D. 501).

(b) *Ibid.*

(c) *Ibid.* p. 505.

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Remedy for
wrongful entry
in list of pro-
hibited books.

By sect. 45, "if any person shall have cause to complain of the insertion of any book in such 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 inserted, to appear before any 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 any 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 commissioners 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 importation thereof shall not be deemed to be prohibited. 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 the person so summoned, or sent to him by post to or left at his last known place of abode or business, any such judge may proceed *ex parte* to hear and determine the matter; but if either party be dissatisfied with such order, he may apply to a superior Court to review such decision and to make such further order thereon as the Court may see fit."

Reservation to
persons
aggrieved of all
other remedies.

A proviso is added "that nothing herein contained shall affect any proceeding at law or in equity, which any party, aggrieved by reason of the insertion of any book pursuant to any such notice, or the removal of any book from such list pursuant to any such order, or by reason of any false declaration under this Act, might or would otherwise have against any party giving such notice, or obtaining such order, or making such false declaration."

Prohibition of
importation into
British posses-
sions abroad.

Sect. 152 enacts that "any books wherein the copyright shall be subsisting, first composed or written or printed in the United Kingdom, and printed or reprinted in any other country, shall be and are hereby absolutely prohibited to be imported into the British possessions abroad; provided always 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."

The Commissioners are to "cause to be made and transmitted to the several ports in the British possessions abroad, from time to time to be publicly exposed there, lists of books respecting which such notice shall have been duly given, and all books imported contrary thereto shall be forfeited."*(a)*

Nothing contained in the above enactment is to be "taken to prevent Her Majesty from exercising the powers vested in her by the 10 & 11 Vict. c. 95, entitled '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."*(b)*

Where a person simply sells pirated copies of the work of another, Wilde, C.J., held, in *Leader 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 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.*(d)*

Sale of pirated copies.

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.*(e)*

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*(f)* that even when the copyright in contributions to encyclopaedias, reviews, magazines, and other periodicals is vested in the proprietors of such encyclopaedias, &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.

Periodicals.

(a) See 152.*(b)* *Ibid.**(c)* 2 Car. & Kir. 1010.

(d) 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. 37; 18 L. T. N. S. 285; 37 L. J. 161, Q. B.). *Ante*, pp. 129, 130.

(e) *Taylor v. Pillow* (L. Rep. 7 Eq. 418). *(f)* *Ante*, pp. 100, 101.

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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.(a)

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.(b)

Dramas and
musical compo-
sitions.

Dramas and 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 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.(c)

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

The same learned judge held in that case that to publish in the form of quadrilles and waltzes the airs of an opera, in 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

(a) 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); *Pullarton v. M'Phun* (13 Scotch Ses. Cas. 219).

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

(c) See the opinions of Cockburn, C.J., and Blackburn, J., in *Wood v. Boosey* (L. Rep. 2 Q. B. 350, 354; 7 B. & S. 800; 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. 125).

(d) 1 Y. & C. 301.

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 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 recognized by the ear. The adding variations makes no difference in the principle."

ENGRAVINGS AND LITHOGRAPHS.

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 other-

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wise 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)

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.

Lithographs.

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.(c) 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.

How piratical copy may be taken.

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.

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

(b) *Ibid.*; 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.

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

This was the opinion of the Court of Common Pleas in *Gambart v. Bull*,^(a) 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."^(b)

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 pronounced. 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 unanimous judgment of the Court, said,^(c) "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."

After this unanimous decision of a Court of Error, and of which Bramwell, L.J., formed part,^(d) it is somewhat curious to

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

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

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

(d) The members of this court were Kelly, C.B., Bramwell, Channell,

read the guarded and hesitating language used in the recent case of *Dicks v. Brooks*,^(a) "I do not say," observed Bramwell, L.J., "that if this were an original engraving with no picture, and a copy were made of it and afterwards coloured, there might not be some ground for saying that there was a piracy of the art and skill of the engraver. I should have very great misgiving about it, because I doubt whether the statutes were not intended to protect the artist's skill as an engraver only, and not as a draftsman. I give no opinion on the point." Similarly Baggallay, L.J.: "I do not mean to say that a representation of this print in chromo-lithography, executed with that high skill and art with which works in chromo-lithography are now executed, could not be treated as a copy of the print prohibited by the statute. I do not say that it would be so; but I consider it a fairly arguable question."

It is submitted that these doubts can only be justified by regarding the statutes as designed merely for the protection of the reputation of the engraver, and not also (as they were considered by Baggallay, L.J., approving the language of Erle, C.J., in *Gambart v. Ball*) for his protection against any invasion of his commercial property in the print. The competition of chromo-lithographic copies must surely injure the sale of the engravings. And the language of the recital in 8 Geo. 3, c. 13, should not be forgotten, viz., that "divers persons have by their own genius, industry, pains, and expense, invented and engraved, or worked, &c., in hopes to have reaped the sole benefit of their labours."

Definition of 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

and Pigott, B.B., Mellor and Tush, J.J.; and the judgment affirmed the ruling of Erle, C.J., at the trial, and the decision of the Court of Common Pleas.

^(a) 11 R. 15 C. D. 38.

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

^(b) 5 B. & Ald. 743.

^(d) *Ibid.* 742, 743.

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*,^(a) 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.

The copy must be something which a person might take to be the print, or would buy instead of the print. Where a periodical published a pattern for wool-work (a mosaic built up of small coloured squares) consisting of the figures in Millais' picture "The Huguenot," which the Court was of opinion had been taken mediately or immediately from a copyright engraving of the picture, the Court of Appeal (reversing the decision of Bacon, V.C.) held that this was not a "copy" of the engraving within the meaning of the Acts. "Nobody," said James, L.J., "would ever take it to be the print; nobody would ever buy it instead of the print; nobody would ever suppose that it was, to use the language of the first Act, a base copy of the print. It is a work of a different class, intended for a different purpose, and, in my opinion, no more calculated to injure the print, *quâ* print, or the reputation of the engraver, or the commercial value of the engraving in the hands of the proprietor, than if the same group were reproduced from the same engraving by waxwork at Madame Tussaud's, or in a plaster of Paris cast, or in a painting on porcelain. I cannot conceive that such a reproduction of the subject in tapestry, or Berlin wool, or upon china or earthenware, is within the meaning of the Act of Parliament."^(b)

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

Publicly exhibiting a copy.

(a) 9 M. & W. 692.

(b) *Dicks v. Brooks*, L. R. 15, C. D. 35.