

PART I.

CHAPTER XV.

Prints unlawfully struck off from original plate.

worse, then the misrepresentation is only a sort of libel, and this Court will not prevent the publication of a libel." (a)

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

As to prints forming part of a book, see the case of *Bogue v. Houlston*, referred to *ante*, pp. 85, 86.

PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.

In what piracy consists.

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

Sect. 6 of 25 & 26 Vict. c. 68, enacts that "if the author of any painting, drawing, or photograph in which there

(a) *Martin v. Wright* (6 Sim. 297). See also *per Best, C.J.*, (4 Bing. 245).

(b) *Murray v. Heath* (1 Bar. & Ad. 804).

(c) *Ibid.* 811.

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

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

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

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

(2.) Fraudulently selling, publishing, exhibiting, or disposing of or offering for sale, exhibition, or distribution, any painting, drawing, or photograph, or negative of a photograph, having thereon the name, initials, or monogram of a person who did not execute or make such work:

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

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

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

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

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

In *Ex parte Beal*,^(b) a doubt was suggested whether taking the words "the author of any painting, drawing, or photograph," *reddendo singula singulis*, they might not mean "where a painting is made which is the copy of another painting, a drawing which is the copy of another drawing, or a photograph which is the copy of another photograph;" but the Court, looking at the very extensive terms in which the copyright is given in sect. 1, on the infringement of which the penalty followed, considered it plain that the photograph of a painting, or the photograph of a drawing of a painting, or the photograph of a photograph, all

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

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

equally come within the Act, and are infringements of the copyright.

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

If the assignee of the right "of producing an engraving of one size" from a picture sues for an infringement of his copyright in the engraving, the onus is upon him to show that the alleged piracy has been copied from his engraving, and was not taken from the original painting.^(c)

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

Separate penalty
for each copy
sold.

SCULPTURE, MODELS, AND BUSTS.

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

There are no decided cases on this kind of piracy.

RIGHT OF DRAMATIC AND MUSICAL REPRESENTATION.

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

Right of representation and performance of dramatic and musical compositions.

(a) *Ex parte Beal* (9 B. & S. 395, 401).

(b) *Ibid.*

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

(d) *Ex parte Beal* (9 B. & S. 395, 401).

(e) *Vide ante*, pp. 132, 133.

(f) 54 Geo. 3, c. 56, s. 3.

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Dramas.

representation and performance of dramatic and musical compositions are explained, *ante*, pp. 120 *seq.*

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

"Any part thereof."

The part taken must, however, be a material and substantial part, in order to sustain an action for infringement. Where the judge (by consent acting as a jury) found as a fact that two scenes or points—not part of the dialogue, but in the nature of dramatic situations or scenic effects—of the defendant's drama were taken direct from the plaintiff's, but that the extent to which the one was taken from the other was so slight, and the effect upon the total composition was so small, that there was no substantial and material taking of any one portion of the defendant's drama from any portion of the plaintiff's, it was held (by the House of Lords, affirming the decision of the Court of Appeal) that the plaintiff could not maintain an action for penalties.^(b)

Referring to the argument based on the words "or any part thereof," which are not found in the Acts conferring copyright in books, and to the 40s. penalty imposed, Lord Hatherley said: "It was suggested that these differences indicated an intention to prevent the invasion of dramatic copyright, independently of the quantity or materiality of the portion of dialogue or dramatic incident proved to have been copied by the defendant. Now it appears to me that this argument goes much too far. As was said by the counsel for the respondent, the appellant would wish to read the word 'part' in the Dramatic Copyright Act as 'particle'; so that the crowing of the cock in *Hamlet*, or the introduction of a line in the dialogue, might be held to be an invasion of copyright, entitling the plaintiff to 40s. damages, and consequently, as the law stood, I believe, at the passing of the statute of 3 & 4 Will. 4, to the costs of his action." Lord O'Hagan added: "It is true that the Act of Geo. 3 does not contain the words 'or any part thereof,' which are inserted

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

(b) *Chatterton v. Cave* (L. R. 3 App. Cas. 483; 2 C. P. D. 42; 10 C. P. 572).

in the statute of Will. 4. But this does not appear to me to create any real distinction between them. Some such words must necessarily be implied in the earlier statute, otherwise the author of a book could not bring his action unless there had been a piracy of the whole of its contents; and any partial appropriation of them could not authorise the claim for a penalty. No one has suggested a construction so manifestly inconsistent with the clear purpose of the Legislature; and it seems to me that all the authorities as to a partial taking^(a) are fairly applicable to the Dramatic Copyright Act, and if so, an infringement of it, to be penal, must be material and of a substantial kind."

The plaintiff need not, however, prove actual damage; the penalty is recoverable though there be no actual damage.^(b)

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

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

A dramatic representation in which a substantial and material part of an opera has been performed constitutes an infringement of the sole right of performing that opera, though the operatic score may have been obtained by independent labour bestowed on an unprotected pianoforte arrangement of the opera.^(e)

"There is scarcely any popular opera the score of which is not, within a short time after its first performance, arranged for the piano; and if, by reconversion of the pianoforte arrangement into an operatic score, a task which could be executed by any skilled musician, and performance of that score, the penalties of infringement could be escaped, the

(a) *Ibid.* p. 496.

(b) See *per* Tindal, C.J., *Planche v. Braham* (4 Bing. N. C. 19); *per* Lord Hatherley in *Chatterton v. Cave* (3 App. Cas. 498); and *per* Bowen, L.J. (L. R. 11, Q. B. D. 112).

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

(d) 15 Sim. 187. See now the decision of the Court of Appeal in *Wall v. Taylor, Wall v. Martin*, *post*, p. 240.

(e) *Boosey v. Fairlie* (L. R. 7 C. D. 317).

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 Consent may be
 by agent.

protection given to operatic compositions would be almost nugatory.”(a)

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

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

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

A licence from a part owner will not be sufficient, without the consent of the other owners.(c)

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

“Place of
 dramatic enter-
 tainment.”

It was made a question in *Russell v. Smith*(e) whether the Acts of 3 & 4 Will. 4, c. 15, and 5 & 6 Vict. c. 45, prohibited the unauthorised performance of musical compositions if they were not dramatic in their nature, or performed at a place of dramatic entertainment; but the Court did not find it necessary to decide the point, as they were of opinion that the musical composition in question in that case was of a dramatic nature. It was a song relating the burning of a ship at sea, and the escape of those on board, and describing their feelings in vehement language—sometimes expressing them in the supposed words of the suffering parties. The Court held that it was dramatic; sect. 2 of 5 & 6 Vict. c. 45, declaring that “dramatic piece”

(a) *Boosey v. Fairlie*, L. R. 7, C. D. 317.

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

(c) *Powell v. Head* (L. R. 12, C. D. 686).

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

(e) 12 Q. B. 217.

within that Act includes "tragedy, comedy, play, opera, farce, or" any "other scenic, musical, or dramatic entertainment." (a)

It was, however, held in that case that a room in which a dramatic piece is performed, and to which persons paying for tickets are admitted for the purpose of hearing it, is for the time a place of dramatic entertainment within the meaning of the statutes, although the room is ordinarily used for different purposes; in other words that the epithet, "dramatic," in the clause "place of dramatic entertainment," has in 3 & 4 Will. 4, c. 15, no particular signification. It is, according to the present Master of the Rolls, a word of supererogation. (b)

The question as to dramatic representations came again before the Queen's Bench Division in the recent case of *Duck v. Bates*, (c) with regard to certain unauthorised performances of a drama by an amateur dramatic club at Guy's Hospital for the entertainment of the nurses, attendants and other persons connected with the Hospital to whom a general invitation was issued. Besides this, tickets, for which nothing was paid, were issued to the medical men attached to the Hospital, and to the members of the Amateur Club, for distribution amongst their friends. Some were also sent to the editors of theatrical newspapers. On the occasion of one performance a newspaper reporter was present. Lord Coleridge, C.J., and Stephen, J., held that under the circumstances there had been no "representation at a place of dramatic entertainment."

Lord Coleridge was of opinion that *Russell v. Smith* (*ubi supra*) was the true authority upon the point, and in that case the Court twice in its judgment dwelt on the facts (1) that the place was "public," and (2) that the representation was "for profit."

The whole law on the subject is in a very vague and unsatisfactory state. *Russell v. Smith* decides simply that a dramatic piece (though musical also) cannot, without the proprietor's consent, be performed at a "public place of entertainment for profit," but any room may become such also, though used ordinarily for a different purpose, by a public representation for profit taking place there; and Lord Coleridge, in *Duck v. Bates*, seems to think that the two elements must be present of (1) publicity and (2) profit. But Stephen, J., puts a case in which these two elements are not found, and which yet could

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

(b) Judgment in *Wall v. Taylor, Wall v. Martin* (L. R. 11, Q. B. D. 108).

(c) L. R. 12, Q. B. D. 79, 49 L. T. N. S. 507.

hardly fail to work the mischief which it was intended by the Act to prevent. "Suppose while a copyright play was being performed at one theatre, another theatre were to perform the same play for the purpose of damaging the author, and were to be thrown open gratuitously to any person who would come to see the performance. I am far from saying that such a case would not be within the Act."(a)

As to musical compositions, the judgment of the Court of Appeal (Brett, M.R. and Bowen, L.J., *dissentiente* Cotton, L.J.), affirming the decision of Field and Cave, J.J., in the recent cases of *Wall v. Taylor* and *Wall v. Martin*,(b) has settled one of the points raised in *Russell v. Smith*—viz., whether a musical composition, not dramatic in its nature, must be performed at a place of dramatic entertainment in order that the penalty should be incurred. The Court held that the person who, under 5 & 6 Vict. c. 45, s. 20, has the sole liberty of performing a musical composition, is entitled to recover the penalty of forty shillings imposed by 3 & 4 Will. 4, c. 15, s. 2, for an unauthorised performance of it, though not at a place of dramatic entertainment and (see the 2nd case) though no money was taken for admission. The point whether the song in question was or was not dramatic in its nature was wholly ignored by all the judges. The decision, therefore, must not be taken to apply to musical dramas. The question involved was thus stated by Brett, M.R.: "On the part of the defendants it is admitted that 5 & 6 Vict. c. 45, s. 20, gives the plaintiff his right; but they say the remedy given by sect. 21 is only that which is given by 3 & 4 Will. 4, c. 15, sect. 2, in respect of a dramatic piece, and where the same circumstances exist as would give the proprietor of such dramatic piece a right to recover a penalty for its representation. In other words, the plaintiff says that only part of 3 & 4 Will. 4, c. 15, s. 2, is incorporated in sect. 21 of 5 & 6 Vict. c. 45, whilst the defendants say that the whole of it is incorporated in that section, and consequently that the condition in sect. 2, of 3 & 4 Will. 4, c. 15, that the piece be represented at a place of dramatic entertainment is introduced into sect. 21 of 5 & 6 Vict. c. 45, and therefore no penalty was recoverable here, because the song was not sung at a place of dramatic entertainment. This is the point we have to determine. Now the right which is given by 5 & 6 Vict. c. 45 is not limited to the representation being at a place of dramatic entertainment."(b)

What amounts to an unauthorised "representation or per-

(a) *Duck v. Bates*, L. R. 12, Q. B. D. 85. This case is at present under appeal.

(b) L.R. 11, Q. B. D. 102. In the court below, L. R. 9, Q. B. D. 727.

formance" must in each case be a question of fact to be determined according to the ordinary acceptance of those terms. (a) "Singing for one's own gratification," said the Master of the Rolls, "without intending thereby to represent anything or to amuse any one else, would not, I think, be either a representation or performance, according to the ordinary meaning of those terms, nor would the fact of some other person being in the room at the time of such singing make it so. But where, to give effect to the song, it is necessary that the singing should be made to represent something, or where it is performed for the amusement of other persons, then I think when this takes place it would be a representation or performance."

This language is very wide. If a host or hostess sings a copyright song for the amusement of the guests after a dinner party, this can hardly be such a "representation" or "performance" as the Legislature contemplated. If at an evening party wholly devoted to music such a song is sung, or an instrumental piece is played, for the amusement of those invited, is this a "representation" or "performance" of it for which the statutory penalty can be recovered? Neither the word "represent" nor "perform" is, indeed, according to the usual meaning of those terms, applicable to an ordinary song; the former suggesting something dramatic in its character, the latter being generally applied to instrumental compositions. But further, if a musical teacher invites all together the families of his pupils to hear some of the results of his teaching, and one pupil sings for the amusement of those assembled a dramatic song in character, whilst another performs a sonata on the piano, are the owners of the copyright entitled to sue for penalties?

In the *Law Journal* (b) the Master of the Rolls is reported as having said that the word "representing or performing" means that there must be *publicity*; and Field and Cave, JJ., in the Court below, considered the right conferred by statute to be the right of "performing in public." (c) And this, it is submitted, ought to be regarded as the true test. In other words that should be regarded as a "representation or performance" within the meaning of the Act to which any member of the public may obtain admittance either by payment or otherwise; that should not be deemed such to which one's private friends are alone invited.

The Master of the Rolls, on being consulted by Lord Cole-

(a) *Per Brett, M.R.*, L. R. 11, Q. B. D. 106, 107.

(b) 52 Q. B. D. 562.

(c) L. R. 9, Q. B. D. 732.

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Penalties.

ridge during the argument of the recent case of *Duck v. Bates* (*ante*, p. 239) said that the dicta above cited went beyond what he intended.

The inadequacy of the remedy by action for damages was pointed out by Bowen L.J.: "What pecuniary damage does an author suffer who finds that out of twenty songs sung at a concert one of them is his? Therefore an action for damages would really afford him no protection; neither would an injunction, because it might not be easy to prove that the offender intended to repeat the offence; and what has been sung at one time by one person may be sung afterwards by another person, and the author would never get protection if he could not recover a penalty." (a)

Knowledge not necessary to piracy.

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

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

Actual participation in representation necessary.

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

In that case the defendant had let a room in his tavern to a person who gave a musical entertainment there. After the entertainment had been continued for some nights, the defendant received a formal notice from the plaintiff's attorneys that certain of the pieces performed were the copyright property of the plaintiff, and warning him against causing or permitting them to be performed at his house. The defendant, notwithstanding this, permitted the entertainment to be continued, furnished the platform and lights for the performances, allowed bills of them to be put up in the tavern, and tickets of admission to

(a) P. 112.

(b) 3 C. B. 883.

(c) 8 C. B. 836.

be advertised to be sold at the bar, and he himself sold one ticket. The question for the decision of the Court was, did this conduct on the part of the defendant amount to a "representing or causing to be represented" within the meaning of the Acts? and the Court of Common Pleas held that it did not. "If it were to be held," said Wilde, C.J., "that all those who supply some of the means of representation to him who actually represents, are to be regarded as thereby constituting him their agent, and thus causing the representation within the meaning of the Act, such a doctrine would, we think, embrace a class of persons not at all intended by the Legislature."

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

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

can be said to do all that is done by those servants while under the command of that other." And with respect to the division of profits, Crompton, J., said: "The question is whether, looking at the present case fairly, it amounts to more than this—that the rent of the theatre is to be paid by part of the profits. In one respect, I do not agree with my brother Pigott;(a) I do not think that the defendant's divesting himself of control over the theatre would divest him of liability if he and Dillon were partners. Suppose there had been an agreement of partnership between the defendant and Dillon that each should contribute so much money, or that each should contribute so much capital, though of a different kind, and the theatre were taken between them. I should think the act of either was the act of both. But the authorities clearly show that two persons merely receiving payment out of the gross profits of a business does not make a partnership between them, even as against the world." Blackburn, J., added, "If the receipt of the money in this way was only a colourable pretence to escape the consequence of a partnership, I do not say that that would not have made a difference."

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

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

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

whereas here the defendant was the owner of the dramatic company, with whom the son performed the piece. The defendant, therefore, I think, in this case, caused such piece to be performed."

What is a representation within the Acts is a question for the jury. Where the jury found that the singing of two or three songs of the plaintiff's libretto to Weber's opera of "Oberon," was a representation of part of the plaintiff's composition, the Court of Common Pleas refused to grant a new trial.^(a) "It is difficult," said Tindal, C.J., "to say what is or is not a representation of part of a dramatic production: the subject *patitur majus et minus*, and it must be left to a jury to determine the fact." Vaughan, J., added, "We should be interfering with the province of the jury, if we did not leave it to them to say whether this was a representation of a part of the plaintiff's production."

What is a representation is a question for the jury.

CHAPTER XVII.

REMEDIES FOR INFRINGEMENT OF COPYRIGHT.

UNPUBLISHED WORKS.

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

Copyright in unpublished works.

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

The proprietor of unpublished innocent works may also restrain the authorised publication of them. In the leading

^(a) *Planché v. Braham* (4 Bing. N. C. 17). See the observations, approving and explaining this decision, of Lords Hatherley and O'Hagan, *Chatterton v. Cave* (L. R. 3 App. Cas. 473, 499).

^(b) *Ante*, pp. 24 seq.

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

^(d) Co. Lit. 285, a.

case of *Prince Albert v. Strange*(a) an injunction was granted to restrain the publication, not only of certain unpublished etchings belonging to the plaintiff, but even of a descriptive catalogue of them.

The unauthorised publication of works not previously published has also been restrained, in the case of a conveyancer's clerk, who sought to publish the conveyancing drafts of his deceased master,(b) and in the case of an attempted publication of notes belonging to another which had been surreptitiously obtained.(c) An injunction was also granted to restrain the publication of a certain paper of trials which the plaintiff had bought from the Lord Mayor.(d)

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

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

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

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

PUBLISHED WORKS.

In the case of published works the same remedies are open to the proprietor as in the case of unpublished works,

(a) 2 De G. & S. 652; 1 M. N. & G. 25; see the facts of this case, *ante*, pp. 26-30.

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

(c) *Forrester v. Weller* (*Ibid.*) (d) *Manley v. Owen* (*Ibid.* 2329).

(e) 2 Eden. 329.

(f) *Vide ante*, pp. 34 *seq.*; *Pope v. Curl* (2 Atk. 342); *Thompson v. Stanhope* (Amb. 737); *Percival v. Phipps* (2 V. & B. 19); *Geo v. Pritchard* (2 Swanst. 402); *per Story, J.*, in *Folsom v. Marsh* (2 St. Rep. 100, 111).

(g) 1 H. & T. 39; 3 L. J. 209, Ch.; *ante*, p. 39.

(h) *Vide ante*, pp. 39 *seq.*

and in addition, special penalties for infringement are by statute made recoverable from the offender. The enactments relating to the remedy by action at law are as follow :

BOOKS.

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

Special action
on the case.

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

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

(a) 12 C. B. 177.

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any rule by which the common law gives an action on the case for the violation of rights conferred by statute, would apply, and would render the unauthorised multiplication of copies by lithography the proper subject of an action. The Court held that sect. 15 did not take away the common law remedy by action where copies were multiplied by modes not enumerated in that section, and that if otherwise construed it would destroy the effect of the words "otherwise multiplying" in the interpretation clause.

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

Separate penalties for each sale.

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

Recovery of pirated copies by action.

By sect. 23 of 5 & 6 Vict. c. 45, "all copies of any book wherein there shall be copyright, and of which entry shall have been made in the said registry book, and which shall have been unlawfully printed or imported without the consent of the registered proprietor of such copyright in writing under his hand first obtained, shall be deemed to be the property of the proprietor of such copyright, and who shall be registered as such, and such registered proprietor shall, after demand thereof in writing, be entitled to sue for and recover the same, or damages for the detention thereof, in an action of detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover."(c)

The proprietor must, according to Fry, J.,(d) have been registered as such at the time the piratical copies were printed in order to be entitled to have them delivered up to him

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

(b) *Brooke v. Milliken* (3 T. R. 509). See *Ex parte Beal* (9 B. & S. 395; ante, p. 235).

(c) As to the non-existence at common law of any such right to the delivery up of pirated copies, see the remarks of Wigram, V.C., in *Colburn v. Simms* (2 Hare, 555, 12 L. J., Ch. 388).

(d) *Hole v. Bradbury* (L. R. 12 C. D. 886).

under this section. But the Court has power, under its general jurisdiction, to order delivery up for destruction of all articles created in violation of the plaintiff's rights.(a) According to the same learned judge, the provisions of sect. 16 as to notice of objections, do not apply to actions of trover or detinue under this section.(b)

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

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

Sect. 16 provides, "that after the passing of this Act, in any action brought within the British dominions against any person for printing any such book for sale, hire, or exportation, or for importing, selling, publishing, or exposing to sale or hire, or causing to be imported, sold, published, or exposed to sale or hire, any such book, the defendant, on pleading thereto, shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of such action; and if the nature of his defence be that the plaintiff in such action was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person whom he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when and the place where such book was first published, otherwise the defendant in such action shall not at the trial or hearing of such action be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein; and at such trial or hearing no other objection shall be allowed to be made on behalf of such defendant than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified in such notice, or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication with the title, time, and place specified in such notice."

This section, according to Fry, J.,(c) applies only to actions

(a) *Hole v. Bradbury* (L. R. 12 C. D. 886). See also *Kelly v. Hodge* (Seton, 4 ed. vol. i., p. 244).

(b) *Ibid.*

(c) *Ibid.*

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for infringement of copyright, and does not apply to actions for detinue or trover, asserting the right to copies under sect. 23.

Notwithstanding the words of the Act ("the defendant on pleading thereto," &c.) Bacon, V.C., in a case where the notice of objections was not served till after issue was joined and notice of trial given, dismissed the action for a defect in registration which appeared from the plaintiff's own evidence at the trial.(a)

Where one of the authors of a book and the daughter of the deceased joint author sued, an objection that the daughter did not represent her deceased father's estate was disallowed by Fry, J., no notice of it having been given under sect. 16, and nothing being said about it in the statement of defence.(b)

Requisites of
sect. 16 must
be strictly com-
plied with.

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

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

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

(a) *Cooté v. Judd* (L. R. 23 C. D. 727).

(b) *Hole v. Bradbury* (L. R. 12 C. D. 886).

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

(d) 4 Dow. & L. 153.

(e) 10 Jur. 1038.

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

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

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

"Time when"
first published.

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

"Place where"
first published.

In an action for infringement of copyright in a song, the statement of defence contained the following passage: "The defendant denies that the song has been duly registered. The time of first publication thereof is not truly entered on the register." It was held that this only entitled the defendant to prove that the time of first publication had been untruly entered, and that he was not at liberty to prove that the name of the publisher had been untruly stated. It was held also that leave to amend, so as to raise this point, ought not to be given, though it appeared for the first time by the plaintiff's own evidence at the trial that the name of the publisher had been untruly entered on the register.(c)

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

Objections too
vague.

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

(c) *Collette v. Goode* (L. R. 7 C. D. 842; 47 L. J., Ch. 370).

(d) 4 Dowl. & L. 155. The notice of objections as amended is given in a note to this case, p. 155. See also *Boosey v. Purday* (10 Jur. 1038).

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

Declaration in action.

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

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

Interrogatories.

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

Limitation of time for proceedings.

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

But this limitation of time is not to extend or be construed to extend to any actions, suits, or other proceedings which, under the authority of the Act, shall or may be brought, sued, or commenced for, or in respect of any copies of

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

(b) 14 Ir. Com. L. Rep. 158. (c) *Ibid.*, p. 174.

(d) *Wright v. Goodlake* (13 L. T. N. S. 120). (e) Sect. 26.

books to be delivered for the use of the British Museum, or of any one of the four libraries mentioned in the Act.(a).

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

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

These cases were followed by Hall, V.C., in *Hogg v. Scott*,(d) where the defendant had (in 1868 and 1872) published two editions of a work which was a piracy of one in which the plaintiff had copyright. The V.C. held that sect. 26 was not a bar to an action for an injunction to restrain the further printing, publishing, selling, or otherwise disposing of piratical copies. He said, after referring to sect. 15: "The plaintiff is suing in respect of his copyright, that is his property. The 26th section is no doubt not very happily framed; but I am of opinion that, on the true construction of that and the other sections of the statute, the 'offence' contemplated by it must be the doing, in contravention of its provisions, of something expressly prohibited by them. . . . The non-suing by the owner of the copyright in respect of a particular edition or part of an edition of the defendant's work is one thing; and even if it could be said that so far the owner's remedy was barred by his own neglect, still I find nothing in the statute which states that the person who has already published the edition or part of the edition complained of may go on doing so, and that if he does, the owner has then no remedy for such further offence;" and he considered the Scotch cases referred to quite consistent with good sense and the reasonable interpretation of the statute.

If any action or suit is commenced or brought against any person or persons for doing, or causing to be done anything in pursuance of the Act 5 & 6 Vict. c. 45, the defendant or defendants may plead the general issue and give the special matter in evidence; and if upon such action a verdict is given for the defendant, or the plaintiff is nonsuited or discontinues

Proceedings for anything done in pursuance of this Act.

(a) *Ibid.* (b) 13 Fac. Dec. 335, 29th February, 1804.
(c) 9 Scotch Sess. Cas. 2 Ser. 1029. (d) L. R. 18 Eq. 444.

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his action, the defendant is to recover his full costs, for which he is to have the same remedy as a defendant in any case by law has.(a)

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

ENGRAVINGS AND PRINTS.

We have already seen that the assignee of an engraver of a print may maintain an action for the piracy of it, though none of the Acts expressly gives him such a right.(c) The conditions which must be observed in order to ground an action for the piracy of engravings have been stated, *ante*, p. 111.

Action.

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

(a) Sect. 26.

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

(c) *Thompson v. Symonds* (5 T. R. 41), *ante*, pp. 182, 183.

the original print or prints, who are forthwith to destroy and damask the same; and every such offender or offenders shall also forfeit five shillings for every print which shall be found in his, her, or their custody, either printed or published and exposed to sale, or otherwise disposed of contrary to the true intent and meaning of the Act, one moiety thereof to go to the Crown and the other to any person or persons that shall sue for the same, to be recovered in any of the Courts of Record at Westminster, by action of debt, bill, plaint, or information, &c.

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

Summary procedure.

A further remedy, by action on the case for damages is given by 17 Geo. 3, c. 57. The words of the enactment are: "From and after the 24th day of June, 1777, if any engraver, etcher, printseller, or other person shall, within the time limited by the aforesaid Acts,^(b) or either of them, engrave, etch, or work, or cause or procure to be engraved, etched, or worked, in mezzotinto or chiaro oscuro, or otherwise, or in any other manner copy in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, or cause or procure to be printed, reprinted, or imported for sale, or shall publish, sell, or otherwise dispose of, or cause or procure to be published, sold, or otherwise disposed of, any copy or copies of any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever which hath or have been, or shall be engraved, etched, drawn, or designed in any part of *Great Britain* without the express consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of, and attested by, two or more credible witnesses, then every such proprietor or proprietors shall and may, by and in a special action upon the case, to be brought against the person or persons so offending, recover

Damages.

(a) 25 & 26 Vict. c. 68, s. 8.

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

such damages as a jury, on the trial of such action, or on the execution of a writ of inquiry thereon, shall give or assess, together with double costs of suit.”(a)

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

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

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

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

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

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

DRAMATIC AND MUSICAL COMPOSITIONS.

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

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

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

It is also provided that in every such proceeding, where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty without stating the same to be subject to such right or authority or otherwise mentioning the same.(c)

(a) See as to the effect of the words "place of dramatic entertainment" the cases of *Russell v. Smith* and *Duck v. Bate* referred to, *ante*, pp. 238, 239.

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

(c) *Ibid.*

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These provisions are extended to musical compositions by 5 & 6 Vict. c. 45, ss. 20, 21; but in the case of musical compositions, it is not necessary, in order to a recovery of the statutory penalty, that the unauthorised performance should be at a place of dramatic entertainment.(a)

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

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

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

PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.

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

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

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

"In Scotland by action before the Court of Session in ordinary form, or by summary action before the sheriff of the county where the offence may be committed or the offender resides, who, upon proof of the offence or offences, either by confession of the party offending,

(a) *Wall v. Taylor* (L. R. 11, Q. B. D. 102), *ante*, p. 240.

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

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

(d) For these penalties, *vide ante*, pp. 232-234.

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

or by the oath or affirmation of one or more credible witnesses, shall convict the offender, and find him liable to the penalty or penalties aforesaid, as also in expenses, and it shall be lawful for the sheriff, in pronouncing such judgment for the penalty or penalties and costs, to insert in such judgment a warrant, in the event of such penalty or penalties and costs not being paid, to levy and recover the amount of the same by pouncing: provided always, that it shall be lawful to the sheriff, in the event of his dismissing the action and assoilzieing the defender, to find the complainer liable in expenses, and any judgment so to be pronounced by the sheriff in such summary application shall be final and conclusive, and not subject to review by advocacy, suspension, reduction, or otherwise."

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

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

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

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

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

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

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his discharge; but the Lords Justices on appeal reversed this decision, holding that the process under which the debtor was arrested was of a criminal nature and not for a debt. Wood, L.J., considered that the argument that the debtor escapes by paying money, and therefore that imprisonment is only a process to enforce payment of money, was answered by the judgment of Blackburn, J., in *Bancroft v. Mitchell*.^(a) "Another answer to the same argument," said the Lord Justice, "is that there is the other process against him for damages. The imprisonment is the real punishment for the offence, but he can get off by paying the penalty." Selwyn, L.J., added, "Whether we take the letter or the spirit of the Act, the result is the same. If we look at the letter, the words used are 'penalty' and 'conviction,' all pointing to a criminal offence. If we look to the spirit of the Act, we find certain acts prohibited and treated as offences, and certain penalties imposed; and in addition to the penalty, the prosecutor may recover damages by action. The application for discharge must be dismissed with costs."

Injunction,
inspection, or
account.

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

Before the passing of this Act, in the case of *Mayall v. Higby*,^(b) where photographs were lent by the owner to another person who became insolvent, and, the photographs being sold, the purchaser, by photographically printing from

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

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

negatives, obtained reduced copies, which he published and sold, it was held that the owner of the originals, irrespectively of copyright, was entitled to a writ of injunction to restrain the further taking or selling of copies, and also to recover them or their value under a count in detinue.

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

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

SCULPTURE, MODELS, AND BUSTS.

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

If the sculpture, model, copy or cast has been registered under the Designs Act, 1850 (13 & 14 Vict. c. 104, s. 6), then in any case of piracy which would render the party offending liable to the special action last mentioned, he was also liable to forfeit for every offence a sum not less than £5 and not exceeding £30 to the proprietor of the sculpture, model, copy or cast of which the copyright had been infringed; and this penalty might be recovered in

(a) *Vide ante*, pp. 132-135.

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

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England(*a*) by an action of debt or on the case against the party offending, or by summary proceeding before two justices having jurisdiction where the party offending resides; in Scotland by action before the Court of Session in ordinary form, or by summary action before the sheriff of the county where the offence is committed, or the offender resides; in Ireland either by action in a Superior Court of law at Dublin, or by civil Bill in the Civil Bill Court of the county or place where the offence was committed.*(b)* This enactment is, however, no longer in force; for little use having for many years been made of the permission to register under this Act, the permission has, as already stated (*ante*, p. 134), been abolished by the Patent Designs and Trade Marks Act, 1883, 46 & 47 Vict. c. 57, s. 113, schedule 3.

REMEDY BY INJUNCTION.

Injunction.

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

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

Ground of interference by injunction.

Lord Eldon (*f*) thus states the grounds on which equity interferes by injunction in the case of infringements of copyright: "The jurisdiction upon subjects of this nature is assumed merely for the purpose of making effectual the legal right, which cannot be made effectual by any action for damages; as, if the work is pirated, it is impossible to

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

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

(*c*) 2 St. Eq. Jur. ss. 861, 862.

(*d*) 2 St. Eq. Jur. s. 886.

(*e*) 2 Daniell's Chanc. Pr. 1462.

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

lay before a jury the whole evidence as to all the publications which go out in the world to the plaintiff's prejudice. A Court of equity, therefore, acts with a view to make the legal right effectual by preventing the publication altogether. Elsewhere the same learned judge says: "The principle of granting the injunction in those cases is, that damages do not give adequate relief; and that the sale of copies by the defendant is in each instance not only taking away the profit upon the individual book which the plaintiff probably would have sold, but may injure him to an incalculable extent, which no inquiry for the purpose of damages can ascertain.(a)

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

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

Courts of equity used formerly to direct an issue to be tried by a jury in a court of common law in order to determine the plaintiff's title to copyright. Sect. 1 of 25 & 26 Viet. c. 42, directed that every question of law or fact, cognizable in a court of common law, on the determination of which the title to the relief or remedy sought in a court of equity depends, should be determined by or before that court, unless (sect. 2) where questions of fact might be more conveniently determined at the assizes or in a court of common law in Westminster or Middlesex, in which cases issues of fact might be directed to be tried as before.(d)

Since the Judicature Act, as already pointed out, all branches of the High Court have equal powers.

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

(b) *Lowndes v. Duncombe* (2 Cowp. 216). See also *Byron v. Dugdale* (1 L. J. Ch. 239).

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

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

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DAMAGES.

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

Where injunction would be mischievous.

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

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

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

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

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

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

course to abstain from exercising its jurisdiction till the legal right has been determined."(a)

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

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

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

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

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

(a) See remarks of Hall, V.C., in *Smith v. Chatto* (31 L. T. N. S. 755).

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

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

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

(e) *Dilly v. Doig* (2 Ves. 486).

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apparently new in such cases, and which may be susceptible of an erroneous interpretation.”(a)

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

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

It has been observed that nothing, in general, can call forth a court of equity into activity but conscience, good faith, and personal diligence; and one of the leading maxims that guides its interference is—*Vigilantibus non dormientibus equitas subvenit*.(c) If one slumbers over his rights instead of asserting them in proper time, or if one, by his conduct, acquiesces in or encourages the infringement of a right which he afterwards seeks to enforce, equity has refused to grant its aid.

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

(a) *Dickens v. Lee* (8 Jur. 185). Notwithstanding the language of the report the meaning is clear.

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

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

(d) 3 My. & Cr. 711.

plaintiffs are entitled, under the circumstances, to the interposition of the Court to protect their legal right, when that legal right has not been yet established. But I assume the existence of the legal right, and I say that whatever legal right the plaintiffs may have, the circumstances are such as to make it the duty of a court of equity to withhold its hand, and to abstain from exercising its equitable jurisdiction, at all events until the plaintiffs shall come here with the legal title established. In doing this, I am only doing what Lord Eldon did in *Rundell v. Murray*, and what is very generally done upon questions of patent right. The Court always exercises its discretion whether it shall interfere by injunction before the establishment of the legal right."

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

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

If any delay occurs in the assertion of the title to a copyright infringed, the delay must be accounted for to the

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

(b) Coop. Ch. Cas. 304.

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Right to an
account.

satisfaction of the Court, otherwise no assistance will be given.(a)

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

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

And before the Judicature Act it was held that a Court of equity had no jurisdiction with reference to a mere question of damages unless the primary right to an injunction exists.(d)

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

Curtis, J., in that case, after referring to the law relating to profits made by one member of a partnership, said: "The jurisdiction in cases of copyright rests upon a similar principle. If the proprietor will waive his action for damages, he may have an account of profits, upon the ground that the defendant has, by dealing with his property, made gains which equitably belong to the complainant. And I perceive no sound reason for restricting those gains to the difference between the cost and the sale price of the map or book, or limiting the right to an account to those persons who have sold the work solely on their own account. He who sells on commission does in truth sell on his own account, so far as he is entitled to a per-

(a) See *Bailey v. Taylor* (1 R. & M. 76; s. c. Tamlyn, 295); *Mawman v. Tegg* (2 Russ. 385, 393); *Lewis v. Chapman* (3 Beav. 135); *Lewis v. Fullarton* (2 Beav. 6); *Buxton v. James* (5 De G. & Sm. 80, 84); per Wood, V.C., in *Tinsley v. Lacy* (11 W. R. 877; 32 L. J. 539, Ch.); and the analogous cases as to patent, *Bridson v. Benecke* (12 Beav. 3); per Lord Brougham, C. in *Crossley v. Derby Gas Light Company* (4 L. J. 26, Ch.; per Wood, V.C., in *Smith v. London and South-Western Railway Company* (1 Kay, 416, 417). See the observations of Hall, V.C., in *Hogg v. Scott* (L. R. 18 Eq. pp. 453, seq.), and the decision of Bacon, V.C., in *Maxwell v. Somerton* (30 L. T. N. S. 11), and the case of *Weldon v. Dicks* (L. R. 10 C. D. 247)

(b) 1 Kay, 417.

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

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

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

centage on the amount of the sales. What he so receives is the gross profit coming to him from the proceeds of the sale, and what he so receives diminishes the net profit of the one who employs him to sell. That part of the profits of the sales, being in the hands of the commission merchant, the consignor is not accountable for them. But why should not the commission merchant, who has them, account for them? He was liable to an action for damages for selling. That right is waived. I think he should pay over to the proprietor, in lieu of the damages, the gain he has made from the sales. It does not seem to me that the term 'profits' necessarily, or, when construed in reference to the subject matter, properly has so restricted a meaning as to exclude commissions received from the proceeds of sales of the property of the complainant."(a)

In *Delfe v. Delamotte*(b) it was argued that sect. 23 of 5 & 6 Viet. c. 45, making pirated copies the property of the proprietor of the copyright, entitled him to the gross receipts for copies sold, and not merely to the net profits realized; but Wood, V.C., decreed only an account and payment of net profits, saying that if the plaintiff wanted more, his remedy was at law.

On this decision Fry, J., remarks in a recent cause:(c) "I am unable to reconcile the judgment with the order made; because it appears that the Vice-Chancellor expressed his opinion that the plaintiff must proceed at law if he desired delivery up of the copies; but the order stated in *Kay & Johnson's Reports*, and referred to in *Seton on Decrees*, was for delivery to the plaintiff; and I think, further, in the case of *Stannard v. Harrison*(d), Vice-Chancellor Bacon upheld the decree by consent for delivering up the copies, holding that the whole of the decree was within the power of the Court."

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

Where some pages of an article on a subject under public discussion at the time, were extracted from a monthly periodical and commented on by a weekly newspaper, Lord Cottenham, in dissolving an injunction which had been

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

(b) 3 K. & J. 581.

(c) *Hole v. Bradbury* (L. R. 12 C. D. 903).

(d) 19 W. R. 811.

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

Injunction where value of property is small.

obtained, said: "It is impossible to say there is any value in the nature of the property in what is here inserted; the question is so minute as a question of property or value—how far, in point of value, it interferes with the sale of the *Monthly Chronicle*. The injunction is not to depend altogether on a question of account; but to what value the question in point of utility is to be carried. If no other danger were to arise from granting this application than what would be consequent in encouraging the litigation of such minute inquiries, it would be a sufficient ground to refuse it, that the Court should not be so occupied to the exclusion of other matters which press upon it." The injunction is dissolved, each party paying their own costs.(a)

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

Sale of pirated copies after expiration of term.

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

Injunction where only part of work is pirated.

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

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

The presiding judge has frequently made the comparison for himself.(f) In some cases a reference has been made to

(a) *Bell v. Whitehead* (3 Jur. 68; 8 L. J. Ch. 141); *Whittingham v. Wooler* (2 Swanst. 460). See also *per* Lord Eldon in *Matthewson v. Stockdale* (12 Ves. 275); and *Cox v. Land and Water Journal Company* (L. Rep. 9 Eq. 324; 21 L. T. N. S. 548; 39 L. J. 152, Ch.; 18 W. R. 207).

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

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

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

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

(f) See the cases of *Matthewson v. Stockdale* (12 Ves. 277); *Whitting-*

the master to report to what extent one book is pirated from another;(a) and in one case Lord Hardwicke thought the best course was to get a report from two persons of learning in the law, chosen by the litigants themselves.(b)

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

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

The remedy by injunction may be applied, even where a new offence, with a penalty for it, is created by statute.(e)

The peculiar nature of the case may sometimes render the remedy by injunction inappropriate, even where the piracy is clearly established. Thus Malins, V.C., refused to grant an interlocutory injunction to restrain the publication in a weekly paper of a "list of hounds," which he was satisfied was copied from the list published in another weekly paper.(f) The Vice-Chancellor, after referring to the rule that where the information is open to all who seek to obtain it, each publisher must, nevertheless, get it at his own expense and as the result of his own labour, and is not entitled to the results of the labour undergone by others, said: "But in this case, as in many others, the question arises, is it a case for the interference of the Court of Chancery at all? and if it is a case for interference, is it a case for interference on an interlocutory application? Now, I do not think it is a case to be decided on an interlocutory application; and my reason is this: this list must be corrected from week to week; it could not be a correct list from the 1st of November until April, or to the end of the hunting-season. Changes must take place; the list of masters, huntsmen, and whips can hardly continue to be correct even for

Remedy by
injunction
sometimes
inappropriate.

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

(a) *Carnan v. Bowles* (2 Bro. C. C. 85); *Nicol v. Stockdale* (12 Ves. 227); *Story's Executors v. Derby* (4 M'Lean, 160, 161).

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

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

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

(e) *Cooper v. Whittingham* (L. R. 15 C. D. 501).

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

a week. Now, suppose I were to grant an injunction, how can it be acted upon? The defendants have only to issue a fresh circular, make an urgent appeal for answers, or send a person by rail and get the information from the masters of the hunts, and next week bring out a very correct list; and how am I to know the way in which they got their information? At present, I do not see that I can interfere. Whether the plaintiff is entitled to any remedy I do not at present decide, but I do not think it a case for an injunction, though the defendants are not entitled to avail themselves of the plaintiff's labours. . . . I would suggest to the parties that the wisest thing would be to let the bill be dismissed without costs. But if they do not agree, then I simply refuse the motion, leaving the case to be decided at the hearing. It may be a question for damages, but I shall certainly not grant an injunction."

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

Not necessary to state in bill or affidavit parts pirated.

It was held not necessary for a person who complains that his copyright has been infringed and seeks an injunction, to specify, either in his bill or his affidavit, the parts of the defendant's work which he thinks have been pirated from his work: it was sufficient to allege generally that the defendant's work contains several passages which have been pirated from the plaintiff's, and to verify the rival works by affidavit.(b)

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

Costs.

Where the action to enforce his copyright is brought successfully by a plaintiff who has been guilty of no misconduct,

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

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

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

the Court has, according to the opinion of Jessel, M.R.,(a) no discretion to refuse him costs.

“There may,” said his lordship, “be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind, the rule is plain and well settled, and is as I have stated it. It is, for instance, no answer where a plaintiff asserts a legal right for a defendant to allege his ignorance of such right and to say, ‘If I had known of your right I should not have infringed it.’”

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

Sale of stereo-
type plates.

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

Publication
disparaging a
rival work.

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

(a) *Cooper v. Whittingham* (L. R. 15 C. D. 501).

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

(c) *Seeley z. Fisher* (11 Sim. 581).

(d) *Ibid.* 583.

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CHAPTER XVIII.

AMERICAN LAW OF COPYRIGHT.

General law
throughout the
United States.

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

Local copyright.

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

Copyright Acts.

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

Terms of
copyright.

The term of copyright fixed by the Act of 1870 (retained in the revised statutes) is twenty-eight years from the time of recording the title thereof, with a right of renewal for fourteen years more (thus making the whole term forty-two years), if, at the expiration of the first period, the author, inventor, or designer, is still living, and a citizen of the United States, or resident therein. If he has died, leaving a widow or

(a) Art. 1, sect. 8.

(b) See *Gibbons v. Ogden* (9 Wheat. 186).

(c) *Livingston v. Van Ingen* (9 Johns. 581).

(d) *Ibid.*

children, the same exclusive right is continued to them for the further term of fourteen years. But, in either case, all the conditions as to recording the title of the work, &c., required in the first instance, must be observed with respect to this renewed copyright within six months before the expiration of the first term. A copy of the record must also, within two months from the date of the renewal, be published in one or more newspapers printed in the United States for the space of four weeks.(a)

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

It would seem that under this section the author can assign only the copyright actually vested in him at the time of assignment, and not the copyright for the additional term before it has been acquired.(c) When the additional term of copyright has been acquired, the right to assign it has also been doubted, but it is difficult to conceive what ground there can be for the doubt.

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

No common law right.

Even what has been termed copyright before publication is not, in America, dependent solely on the common law. Sect. 4967 of the Act of 1870, as contained in the Revised Statutes, provides that any person who shall print or publish any manuscripts whatever, without the consent(e) of the author or proprietor first obtained (if such author or proprietor be a citizen of the United States or resident therein) shall be liable to said author or proprietor for all damages occasioned by such injury.

Unpublished manuscripts.

The similar enactment in the statute of 1831 was held not to take away the right of property which the author possesses at common law in his works before publication, and which he may protect by action at law, or by claiming

(a) Sects. 4953, 4954 of Revised Statutes.

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

(c) *Picrpont v. Fowle* (2 Wood. & Min. 23).

(d) *Dudley v. Mayhew* (3 Coms. 12); *Wheaton v. Peters* (8 Pet. 661); *Clayton v. Stone* (2 Paine, 383).

(e) The Act of 1831 (now repealed) required this consent to be in writing, signed in the presence of two or more credible witnesses: (Sect. 9). As to the continued existence of the common law right, see the judgment in *Boucicault v. Hart* (13 Blatch. p. 59).

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the aid of a Court of Chancery, which will be given on general equitable principles.(a)

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

A surreptitious publication of an important part of a manuscript is as much within the statute as if the manuscript were complete; and the whole of a manuscript need not be printed.(c)

Whether the enactment as to unpublished manuscripts operates in favour of a resident of the United States, who has acquired the proprietorship of an *unprinted* literary composition from a non-resident alien author, is not clearly settled; but it gives no redress for an unauthorised theatrical representation in such a case.(d)

It has been said that the alienage of an author is no obstacle to him or his assignee suing for a violation or to prevent a violation of his rights of property in his unpublished works;(e) but the language of Sect. 4967 leaves the matter open to grave doubt.

Definition of
copyright.

Copyright is defined to be the sole liberty of printing, reprinting, publishing and vending.(f)

Subject matters
in which copy-
right is granted.

Sect. 4952 of the Act enumerates the subject matters in which copyright is granted—viz., book, map, chart, dramatic or musical composition, engraving, cut, print or photograph, or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and in the case of a dramatic composition, the sole liberty of publicly performing or representing it, or causing it to be performed or represented by others; and authors may reserve the right to dramatise, or to translate their own works.

Who may
possess
copyright.

The Act confers copyright only on those who are citizens of the United States, or resident therein. The word "resident" has been interpreted to mean permanently resident; so that a person temporarily residing in America, even though he has declared his intention of becoming a citizen, cannot take or hold a copyright.(g) If, however,

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

(b) *Bartlett v. Crittenden* (5 M'Lean, 36, 38). (c) *Ibid.* 39, 40.

(d) *Keene v. Wheatley* (9 Amer. Law Reg. 45); *Boucicault v. Hart* (13 Blatch. 47).

(e) *Palmer v. De Witt* (47 N. Y. 540). (f) Sect. 4952.

(g) *Cary v. Collier* (56 N. Y. Reg. 262). The question is treated as one of fact, and the evidence in that case (relating to Captain Marryat,

a bonâ fide intention to make the United States his home exists at the time of recording the title, the author may acquire a copyright, though he should subsequently change his mind.(a)

The illiberality of the rule, which requires permanent residence in order to entitle to copyright, contrasts very disadvantageously with the rule of our law on the subject, as laid down in the cases of *Jefferys v. Boosey* and *Low v. Routledge* (*ante*, pp. 16 and 21).

Sect. 4971 provides that nothing contained in the Act shall be construed to prohibit the printing, publishing, importation, or sale of any book, map, chart, dramatic or musical composition, print, cut, engraving, or photograph, written, composed, or made by any person not a citizen of the United States, nor resident therein.

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

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

No person is to be "entitled to a copyright" unless, (1) before publication, he deposits in the mail a printed copy of the title of the book, or other article, or a description of the painting, drawing, chromo, statue, statuary, or model or design for a work of the fine arts, for which he desires a copyright, addressed to the librarian of Congress,(f) and also, (2) within ten days from the publication, deposits in the mail two copies of such book, or other article, or in case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of the same, to be addressed to the said librarian of Congress.(g) He must also, in order

Originality.
Requisites to be observed.

an officer in the British Navy) was considered to negative the intention declared.

(a) See *Boucicault v. Wood* (2 Biss. 34).

(b) *Atwill v. Ferrett* (2 Blatch. 46). See *per Story, J.*, quoted *ante*, pp. 76, 77.

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

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

(e) *Ibid.*

(f) Sect. 4956.

(g) Sect. 4959.

to maintain an action. (3) print on the title-page or page next following of every book, or in the case of a map, musical composition, print, drawing, photograph, &c., inscribe on some visible part of it, or on the substance on which it is mounted, notice of entry of copyright in the prescribed form.(a)

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

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

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

On the book being sent to the librarian of Congress, that officer is to record the name of the copyright book or other article forthwith in a book to be kept for that purpose in a printed form, and is to give a copy of the title or description, under the seal of the librarian of Congress, to the proprietor whenever he requires it.(e)

The form of notice of entry of copyright is as follows:—
"Entered according to Act of Congress, in the year , by A. B., in the office of the librarian of Congress, at Washington."(f)

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

Piracy of books.

If any one, after the recording the title of any book according to the Act, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, print, publish, or import, or knowing the same to be

(a) Sect. 4962.

(b) Sect. 4959.

(c) *Bartlett v. Crittenden* (5 M'Lean, 37).

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

(e) Sect. 4957.

(f) Sect. 4962.

(g) Sect. 4963.

so printed, published, or imported, shall sell or expose to sale any copy of such book, such offender shall forfeit every copy thereof to the said proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any Court of competent jurisdiction.(a)

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

Maps, prints,
musical compo-
sitions, &c

The exclusive right to publicly perform a dramatic composition is dependent upon the existence of a copyright therefor.(c)

Dramas.

Where a printed copy of the title of a dramatic composition was deposited, pursuant to statute, in October, 1874, and a bill was filed in February, 1875, to restrain an infringement of the copyright in it, but the bill did not allege any publication of the work, or any delivery of copies, it was held, on demurrer, that the bill did not show that a complete copyright had been obtained.(d)

It was held in the same case that where the dramatic composition still remained in manuscript, the representation of it on the stage, for the benefit and under the control of the author, was not an abandonment or dedication of it to the public, nor a publication of it within the provisions of the copyright statute.

(a) Sect. 4964.

(c) *Boucicault v. Hart* (13 Blatch. 47).

(b) Sect. 4965.

(d) *Ibid.*

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Dramatic representations.

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

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

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

Piracy in general.

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

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

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

Limitation of actions.

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

Remedies for infringement.

The circuit Courts of the United States, or any district Court having the jurisdiction of a circuit Court, are empowered upon Bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violation of any rights secured by the copyright laws according to the course and principles of Courts of equity, on such terms as the Court may deem reasonable.(j)

The jurisdiction given to the Federal Courts by the Acts

- (a) Sect. 4966. (b) *Keene v. Wheatley* (9 Amer. Law Reg. 44).
 (c) *Ibid.* (d) *Folsom v. Marsh* (2 St. 115).
 (e) *Story's Executors v. Holcombe* (4 M'Lean, 309, 310).
 (f) *Millett v. Snowden* (1 West. L. J. 240).
 (g) *Stowe v. Thomas* (2 Amer. Law Reg. 230).
 (h) *Rogers v. Jewett* (12 Mo. L. Rep. 340, 341). (i) Sect. 4968.
 (j) Sect. 4970.

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

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

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

Assignment of
copyright.

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

CHAPTER XIX.

COPYRIGHT IN DESIGNS.

ALL previous legislation affecting Copyright in Designs has been repealed by the Patents, Designs and Trade Marks Act 1883, (g) Parts III. and V. of which contain all the statute law now relating to the subject.

Patents, Designs
and Trade Marks
Act 1883.

The requisites to copyright are, (1) the design must be new and original; (2) it must be registered; (3) neither it nor any article to which it is applied must have been previously exhibited, nor any description of it published, otherwise than as allowed by sect. 57; (4) before sale the prescribed number of exact representations or specimens must be furnished to the Comptroller.

When a new and original design is registered, the registered proprietor of the design is henceforth, subject to the provisions

Duration of
copyright.,

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

(b) *Woolsey v. Judd* (4 Duer. 382).

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

(d) Sect. 4955.

(e) Sect. 4498.

(f) Sect. 4951.

(g) 46 & 47 Vict. c. 57, s. 113, Third Schedule.

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of this Act, to have in all cases copyright in the design during five years from the date of registration,^(a) instead of, as formerly, for periods varying from nine months to five years, according to the class of article to which it was applied.

No provisional registration.

It is further to be observed that the provisional registration allowed by the former Acts is no longer permitted.

Definition of "design."

"Design" means any design applicable to any article of manufacture, or to any substance artificial or natural, or partly artificial and partly natural, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical, or chemical, separate or combined, not being a design for a sculpture, or other thing within the protection of the Sculpture Copyright Act of the year 1814 (fifty-fourth George the Third, chapter fifty-six).^(b)

The distinction is no longer maintained between the application of the design to purposes of ornament and its applications to purposes of utility.

Definition of "copyright."

"Copyright" means the exclusive right to apply a design to any article of manufacture or to any such substance as aforesaid in the class or classes in which the design is registered.^(c)

Design must have reference to shape or configuration.

On the construction of the repealed Act sect. 6 & 7 Vict. c. 65, giving protection to designs "for the shape or configuration" of any article having reference to some purpose of utility, it was held that, if the utility of the design were not produced by the "shape or configuration" of any of the parts, but only by the mode of putting them together, the design did not come within the Act, the Act not applying to designs which have reference to a purpose of utility through the combination of parts, independently of their shape and figuration.^(d)

Thus, where the design was for a ventilator, consisting of a thin metallic frame occupying the place of one of the panes of the upper sash of a window, containing a whole pane and a half of glass, the one within the other, so as to appear, when the ventilator was closed, to be one single pane; the frame being hinged at the top, so as to open by means of a straight screw, the head of which formed a pulley, over which were passed cords for the purpose of turning it, and

(a) Sects. 47, 50.

(b) Sect. 60.

(c) *Ibid.*

(d) *Reg. v. Bessell* (16 Q.B. 810; 20 L.J. 177, M.C.; 15 Jur. 773).

so of either opening or shutting the ventilating pane; the half pane of glass being fixed in the lower portion of the frame, in which the ventilating frame moved, in order to prevent a downward draught of cold air; and the registration of the design stated that the part or parts of the design which were not new or original were "all the parts taken *per se*, and apart from the purposes thereof," and that what was claimed as new was "the general configuration and combination of the parts;" it was held by the Court of Queen's Bench that the design was not for "the shape or configuration" of an article of manufacture within the Act, and was, therefore, not the subject of registration.^(a) "It appears to me," said Erle, J.,^(b) "that this invention is not within the meaning of the statute. It is a skilful combination of means for producing an end. But the statute applies only to shape or configuration; and, in producing the end which is here attained, shape and configuration are immaterial. The figure of the pane in the drawing is an oblong rectangle; a square or a circular pane would produce the same result. The screw is straight; a crooked screw would produce the result equally well, perhaps better." "Combination," said Patteson, J.,^(c) "is not 'shape.' What the general meaning of 'configuration' is, I cannot exactly define; but the word must, I think, have been used by the Legislature to denote some relation to shape visible to the eye. Here there is nothing peculiar in the shape; all depends upon the way in which the parts are put together; that is, as has been rightly said, upon the general combination. The case is not, therefore, within stat. 6 & 7 Vict. c. 65."

The design of a newly-invented brick, having on two of its opposite sides a semicircular cavity, corresponding with a similar cavity in the brick which was to be placed next to it, so that when two were laid together a cylindrical aperture was formed; and when the bricks were built into a wall, and the apertures fitted to each other, the air was admitted to circulate, and a saving in the number of bricks required was effected, was held to be a design which might be registered under 6 & 7 Vict. c. 65.^(d) "The novelty," said Wightman, J.,^(e) "is in the new shape and configuration of that ancient article of manufacture called a brick; and I agree with my brother Erle, that it is precisely such a specimen of a new design for an article of manufacture,

(a) *Reg. v. Bessell, ubi supra.*

(b) 16 Q. B. 818.

(c) *Ibid.* 817.

(d) *Rogers v. Driver* (16 Q. B. 102; 20 L. J. 31, Q. B.).

(e) 16 Q. B. 108.

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having reference to a purpose of utility, as might have been referred to by the Legislature as explanatory of their meaning.”

The applicability of the Act to the design of a “protector label,” which consisted in making, in the label, an eyelet-hole, and lining it with a ring of metallic substance, through which a string, attaching the label to packages, passed, was considered so doubtful by Knight Bruce, V.C., that he refused an injunction, before the hearing, against an infringement of such design.(a)

A design consisting of a particular collocation of shaded and bordered stars, on an ornamental chain surface, forming together the ornamentation of a woven fabric, was held to be a design protected by 5 & 6 Vict. c. 100.(b)

New combina-
tion of old
patterns.

It was held that a new combination of old patterns might be “a new and original design” within 5 & 6 Vict. c. 100, and entitled to the protection of that Act.(c)

Thus, where a person designed a pattern for woollen cloths, in which large and small honeycomb cells were so arranged that a border of the larger cells surrounded an enclosed portion of the smaller cells, though neither the large nor the small honeycomb was new, it was held by the Court of Exchequer Chamber, reversing the decision of the Court of Exchequer, that this combination of the two was a new and original design within the meaning of the Act.(d)

“I cannot help thinking,” said Wightman, J., “that the Court of Exchequer, in their decision, proceeded upon a supposed analogy between the case of an invention for which a patent is obtained, and a design which comes under the protection of the Act for amending the laws relating to the copyright of designs for ornamenting articles of manufacture. The Act uses the words ‘any new and original design.’ That is not a project or idea in the nature of an invention, but the representation of something which a draughtsman has for the first time produced. If that be the true meaning of the word ‘design,’ there is no doubt

(a) *Margetson v. Wright* (2 De G. & S. 420). And see *Millingen v. Picken* (1 C. B. 799), where it was doubted whether a mechanical contrivance within the stem of a parasol, for raising or lowering it with one hand, was a design for the shape or configuration of an article of manufacture within the Act. See also *Windover v. Smith* (32 Beav. 200; 7 L. T. N. S. 776; 32 L. J. 561, Ch.).

(b) *Holdsworth v. M’Crae* (L. Rep. 2 Eng. & Ir. App. 380; 36 L. J. 297, Q. B.; S. C., in Courts below, 5 B. & S. 495; 33 L. J. 329, Q. B.; L. Rep. 1 Q. B. 264; 35 L. J. 123, Q. B.; 13 L. T. N. S. 801).

(c) *Harrison v. Taylor* (4 H. & N. 815; 29 L. J. 3, Ex.).

(d) *Ibid.*

in this case that there was a design; for there was a drawing, and it was an original drawing. It is true that all its component parts had already been produced; but no one had produced such a pattern. It was said in the Court below that this was 'a mere combination in a manner well-known.' So it is with a picture: all its parts may be old, but the combination forms a new design."*(a)*

So it has been held that a new and original combination, to be protected as a design, may be the result of simultaneously applying two old and known designs to the ornamenting of a button.*(b)*

But where four old designs were respectively applied to three ribbons and a button, the three ribbons being then united so as to form a badge, Lord Hatherley (when Vice-Chancellor Wood) considered it so very doubtful whether this union amounted to a new design within 5 & 6 Vict. c. 100, that he refused to grant an injunction to restrain the manufacture and sale of a similar combination.*(c)*

A design consisting of a double card-basket, formed of a combination of two baskets, admitted to be separately old in design, was held not to be a new and original design by Malins, V.C.*(d)*

The same judge decided similarly as to the portrait of a public personage, copied from a photograph and applied as a design upon earthenware.*(e)*

A new combination must, in order to be protected, constitute one design, and not a multiplicity of designs.*(f)*

New combination must constitute one design.

Thus, where a person claimed the protection of 5 & 6 Vict. c. 100, for a shawl which he contended was new in respect of the five following points: (1) a reversible cloth, with the two sides of different texture and colours; (2) a scallop pattern on parts of the shawl; (3) a particular border round the shawl; (4) a particular configuration of the corners of the shawl; (5) a newly invented fringe to surround the shawl; all which points had been in public use before, but the combination of them in the case of his shawl was new, the Court of Queen's Bench was strongly

(a) 4 H. & N. 820.

(b) *Req. v. Firman*, referred to by Lord Campbell, C.J., in *Norton v. Nicholls* (1 El. & El. 765; 27 L. J. 225, Q. B.; 7 W. R. 421; 33 L. T. 181); and *arguendo* in *Harrison v. Taylor* (3 H. & N. 301, 304).

(c) *Mulloney v. Stevens* (10 L. T. N. S. 190).

(d) *Lazarus v. Charles* (L. R. 16 Eq. 117).

(e) *Adams v. Clementson* (L. R. 12 C. D. 714).

(f) *Norton v. Nicholls* (1 El. & El. 761; 27 L. J. 225, Q. B.; 7 W. R. 420; 33 L. T. 131).

inclined to think that such a combination was not a "design" within the meaning of the Act.^(a) "The five points relied upon," said Lord Campbell, C.J., "being all old, no distinction is to be made between them and any other, in the texture, configuration, or ornaments of the shawl. Therefore the combination supposed to constitute the design which the plaintiff now seeks to protect, comprehends all that is to be discovered on both sides of the shawl, colour as well as shape. We do not doubt that a combination may be a 'design' within the meaning of the statute: and we adhere to the decision of this court in *Reg. v. Firman*, cited in *Harrison v. Taylor*,^(b) that a new and original combination, to be protected as a 'design,' may be the result of simultaneously applying two old and known designs to the ornamenting of a button. But, having regard to the language of the Act of Parliament, and to the object of the Legislature, we think that the result of the combination, to be protected as a 'design,' must be one design and not a multiplicity of designs. The statute does not mention any article of manufacture being a design, but considers the design to be protected as 'applicable to the ornamenting of any article of manufacture.' The 'design' is always considered different from the 'article of manufacture or the substance to which it is to be applied.' This is particularly to be observed in sect. 3, in which the articles of manufacture are enumerated, 'to which' the design 'is to be applied.' An ornament for a lady's gown may well be a 'design' to be protected, although the ornament be the result of a new combination of lace and ribands: but the whole gown itself could hardly be such a 'design,' although it be granted that the compound parts and ornaments, before well-known separately, are arranged according to a fashion entirely new. Such an extension of the statute is quite unnecessary for the object which the Legislature seems to have had in view; and we need not point out the great public inconvenience which would arise if we were to put such a construction upon it."

Who is
"proprietor."

The author of any new and original design shall be considered the proprietor thereof, unless he executed the work on behalf of another person for a good or valuable consideration, in which case such person shall be considered the proprietor; and every person acquiring for a good or valuable consideration a new and original design or the right to apply the same

(a) *Norton v. Nicholls* (1 El. & El. 761; 27 L. J. 225, Q. B.; 7 W. R. 420; 33 L. T. 131).

(b) 3 H. & N. 301, 304.

to any such article or substance as aforesaid, either exclusively of any other person or otherwise, and also every person on whom the property in such design or such right to the application thereof shall devolve, shall be considered the proprietor of the design in the respect in which the same may have been so acquired, and to that extent, but not otherwise.(a)

On the similar words of the old Act,(b) Jessel, M.R., laid it down that in order for a man to be a proprietor, he must have some right, either general or limited, "to apply the design." Therefore, where the plaintiff agreed to purchase from C., an American, a number of cases of an article newly designed and about to be manufactured, together with the exclusive right to sell the article in England, for a price agreed upon, which was to cover both the right and the goods: the plaintiff to obtain such protection as he could do under English law, and to get the goods only from C., it was held that the plaintiff was not entitled to register himself as proprietor. His lordship was of opinion that the purchaser never had the "right to apply" the design to any article manufactured: C. still retained the right to manufacture the articles, the plaintiff being entitled only to the sole right of selling in England.(c)

In this case, the contract being made in July and the money not being paid till the goods were delivered in the following September, nothing passed to the purchaser until the delivery of the goods in September; so that even if the contract had amounted to a transfer of copyright, the transfer did not take place till then.

REGISTRATION OF DESIGNS.

On application by or on behalf of any person claiming to be the proprietor of any new or original design(d) not previously published in the United Kingdom, the Comptroller General of Patents, Designs and Trade Marks may register the design under this part of this Act.(e)

The application must be made in the form set forth(f) in the First Schedule to the Act, or in such other form as may be from time to time prescribed, and must be left at, or sent by post to, the Patent Office in the prescribed manner.(g)

The application must contain a statement of the nature of the design, and the class or classes of goods in which the applicant desires that the design be registered.(h)

(a) Sect. 61.

(b) 5 & 6 Vict. c. 100, s. 5.

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

(d) As to what designs are new and original, *vide ante*, pp. 283, 284.

(e) Sect. 47. (f) See the form set forth *post*, p. 289, note (a).

(g) *Ibid.* subsect. 2.

(h) *Ibid.* subsect. 3.

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 Registration in
 more than one
 class.

The same design may be registered in more than one class, and, in case of doubt as to the class in which a design ought to be registered, the Comptroller may decide the question.(a)

For the purposes of the registration of designs, goods are (by the Designs Rules 1883, Rule 5) classified in the manner following:—

CLASSES.

1. Articles composed wholly or partly of metal, not included in Class 2.
2. Jewellery.
3. Articles composed wholly or partly of wood, bone, ivory, papier maché, or other solid substances not included in other classes.
4. " " glass, earthenware or porcelain, bricks, tiles, or cement.
5. " " paper (except hangings).
6. " " leather, including bookbinding, of all materials.
7. Paper hangings.
8. Carpets and rugs in all materials, floorecloths, and oil-cloths.
9. Lace, hosiery.
10. Millinery and wearing apparel, including boots and shoes.
11. Ornamental needlework on muslin or other textile fabrics.
12. Goods not included in other classes.
13. Printed or woven designs on textile piece goods.
14. " " handkerchiefs and shawls.

**Consequence of
 registering
 under wrong
 class.**

The consequence of registering a design under a wrong class appears not to have been judicially determined; but a mistake of this kind could hardly be held to excuse a piracy.(b)

Agents.

All communications between an applicant for the registration of a design and the Comptroller or the Board of Trade, as the case may be, may be made by or through an agent duly authorised to the satisfaction of the Comptroller.(c)

(a) Sect. 47, subsects. 4 and 5.

(b) See *per Moore, J., Lowndes v. Browne* (12 Ir. L. R. 303).

(c) Rule 6.

An application for the registration of a design shall, with the prescribed fee, be left at the Patents Office, Designs Branch, or be sent prepaid by post, addressed to the Comptroller at the Patents Office (Designs Branch), 25, Southampton Buildings, Chancery Lane, London.(a)

An application for the registration of a design, and all drawings, sketches, photographs, or tracings of a design, and all other documents sent to or left at the Patent Office, Designs Branch, or otherwise furnished to the Comptroller or to the Board of Trade, shall be written, printed, copied, or drawn upon strong wide-ruled foolscap paper (on one side only), of the size of 13 inches by 8 inches, leaving a margin of not less than one inch and a half on the left-hand part thereof, and the signature of the applicants or agents thereto must be written in a large and legible hand.(b)

The Comptroller may in any particular case vary the requirements of this rule as he may think fit.(c)

On application for registration of a design the applicant must furnish to the Comptroller the prescribed number of drawings, &c. to be furnished when application made.

(a) Rule 7 of the Designs Rules, 1883. By Rule 4 an application for the registration of a design is to be in the following form:—

APPLICATION FOR REGISTRATION OF DESIGN IN
CLASSES _____.

You are hereby requested to register the accompanying design in Class _____, in the name of * _____ of _____ who claims to be the proprietor thereof, and to return the same to

* Here insert legibly the name, address, and description of the individual or firm.

Statement of nature of design † _____

† Such as whether it is applicable for the pattern or for the shape.

(Signed) _____ ‡

‡ To be signed by the applicant.

Dated the _____ day of _____ 188_____.

To the Comptroller,
Patent Office, Designs Branch,
25, Southampton Buildings,
Chancery Lane, London, W.C.

(b) Rule 8.

(c) *Ibid.*

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copies of drawings, photographs, or tracings of the design sufficient, in the opinion of the Comptroller, for enabling him to identify the design; or the applicant may, instead of such copies, furnish exact representations or specimens of the design.(a)

This is a relaxation of the old rule, which required that exact copies of the design should be furnished.

Sketches and drawings.

Nature of design.

By Rule 9 of the Designs Rules, 1883, the application for the registration of a design is to be accompanied by a sketch or drawing, or by three exactly similar drawings, photographs, or tracings of the design, or by three specimens of the design, and shall, in describing the nature of the design, state whether it is applicable for the pattern or for the shape or configuration of the design, and the means by which it is applicable.

When sketches, drawings, or tracings are furnished they must be fixed.

When the articles to which designs are applied are not of a kind which can be pasted into books, drawings, photographs, or tracings of such designs must be furnished.

Amendments.

Any document, drawings, sketches, or tracings for the amending of which no special provision is made by the Act may be amended, and any irregularity in procedure which, in the opinion of the Comptroller, may be obviated without detriment to the interest of any person may be corrected, if the Comptroller think fit, and upon such terms as he may direct.(b)

Enlargement of time.

The time prescribed by the Rules for doing any act or taking any proceeding thereunder may be enlarged by the Comptroller, if he think fit, and upon such terms as he may direct.(c)

Applications may be sent by post.

Any application, notice, or other document authorised or required to be left, made, or given at the Patent Office or to the Comptroller or to any other person under the Designs Rules, 1883, may be sent by a prepaid letter through the post, and if so sent shall be deemed to have been left, made, or given respectively at the time when the letter containing the same would be delivered in the ordinary course of post.(d)

Acknowledgment to applicant.

On receipt of an application for registration, the Comptroller is to send to the applicant an acknowledgment thereof.(e)

Patterns."

In a case decided under 21 & 22 Vict. c. 70, s. 50 (which

(a) Sect. 48.

(b) Rule 30.
(d) Rule 12.

(c) Rule 31.
(e) Rule 10.

permitted registration of a "pattern" of the article to which the design was applied), it was held that where a pattern consisting of different parts, any one of which might be considered a "design," was registered, the claim was to the whole combination, and not to any of the parts thus combined; none of the parts, taken separately, being protected by such registration, though the pattern taken as a combination was.^(a)

In this case Lord Westbury pointed out, "as well for warning to inventors as for the protection of the public, that if a design, as exhibited in a pattern, is filed and registered by an inventor, without any further limitation or description than that which is given by the design itself, it protects the entire thing and the entire thing only; the protection cannot, at pleasure, be made applicable one day to the entirety and another day to the separate integral parts or elements of the entire design. It must be considered that the protection of the statute is invoked for the entire thing that appears upon the register, and is applicable to nothing but the exact copy of the thing so registered."

"That which is different in shape and form, or in the relative positions of its several parts, which is not a reproduction of it, as a *replica* or copy of a picture, would not be an infringement of the thing so specified."^(b)

The Comptroller may, if he thinks fit, refuse any drawing, photograph, tracing, representation, or specimen which is not, in his opinion, suitable for the official records.^(c)

Power of refusal given to Comptroller.

The Comptroller may also, if he thinks fit, refuse altogether to register a design presented to him for registration;^(d) but in this case any person aggrieved by such refusal may appeal therefrom to the Board of Trade.

By section 94 of the Act the applicant is given a right to be heard, before the Comptroller exercises adversely to him any discretionary power.

Hearing by Comptroller.

Before exercising any discretionary power given to the Comptroller by the Act adversely to an applicant for registration of a design, the Comptroller is to give him ten days notice of the time when he may be heard personally or by his agent before the Comptroller.^(e)

Within five days from the date when such notice would be delivered in the ordinary course of post, the applicant must

(a) *Holdworth v. M'Crea* (L. R. 2 Eng. & Ir. App. 380).

(b) *Ibid.* p. 388.

(c) Sect. 48.

(d) Sect. 48, subsect. 6. There is also a special provision in sect. 86 empowering the Comptroller to refuse to register a design or trade-mark of which the use would, in his opinion, be contrary to law or morality.

(e) Rule 13.

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Notification of
Comptroller's
decision.

Appeal to Board
of Trade.

Notice of
appeal to Board
of Trade.

Statement on
appeal.

Notice to
Secretary of
Board of Trade.

Directions by
Board of Trade.

notify to the Comptroller whether or not he intends to be heard upon the matter. *(a)*

The decision or determination of the Comptroller in the exercise of any such discretionary power as aforesaid must be notified to the applicant. *(b)*

The Board of Trade must, if required, hear the applicant and Comptroller, and may make an order determining whether, and subject to what conditions, if any, registration is to be permitted. *(c)*

Where the Comptroller refuses to register a design, and the applicant intends to appeal to the Board of Trade from such refusal, he must, within one month from the date of the decision appealed against, leave at the Patent Office, Designs Branch, a notice of such his intention. *(d)*

Such notice must be accompanied by a statement of the grounds of appeal, and of the applicant's case in support thereof. *(e)*

The applicant must forthwith on leaving such notice send a copy thereof to the Secretary of the Board of Trade, No. 7, Whitehall Gardens, London. *(f)*

The Board of Trade may thereupon give such directions

(a) Rule 14.

(b) Rule 15.

(c) Sect. 47, subsect. 7.

(d) Rule 16. The following is the form given in the 2nd Schedule to the Designs Rules, 1883 :—

APPEAL TO BOARD OF TRADE ON REFUSAL OF COMPTROLLER
TO REGISTER A DESIGN.

[To be accompanied by an unstamped copy.]

SIR,

I hereby appeal against your decision upon my application
to register _____

* The statement of the case to be written upon foolscap paper (on one side only), with a margin of two inches on the left-hand side thereof.

and beg to submit my case* for the decision of the Board of Trade.

I am, Sir,

Your obedient servant,

The Comptroller,
Patent Office, Designs Branch,
25, Southampton Buildings,
Chancery Lane, London, W.C.

(e) Rule 17.

(f) Rule 18.

(if any) as they may think fit for the purpose of the hearing of the appeal for the Board of Trade.(a)

Notice of time of hearing.

Seven days notice, or such shorter notice as the Board of Trade may in any particular case direct, of the time and place appointed for the hearing of the appeal shall be given to the Comptroller and the applicant.(b)

The Comptroller may, in any case of doubt or difficulty arising in the administration of any of the provisions of this Act, apply to either of the law officers for directions in the matter.(c)

Power of Comptroller to take directions of law officers.

If the Comptroller determines to register a design, he shall as soon as may be send to the applicant a certificate of such registration in the prescribed form, sealed with the seal of the Patent Office.(d)

Notice of registration.

Upon the sealing of a certificate of registration the Comptroller is to cause to be entered in the register of designs the name, address, and description of the registered proprietor, and the date upon which the application for registration was received by the Comptroller, which day shall be deemed to be the date of the registration.(e)

Registering design.

There is to be kept at the patent office a book called the Register of Designs, in which are to be entered the names and addresses of proprietors of registered designs, notifications of assignments and of transmissions of registered designs, and such other matters as may from to time be prescribed.(f)

Register of Designs.

The register of designs is to be *prima facie* evidence of any matters by the Act directed or authorised to be entered therein.(g)

(a) Rule 19.

(b) Rule 20.

(c) Sect. 95.

(d) Rule 11. The following is the form given in Schedule 2 to the Designs Rules, 1883:—

CERTIFICATE OF REGISTRATION OF DESIGN.

(Rⁿ No. _____.)

Patent Office, Designs Branch.

25, Southampton Buildings,

Chancery Lane, London, W.C.

This is to certify that the Design of which this is a copy was registered this _____ day of _____ 188____, in pursuance of the Patents, Designs, and Trade Marks Act, 1883, in respect of the application of such Design to articles in Class _____, for which a copyright of five years is granted.

(e) Rule 21.

(f) Sect. 55.

(g) *Ibid.*

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Certificate of registration.

The Comptroller is to grant a certificate of registration to the proprietor of the design when registered; and the Comptroller may, in case of loss of the original certificate, or in any other case in which he deems it expedient, grant a copy or copies of the certificate.(a)

Trusts not to be registered.

No notice of any trust expressed, implied or constructive is to be received by the Comptroller or entered in the register.(b)

Inspection of registered designs.

During the existence of copyright in a design, the design is not to be open to inspection except by the proprietor, or a person authorised in writing by the proprietor, or a person authorised by the Comptroller or by the Court, and furnishing such information as may enable the Comptroller to identify the design; nor except in the presence of the Comptroller, or of an officer acting under him, nor except on payment of the prescribed fee; and the person making the inspection shall not be entitled to take any copy of the design, or of any part thereof.(c)

When the copyright in a design has ceased, the design shall be open to inspection, and copies thereof may be taken by any person on payment of the prescribed fee.(d)

Information as to existence of copyright.

On the request of any person producing a particular design, together with its mark of registration, or producing only its mark of registration, or furnishing such information as may enable the Comptroller to identify the design, and on payment of the prescribed fee, it is the duty of the Comptroller to inform such person whether the registration

(a) Sect. 49. The following form is given in the Schedule to the Rules of 1883:—

APPLICATION FOR COPY OF CERTIFICATE OF REGISTRATION
OF DESIGN.

SIR,

I hereby request you to furnish me with a Copy Certificate of Registration of Design No. _____ in Class _____.

(Signed) _____

Dated the _____ day of _____ 188 _ .

To the Comptroller,

[Addressed as in previous notices.]

Sect. 85.

(c) Sect. 52.

(d) *Ibid.*

still exists in respect of such design, and if so, in respect of what class or classes of goods, and stating also the date of registration, and the name and address of the registered proprietor.(a)

The Comptroller may, on receipt of the prescribed fee, make searches among the designs registered at the Patent Office after the commencement of the Act, and inform any person requesting him so to do whether a particular design produced by such person, and to be applied to goods in any particular class, is or is not identical with, or an obvious imitation of, any design applied to such goods and registered since the commencement of the Act.(b)

Search on production of sketch or design.

If a registered design is used in manufacture in any foreign country, and is not used in this country within six months of its registration in this country, the copyright in the design is to cease.(c)

Copyright to cease in certain events.

Before delivery on sale of any articles to which a registered design has been applied, the proprietor must (if exact representations or specimens were not furnished on the application for registration), furnish to the Comptroller the prescribed number of exact representations or specimens of the design; and if he fails to do so, the Comptroller may erase his name from the register, and thereupon his copyright in the design shall cease.(d)

Before sale specimens must be furnished to Comptroller.

Before delivery on sale of any articles to which a registered design has been applied, the proprietor of the design must cause each such article to be marked with the prescribed mark, or with the prescribed word or words or figures, denoting that the design is registered; and if he fails to do so the copyright in the design shall cease, unless the proprietor shows that he took all proper steps to ensure the marking of the article.(e)

Marking registered designs before sale.

Before the delivery on sale of any article to which a registered design has been applied, the proprietor of such design must, if such article is included in any of the classes one to twelve (*ante*, p. 288), cause each such article to be marked with the abbreviation "Rⁿ" and the number appearing on the certificate of registration, and shall, if such article is included in the classes thirteen or fourteen, cause each such article to be marked with the abbreviation "REGⁿ."(f)

How to be marked.

Under the repealed 5 & 6 Vict. c. 200 s. 4, it was held that if the proprietor, whether English or foreign, sold the registered article abroad without the prescribed mark, he lost

(a) Sect. 53.

(b) Rule 35.

(c) Sect. 54.

(d) Sect. 50, subsect. 2.

(e) Sect. 51.

(f) Rule 32.

his copyright.(a) Lord Romilly, M.R. said: "It is not of the slightest importance whether the sale is at Calais or at Dover: the spirit, the meaning and the words of the Act are clear, and they apply to every person and to every place."

Where the inventor of new designs published and sold them in a book, registered under the 5 & 6 Viet. c. 100, and containing a notice that persons wishing to manufacture them for purposes of sale, must have the inventor's permission, it was held that the book did not require to be stamped with the letters "R^o," under sect. 4 of the Act.(b)

It was held by the majority of the Court of Queen's Bench (Lord Campbell, C.J., and Wightman, J.; *dissentiente* Coleridge, J.), in the case of *Heywood v. Potter*,(c) that the sale of patterns only of certain small pieces of paper-hangings containing the whole design, registered under 5 & 6 Viet. c. 100, but not bearing the prescribed mark, disentitled the proprietor to protection against parties copying the design from such pattern pieces, and publishing articles with such design applied to them. The majority of the Court considered that these pattern pieces were "articles of manufacture" within sect. 4 of the Act, and that every article, containing the design secured, should, if put forth by the manufacturer in the ordinary course of trade, contain the mark intended to be a caution to the public that the design of the article had been secured to the proprietor by registration. Lord Campbell said he could not see that any limit was fixed to the size of the article so put forth. Coleridge, J., on the other hand, considered that these pieces, sold merely as patterns, could not properly be considered as paper hangings. "There is," he said, "a broad distinction, as it seems to me, between the pattern of an article and the article itself; between what is the ordinary subject of trade and what is put forth, as it were, to induce such trade."

This was remedied by sect. 4 of 21 & 22 Viet. c. 70, which provided that nothing in the 4th section of the Copyright of Designs Act, 1842, should extend or be construed to extend to deprive the proprietor of any new and original design, applied to ornamenting any article of manufacture contained in the 10th class, of the benefits of the Copyright of Designs Acts, or of this Act, provided there should have been printed

(a) *Sarazin v. Hamel* (32 Beav. 145, 151; 32 L. J. Ch. 380).

(b) *De la Branchardière v. Elvery* (4 Exch. 380; 18 L. J. 381, Ex.).

(c) 1 E. & Bl. 439; 22 L. J. 133, Q. B.

on such articles, at each end of the *original piece* thereof, the prescribed mark &c.

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The present Act repeals both the Acts just referred to, but contains no provision on the subject.

If any person describes any design applied to any article sold by him as registered which is not so, he is liable for every offence on summary conviction, to a fine not exceeding £5.(a)

Penalty for falsely describing design as registered.

He will be deemed so to describe the design if he sells the article with the word "registered," or any word or words expressing or implying that registration has been obtained for the article stamped, engraved or impressed on, or otherwise applied to the article.(b)

The exhibition at an industrial or international exhibition, certified as such by the Board of Trade, or the exhibition elsewhere during the period of the holding of the exhibition, without the privity or consent of the proprietor, of a design, or of any article to which a design is applied, or the publication, during the holding of any such exhibition, of a description of a design, is not to prevent the design from being registered, or invalidate the registration thereof, provided that both the following conditions are complied with; namely,—

Exhibition at industrial or international exhibition not to prevent or invalidate registration.

- (1) The exhibitor must, before exhibiting the design or article, or publishing a description of the design, give the Comptroller the prescribed notice of his intention to do so; and
- (2) The application for registration must be made before or within six months from the date of the opening of the exhibition.(c)

Any person desirous of exhibiting a design, or any article to which a design has been applied, at an industrial or international exhibition, or of publishing a description of a design during the period of the holding of the exhibition, must, after having obtained from the Board of Trade a certificate that the exhibition is an industrial or international one, give to the Comptroller seven days' notice in writing of his intention to exhibit the design or article, or to publish a description of the design, as the case may be. For the purpose of identifying the design in the event of an application to register the same being subsequently made, the applicant must furnish to the Comptroller a brief description of the nature of the design, accompanied by a sketch or drawing thereof, and

Notice of exhibition.

(a) Sect. 105.

(b) *Ibid.*

(c) Sect. 57.

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CHAPTER XIX.

Entry of assignments and transmissions in registers.

such other information as the Comptroller may in each case require.(a)

Where a person becomes entitled by assignment, transmission, or other operation of law to the copyright in a registered design, the Comptroller, on request, and on proof of title to his satisfaction, is to cause the name of such person to be entered as proprietor of the copyright in the design in the register of designs.(b)

The person for the time being entered in the register of designs as proprietor of a copyright in a design shall, subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licences as to, or otherwise deal with, the same, and to give effectual receipts for any consideration for such assignment, licence, or dealing. Provided that any equities in respect of such design may be enforced in like manner as in respect of any other personal property.(c)

Mode of transferring copyright.

By the repealed Acts the copyright in designs might be transferred by any writing purporting to be a transfer, and signed by the proprietor: and forms of transfer and authority to register were given (d) The present Act contains no provision on the subject.

Jessel, M.R., was of opinion that under the repealed Acts a partial assignment or licence must also have been in writing.(e)

(a) Rule 36. The following is the form of notice given in the Schedule to the Rules of 1883:—

NOTICE OF INTENDED EXHIBITION OF AN UNREGISTERED
DESIGN.

* Here state name and address of applicant.

*

_____ hereby give notice of my intention to exhibit a _____

of _____ at the _____

† State "opened" or "is to open."

Exhibition, which † _____

of _____ 188____, under the provisions of the Patents, Designs, and Trade Marks Act of 1883 ‡ _____

‡ Insert brief description of Design, with drawing.

_____ herewith enclose a _____

(Signed) _____

Dated _____ day of _____ 188____.

To the Comptroller,

[Addressed as in previous notices.]

(b) Sect. 85.

(c) Sect. 87.

(d) 5 & 6 Vict. c. 100, s. 6; 6 & 7 Vict. c. 65, s. 6.

(e) See the chapter on Transfer of Copyright, *ante*, p. 185.

The same learned judge was of opinion that an assignee or licensee could not register before the proprietor had himself registered. It will be observed that the new section speaks only of the assignment, &c., of the copyright in a "registered" design.

Where a person becomes entitled to the copyright in a registered design, or to any share or interest therein, by assignment, transmission, or other operation of law, or where a person acquires any right to apply the design either exclusively or otherwise, a request (a) for the entry of his name in the register as such proprietor of the design, or as having acquired such right, as the case may be (hereinafter called the claimant), must be addressed to the Comptroller, and left at the Patent Office, Designs Branch. (b)

Subsequent proprietors.

Every such request shall, in the case of an individual, be

Signature to request.

(a) The following is the form given in Schedule 2 to the Designs Rules, 1883 :—

REQUEST TO ENTER NAME OF SUBSEQUENT PROPRIETOR OF DESIGN,
WITH DECLARATION IN SUPPORT THEREOF.

I, [*] _____
hereby request that you will enter [†] _____ name [‡] _____ in the
Register of Designs as proprietor _____ of the Design No. _____ in
Class _____
[§] _____ entitled as to the said Design _____
[¶] _____

* or We.
Here insert name, full address, and description.
† My or our.
‡ Or names.
§ I am, or We are.
¶ Here state whether design transmitted by death, marriage, bankruptcy, or other operation of law, and if entitled by assignment state the particulars thereof as, e.g., "by deed dated the _____ day of _____ 188 _____ made between So-and-so of the one part."
¶ This paragraph is not required when the declaration is made out of the United Kingdom.
•• To be signed here by the person making the declaration.
†† Signature and title of the authority before whom the declaration is made.

[•] And I do solemnly and sincerely declare that the above several statements are true, and the particulars above set out comprise every material fact and document affecting the proprietorship of the said Design as above claimed.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

[•*]

Declared at _____

_____ this _____ day of _____ 188 _____

Before me,

[††]

To the Comptroller,

[Addressed as before.]

(b) Rule 22.

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made and signed by the person requiring to be registered as proprietor; and in the case of a firm or partnership, by some one or more members of such firm or partnership, or, in either case, by his or their agent respectively duly authorised to the satisfaction of the Comptroller; and in the case of a body corporate, by their agent authorised in like manner.(a)

Particulars in request.

Every such request shall state the name, address, and description of the claimant, and the particulars of the assignment, transmission, or other operation of law by virtue of which the request is made, so as to show the manner in which and the person or persons to whom the design has been assigned or transmitted, or the person or persons who has or have acquired such right as aforesaid, as the case may be.(b)

Statutory declaration with request.

Every such request must also be accompanied by a statutory declaration to be thereunder written verifying the several statements therein, and declaring that the particulars above described comprise every material fact and document affecting the proprietorship of the design or the right to apply the same, as the case may be, as claimed by such request.(c)

Proof of title if required.

The claimant must furnish to the Comptroller such other proof of title as he may require for his satisfaction.(d)

Corporate name.

A body corporate may be registered as proprietor by its corporate name.(e)

Comptroller's discretion as to evidence.

Where under these Rules any person is required to do any act or thing, or to sign any document, or make any declaration on behalf of himself or of any body corporate, or any document or evidence is required to be produced to, or left with, the Comptroller or at the Patent Office, and it is shown to the satisfaction of the Comptroller that from any reasonable cause such person is unable to do such act or thing, or to sign such document, or make such declaration, or that such document or evidence cannot be produced or left as aforesaid, it shall be lawful for the Comptroller, with the sanction of the Board of Trade, and upon the production of such other evidence and subject to such terms as they may think fit, to dispense with any such act or thing, document, declaration, or evidence.(f)

Inspection of and extracts from registers.

The register kept is to be at all convenient times open to the inspection of the public, subject to such regulations as may be prescribed; and certified copies, sealed with the seal of the Patent Office, of any entry in any such register are to be given to any person requiring the same on payment of the prescribed fee.(g)

(a) Rule 23.

(b) Rule 24.

(c) Rule 25.

(d) Rule 26.

(e) Rule 27.

(f) Rule 29.

(g) Sect. 88. On such days and during such hours as the Comp-

Printed or written copies or extracts, purporting to be certified by the Comptroller and sealed with the seal of the Patent Office, of or from registers and other books kept there, are to be admitted in evidence in all Courts in Her Majesty's dominions, and in all proceedings, without further proof or production of the originals.(a)

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Sealed copies to be received in evidence.

troller shall from time to time determine and notify by a placard posted at the Patent Office any person paying the prescribed fee may, on production of the number of any design of which the copyright has ceased, inspect such design, and any person paying the prescribed fee may take a copy or copies of such design. Office hours.

(a) Sect. 89. Where a certificate is required for the purpose of any legal proceeding or other special purpose as to any entry, matter, or thing which the Comptroller is authorised by the said Act or these Rules to make or do, the Comptroller may, on a request in writing and on payment of the prescribed fee, give such certificate, which shall also specify on the face of it the purpose for which it has been requested as aforesaid (Rule 34). Certificate in legal proceedings.

The following forms are given in Schedule 2 to the Rules of 1883:—

REQUEST FOR CERTIFICATE FOR USE IN LEGAL PROCEEDINGS.

SIR,

I hereby request you to send me for the purposes of use in the suit of (*) _____

a certificate that the design of which a copy is herein enclosed was (+) _____

(Signed) _____

_____ day _____ 188_____ .

To the Comptroller,
[Addressed as before.]

* Here state the title of the legal proceedings or the other purpose for which the certificate is required.
† Here state the entry, matter, or thing which the writer wishes certified.

CERTIFICATE FOR USE IN LEGAL PROCEEDINGS.

In the matter of _____

No. _____

I, _____ Comptroller-General of Patents,

Designs, and Trade Marks, hereby certify that _____

Witness my hand and seal this _____ day of _____ 188_____ .

Comptroller.

Patent Office, Designs Branch,
25, Southampton Buildings,
London.

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Certificate of
Comptroller to
be evidence.

Rectification
of registers by
Court.

A certificate purporting to be under the hand of the Comptroller as to any entry, matter, or thing which he is authorised by this Act, or any general rules made thereunder, to make or do, shall be *prima facie* evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone.(a)

The Court(b) may on the application of any person aggrieved by the omission without sufficient cause of the name of any person from any register kept under the Act, or by any entry made without sufficient cause in any such register, make such order for making, expunging, or varying the entry as the Court thinks fit; or the Court may refuse the application; and in either case may make such order with respect to the costs of the proceedings as the Court thinks fit.(c)

The Court may, in any proceeding under this section, decide any question that it may be necessary or expedient to decide for the rectification of a register, and may direct an issue to be tried for the decision of any question of fact, and may award damages to the party aggrieved.(d)

Any order of the Court rectifying a register shall direct that due notice of the rectification be given to the Comptroller.(e)

If any rectification of a register under the Act is required, in pursuance of any proceeding in a Court in Scotland or Ireland, a copy of the order, decree, or other authority for the rectification must be served on the Comptroller, who is to rectify the register accordingly.(f)

Notice of order
of Court.

Where an order has been made by the Court, under section 90 of the Act, the person in whose favour such order has been made shall forthwith leave at the Patent Office an office copy of such order. The register shall thereupon be rectified, or the purport of such order shall otherwise be duly entered in the register, as the case may be.(g)

Power for Comptroller to correct clerical errors.

The Comptroller may, on request in writing, accompanied by the prescribed fee,—

- (1) Correct any clerical error in, or in connexion with, an application for registration of a design; or
- (2) Correct any clerical error in the name, style, or address of the registered proprietor.(h)

(a) Sect. 96.

(b) "The Court" means in England and Ireland, Her Majesty's High Court of Justice; and in Scotland, any Lord Ordinary of the Court of Session (sects. 111, 117).

(c) Sect. 90.

(d) *Ibid.*

(e) *Ibid.*

(f) Sect. 111.

(g) Rule 28.

(h) Sect. 91.

If any person makes or causes to be made a false entry in any register kept under this Act, or a writing falsely purporting to be a copy of an entry in any such register, or produces, or tenders, or causes to be produced or tendered in evidence any such writing, knowing the entry or writing to be false, he shall be guilty of a misdemeanor.^(a)

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CHAPTER XIX.
Falsification of
entries in
registers.

INFRINGEMENT OF COPYRIGHT AND REMEDIES.

During the existence of copyright in any design—

Penalty.

- (1.) It shall not be lawful for any person, without the licence or written consent of the registered proprietor, to apply such design or any fraudulent or obvious imitation thereof, in the class or classes of goods in which such design is registered, for purposes of sale to any article of manufacture or to any substance artificial or natural or partly artificial and partly natural; and
- (2.) It shall not be lawful for any person to publish or expose for sale any article of manufacture or any substance to which such design, or any fraudulent or obvious imitation thereof, shall have been so applied, knowing that the same has been so applied without the consent of the registered proprietor.

Any person who acts in contravention of this section shall be liable for every offence to forfeit a sum not exceeding £50 to the registered proprietor of the design, who may recover such sum as a simple contract debt by action in any Court of competent jurisdiction.^(b)

Under the similar provisions of former acts it was held that the manufacture, within the period of protection of articles to which a registered design is applied without authority, although without the intention of selling them within that period, is piracy.^(c)

Under the repealed act, 5 & 6 Vict. c. 100, s. 7, making it piracy to sell or expose for sale, either with knowledge of non-consent by the proprietor, or after being served with a written notice signed by the proprietor or his agent to a like effect, it was held that the following was not a sufficient statement, that the proprietor of the copyright had not given his consent to the application of his design to a particular manufactured article: "I hereby further give you notice that in case you apply such design, or any fraudulent imitation thereof, for

(a) Sect. 93.

(b) Sect. 58.

(c) *McCree v. Ho'dsworth* (2 De G. & S. 499).

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any purpose whatsoever, or publish, sell, or expose for sale any article of manufacture, or any substance to which such design, or any fraudulent imitation thereof, shall have been so applied, contrary to the true intent and meaning of the said Act of Parliament, the said Joseph Norton(*a*) will institute such proceedings as he may be advised for the recovery of the penalties which you may thereby incur, and also for the recovery of the damages which he may thereby sustain, and likewise to restrain you from any further violation of the said Act of Parliament.”(*b*)

“The notice,” said Lord Campbell, C.J., delivering the judgment of the Court of Queen’s Bench, “does say that if the defendants either apply the design to an article of manufacture, or sell or expose to sale an article of manufacture with the design applied to it, he will sue them; but we cannot think that this is tantamount to a notice that he had not given his consent to the application of his design to the manufactured article. Such notice is perfectly consistent with the fact of his having actually given his consent, and cannot, we think, be considered the performance of a condition introduced to save retail dealers from very serious liability. It is likewise worthy of observation that the notice gives no indication of the plaintiff’s real claim, and that this remained a mystery till the trial began.”(*c*)

Action for damages.

Notwithstanding the remedy given by the Act for the recovery of such penalty as aforesaid, the registered proprietor of any design may (if he elects to do so) bring an action for the recovery of any damages arising from the application of any such design, or of any fraudulent or obvious imitation thereof for the purpose of sale, to any article of manufacture or substance, or from the publication, sale, or exposure for sale by any person of any article or substance to which such design, or any fraudulent or obvious imitation thereof shall have been so applied, such person knowing that the proprietor had not given his consent to such application.(*d*)

Fees on registration, &c.

There shall be paid in respect of applications and registration and other matters under this part of this Act such fees as may be from time to time, with the sanction of the Treasury, prescribed by the Board of Trade; and such fees shall be levied and paid to the account of Her Majesty’s

(*a*) The notice was given “for and on behalf of Mr. Joseph Norton,” by his solicitor and agent, and stated at its commencement that the design had been registered.

(*b*) *Norton v. Nicholls* (1 El. & El. 761; 5 Jur. N. S. 1205; 7 W. R. 420).

(*c*) *Ibid.*

(*d*) Sect. 59.

Exchequer in such manner as the Treasury shall from time to time direct.(a)

Power is given to the Board of Trade from time to time to make such general rules and do such things as they think expedient, subject to the provisions of this Act, for regulating the practice of registration under this Act; for classifying goods for the purposes of designs and trade marks; and generally for regulating the business of the Patent Office, and all things by this Act placed under the direction or control of the Comptroller or the Board of Trade.(b)

Any of the forms in the first schedule to this Act may be altered or amended by rules made by the Board; and general rules may be made under this section at any time after the passing of this Act, but not so as to take effect before the commencement of this Act, and shall (subject as hereinafter

(a) Sect. 56. The following is the Schedule of fees annexed to the Designs Rules, 1883:—

FEES.	£	s.	d.
1. On application to register one design to be applied to single articles in each class except classes 13 and 14	0	10	0
2. On application to register one design to be applied to single articles in classes 13 and 14	0	1	0
3. On application to register one design to be applied to a set of articles for each class of registration	1	0	0
4. On notice of appeal to Board of Trade against refusal of Comptroller to register	1	0	0
5. Copy of certificate of registration, each copy	0	1	0
6. On request for Certificate of Comptroller for legal proceedings or other special purpose	0	5	0
7. On request to enter name of subsequent proprietor	} same as registration fee.		
8. On notice to Comptroller of intended exhibition of an unregistered design	0	5	0
9. Inspection of design of which the copyright has expired, for each quarter of an hour	0	1	0
10. Copy of one such design	} cost according to agreement.		
11. On request to correct clerical error	0	5	0
12. On request for search under section 53	0	5	0
13. On request to enter new address	0	5	0
14. For office copy, every 100 words	0	0	4
	(but never less than 1s.)		
15. For certifying office copies, MS. or printed	0	1	0

NOTE.—The term “set” to include any number of articles ordinarily on sale together irrespective of the varieties of size and arrangement in which the particular design may be shown on each separate article.

(b) Sect. 101.

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 To be laid before
 Parliament.

mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed.(a)

Any rules made in pursuance of this section shall be laid before both Houses of Parliament, if Parliament be in session at the time of making thereof, or, if not, then as soon as practicable after the beginning of the then next session of Parliament, and they shall also be advertised twice in the official journal to be issued by the Comptroller. If either House of Parliament, within the next forty days after any rules have been so laid before such House, resolve that such rules or any of them ought to be annulled, the same shall after the date of such resolution be of no effect, without prejudice to the validity of anything done in the meantime under such rules or rule, or to the making of any new rules or rule.(b)

Applications
 and notices by
 post.

Any application, notice, or other document authorised or required to be left, made, or given at the Patent Office, or to the Comptroller, or to any other person under this Act, may be sent by a prepaid letter through the post; and if so sent shall be deemed to have been left, made, or given respectively at the time when the letter containing the same would be delivered in the ordinary course of post.(c)

In proving such service or sending, it shall be sufficient to prove that the letter was properly addressed and put into the post.(d)

Declaration
 by infant,
 lunatic, &c.

If any person is, by reason of infancy, lunacy, or other inability, incapable of making any declaration or doing anything required or permitted by the Act, or by any rules made under the authority of the Act, then the guardian or committee (if any) of such incapable person, or if there be none, any person appointed by any Court or judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested in the making such declaration or doing such thing, may make such declaration or a declaration as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of such incapable person, and all acts done by such substitute shall for the purposes of the Act be as effectual as if done by the person for whom he is substituted.(e)

Isle of Man.

The Act extends to the Isle of Man, and—

Nothing in this Act is to affect the jurisdiction of the Courts in the Isle of Man in proceedings for infringement or

(a) Sect. 101.
 (c) Sect. 97.

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

(e) Sect. 99.

in any action or proceeding respecting a patent, design, or trade mark competent to those Courts.(a)

The punishment for a misdemeanour under the Act in the Isle of Man shall be imprisonment for any term not exceeding two years, with or without hard labour, and with or without a fine not exceeding one hundred pounds, at the discretion of the Court.(b)

Any offence under the Act committed in the Isle of Man, which would in England be punishable on summary conviction, may be prosecuted, and any fine in respect thereof recovered at the instance of any person aggrieved, in the manner in which offences punishable on summary conviction may for the time being be prosecuted.(c)

For the provisions of the Act on the subject of international arrangements for the protection of designs, *vide* the chapter on International Copyright, *ante*, pp. 162, 163; and for those relating to similar arrangements with the Colonies and India, *vide* the chapter on Colonial Copyright, *ante*, p. 143.

International
and colonial
arrangements.

(a) Sect. 112.

(b) *Ibid.*

(c) *Ibid.*

PART II.

LAW RELATING TO NEWSPAPERS.

Whether there is
copyright in
newspapers.

THE question whether a newspaper is within the Copyright Act (5 & 6 Vict. c. 45), first came before a court for express decision in the case of *Che v. The Land and Water Journal Company*,^(a) where the plaintiff, the proprietor of the *Field* newspaper, sought to restrain the publication in the *Land and Water Journal* of a "list of hounds," alleged to be copied from a list printed in the former paper. It was contended, on behalf of the defendants—(1) that the plaintiff had no copyright in the article of the piracy of which he complained; (2) that if he had a copyright he could not sue until his paper was registered under the Copyright Act. Malins, V.C., said: "The preliminary objection taken in this case raises a point of vast importance to the proprietors of newspapers and to the public at large. It is so important that it seems almost incredible that the point should never have arisen, namely, whether the proprietor of a newspaper has or has not such a property in articles published in that newspaper, and paid for by the proprietor, as entitles him to prohibit the publication by any other newspaper in any other form whatever." On account of the importance of this, the only case decided on the subject at the time the first edition of this work was published, the reasons were set forth at length which induced the Vice-Chancellor to hold that a newspaper does not require to be registered in order to entitle the proprietor to sue in respect of a piracy of its contents, and that though it was neither a "book" within sect. 2, nor a "periodical work" within sect. 18, yet the plaintiff was entitled to restrain the defendants from copying the list of hounds.

"It appears to me" said the Vice-Chancellor towards the close of his judgment, "that a 'newspaper,' which is the best possible and only definition of such a publication as the *Field*, not being within any of the provisions

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

of this Act, I must infer that it was not the intention of the Legislature to apply the Act to newspapers (for it was absolutely impossible that it should have missed insertion in some of the sections), and that the circumstance of non-registration throws no difficulty in the way of the plaintiff maintaining his right in law or equity; and, though it is seldom worth the while of proprietors to assert the copyright in articles in a newspaper, I am of opinion that, whether it be the letters of a correspondent abroad, or the publication of a tale or a treatise, or the review of a book, or whatever else, he acquires—I will not say as copyright, but as property—such a property in every article for which he pays under the 18th section of the Act, or by the general rules of property, as will entitle him, if he thinks it worth while, to prohibit any other person from publishing the same thing in any other newspaper, or in any other form.”

In the last edition of the present work, the author commented upon this decision as follows:—“The effect of this decision, which cannot be considered a satisfactory one, is that the proprietor of a newspaper has a property in its published contents entitling him to restrain the piracy of any portion thereof *for which he has paid*, under the 18th section of the Act, without the necessity of a preliminary registration at Stationers’ Hall. This right, it is obvious, is exactly “the sole and exclusive liberty of printing, or otherwise multiplying copies” which sect. 2 of 5 & 6 Viet. c. 45, calls “copyright,” a term which the Vice-Chancellor is reluctant to apply to it, but which section 18 does expressly apply to it, enacting that the proprietor who has paid for the article shall have “such term of copyright therein as is given to the authors of books by this Act.” Now, it is settled by the decision of the House of Lords, in *Donaldson v. Beckett*,^(a) that the common law right of property in literary works after publication, if such right ever existed, has been taken away by statute, and that copyright after publication is now altogether dependent on statutory enactment. It exists only in those works, and can be enforced only on the observance of those conditions which are mentioned and prescribed in the Acts now in force. Considerations of the great hardship of allowing the unauthorised copying and publication of the copies of paintings, drawings, and photographs were not regarded as sufficient to justify the Courts of law or equity in interfering for the protection of the owners of such works, and

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

(a) 4 Burr. 2408, *ante*, pp. 62, 63.

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the intervention of the Legislature was necessary to confer a copyright in them; so that the observations of the Vice-Chancellor on the hardship of denying a protection from piracy to the proprietor of newspaper articles, are by no means decisive as to the existence of a right to prevent such piracy independent of the statute. If it be thought only just, as everybody must think it, that the publisher of a newspaper should be able to restrain the wholesale piracy of its contents, there does not seem to be much difficulty in the way of interpreting a newspaper to be a "book" within the meaning of sect. 2 of the above Act, there construed to mean and include "every volume, part or division of a volume, pamphlet, *sheet of letterpress*, sheet of music, map, chart, or plan separately published," or in holding it to be a "periodical work, or other work published in a series of books or parts," within the meaning of sect. 19 of the same Act; in either of which cases, however, registration would be necessary before the proprietor could sue in respect of an infringement of his copyright.

Opinion of
Jessel, M.R.

This view has since been adopted by the late Master of the Rolls (Sir George Jessel), who held in the case of *Walter v. Howe*,^(a) that a newspaper does come within the Act, and must be registered before the proprietor can sue in respect of a piracy. "The words of the 18th section," said his Lordship, "are of the most comprehensive kind; 'any periodical work'—a term which certainly includes a newspaper—'or any book whatsoever.' Under the 2nd section the word 'book' includes 'every sheet of letterpress.' In my opinion, therefore, to entitle the plaintiff to sue, his newspaper must have been registered under the Act. I have been referred to *Cox v. Land and Water Journal Company* (*ubi supra*), in which Vice-Chancellor Malins held that a proprietor of a newspaper can sue without joining the author and without registration under the Copyright Act; but, with all respect, I must decline to follow that decision, for it appears to me to be opposed to the plain wording of the Act of Parliament. If I were to decide in accordance with it, I should, in my opinion, be virtually overruling the Act."

The Master of the Rolls also held in the case last cited, that the newspaper proprietor has copyright only in articles for which the author has been paid, and which have been composed on the terms that the copyright in them should belong to the proprietor.

In cases where this is not shown both author and proprietor must join in suing.^(b)

(a) L. R. 17 C. D. 708.

(b) *Ibid.*

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

Though doubts have (without sufficient grounds, it is submitted) been expressed as to whether a copyright in newspapers exists, the right of publishing a newspaper is unquestionably a species of property. It has been held to be goods and chattels under the Bankruptcy Acts. (d)

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

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

When the registered proprietor of certain newspapers published by him, being also the owner of the type and plant used in the printing of them, mortgaged the newspapers, type, and plant to F., who took no steps to alter the registration of proprietorship, and the sheriff entered under an execution issued by a creditor of the publisher, and though possession was demanded by F., remained in possession till after the publisher became bankrupt, which took place after two days, it was held that the type and plant were not within the order and disposition of the bankrupt at the time of his bankruptcy with the consent of the

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

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

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

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

(e) Per Page Wood, L.J., in *Kelly v. Hutton* (L. Rep. 3 Ch. App. 708; 19 L. T. N. S. 231; 38 L. J. 917 Ch.; and see the cases referred to in the preceding note, and *Keene v. Harris*, referred to 17 Ves. 338), and *ante*, pp. 217 *seq.*

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

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true owner, but that as the right of publication was not capable of seizure by the sheriff, and the bankrupt continued the sole registered proprietor, and nothing had been done to make it apparent that he was not the sole owner, the doctrine of reputed ownership applied to the newspapers.(a)

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

As to the interpretation of an agreement relating to the use by one newspaper of the matter and types of another, see the case of *Platt v. Walter*, referred to in Part III. of this work.(c)

Repealed enactments as to newspapers

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

Amongst the provisions swept away by the Act of 32 & 33 Vict. c. 24 (called "The Newspapers, Printers, and Reading Rooms' Act") were enactments requiring, before the publication of any newspaper, the delivery at the Stamp Office of a declaration containing the title of the paper, description of the house where it was to be published, and the names and places of abode of the printer, publisher, and proprietor,(d) certified copies of which declarations were to be received as conclusive evidence of everything contained in them relating to the newspapers.(e) Copies of all newspapers published had to be delivered to the Commissioners of Stamps and Taxes, and might be produced in evidence.(f) Every supplement to a newspaper must have had the word "supplement" printed on it, and have had the same title and date as the newspaper, and a penalty was incurred by publishing supplements without the newspapers.(g)

Every person who prints any paper for hire, reward, gain, or profit, must still carefully preserve and keep one copy

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

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

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

(c) *Post*, pp. 349 seq.

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

(e) Sect. 8.

(f) Sect. 13.

(g) Sect. 5.

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

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

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

Penalties (not exceeding the sum of £20) may be recovered in a summary way before any justice or justices of the peace for the county, stewardry, riding, division, city, town, or place in which the same are incurred, or the person who has in-

(a) 39 Geo. 3, c. 79, s. 29; 32 & 33 Viet. c. 24, sched. 2.

(b) *Ibid.* s. 28.

(c) Sect. 31.

(d) 51 Geo. 3, c. 65, s. 3; 32 & 33 Viet. c. 34, sched.

Recovery of penalties.

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curring them happens to be;(a) and when so recovered, one moiety of the penalty is to go to the informer, and the other moiety to the Crown.(b)

Prosecutions or actions for penalties under this Act are to be brought within three calendar months next after they are incurred;(c) and they can only be brought and prosecuted in the name of Her Majesty's Attorney or Solicitor-General in England, or Her Majesty's Advocate in Scotland; every proceeding commenced or prosecuted in the name or names of any other person or persons is to be null and void to all intents and purposes.(d)

Printer to print
his name and
address on
papers, &c.

On every person who prints any paper or book whatsoever which is meant to be published or dispersed, and who does not print upon the front of every such paper, if the same shall be printed on one side only, or upon the first or last leaf of every paper or book which shall consist of more than one leaf, in legible characters, his or her name and usual place of abode or business, sect. 2 of 2 & 3 Viet. c. 12,(e) inflicts a penalty of not more than five pounds for every copy of such paper so printed. A similar penalty is inflicted on every person who publishes, or disperses, or assists in publishing or dispersing, any printed paper or book on which the name and place of abode of the person printing the same is not printed as aforesaid. But this provision is not to be construed to impose any penalty upon any person for printing any of the papers above excepted.(f)

In the case of books or papers printed at the University Press of Oxford or the Pitt Press of Cambridge, the printer, instead of printing his name thereon, is to print the following words, "Printed at the University Press, Oxford," or "The Pitt Press, Cambridge," as the case may be.(g)

Proceedings for the recovery of any fine, penalty, or forfeiture under the provisions of this Act must be commenced, prosecuted, entered, or filed in the name of the Attorney or Solicitor-General in England, or Her Majesty's Advocate for Scotland (as the case may be respectively). All proceedings commenced, prosecuted, or filed otherwise are to be null and void to all intents and purposes.(h)

None of the preceding enactments apply to Ireland.(i)

6 & 7 Will. 4, c. 76 s. 19 enabled a person to file a bill in

(a) Sect. 35.

(b) Sect. 36.

(c) Sect. 34.

(d) 9 & 10 Viet. c. 33, s. 1; 32 & 33 Viet. c. 24, sched. 2.

(e) 32 & 33 Viet. c. 24, sched. 2.

(f) *Vide ante*, p. 313.

(g) 2 & 3 Viet. c. 12, s. 3.

(h) 2 & 3 Viet. c. 12, s. 4.

(i) See 32 & 33 Viet. c. 24, sched. 2.

equity for discovery of the printer, publisher or proprietor of a newspaper, in order to sue at law for a libel contained in it; (a) but the whole of this Act has been repealed by 33 & 34 Viet. c. 99, and the Act of 1881 contains provisions equally effective for the purpose.

The Newspaper Libel and Registration Act 1881 (44 & 45 Viet. c. 60), which does not extend to Scotland, provides (b) for the establishment of a register of newspaper proprietors for England and Ireland, under the superintendence in England of the Registrar, and in Ireland of the Assistant-Registrar of Joint Stock Companies, or such person as the Board of Trade may for the time being authorise in that behalf. (c)

For the purposes of the act "newspaper" is to mean any paper containing public news, intelligence or occurrences, or any remarks or observations therein printed for sale and published in England or Ireland periodically, or in parts or numbers, at intervals not exceeding twenty-six days between the publication of any two such papers, parts or numbers; also any paper printed in order to be dispersed and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements. (d)

It is the duty of the printers and publishers for the time being to make or cause to be made to the Registry Office annually in the month of July in every year, a return of the following particulars according to a form given in a schedule to the Act, viz. :—

- (1) The title of a newspaper.
- (2) The names of all the proprietors (e) of such newspaper, together with their respective occupations, places of business (if any), and places of residence. (f)

Where in the opinion of the Board of Trade, inconveniences would arise or be caused in any case from the registry of the names of all the proprietors (owing either to minority, coverture, absence from the United Kingdom,

(a) See *Dixon v. Enoch* (L.R. 13 Eq. 392).

(b) Sect. 8.

(c) Sect. 1.

(d) *Ibid.*

(e) The word "proprietor" is defined to mean and include as well the sole proprietor, as also, in the case of a divided proprietorship, the persons who, as partners or otherwise, represent or are responsible for any share or interest in the newspaper as between themselves, and the persons in like manner representing or responsible for the other shares or interests therein, and no other person. (Sect. 1.)

(f) Sect. 9.

Register of
newspaper
proprietors.

Meaning of
"newspaper."

Annual returns.

"Representative
proprietors."

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minute subdivision of shares or other special circumstances) the Board of Trade may authorise the registration in the name or names of some one or more responsible "representative proprietors." (a)

The form of return given in the schedule is as follows:—

Return made pursuant to the Newspaper Label and Registration Act, 1881.

Title of the Newspaper.	Names of the Proprietors.	Places of Business if any of the Proprietors.	Places of Residence of the Proprietors.

Penalty for omission.

If within a month from the time appointed, the return is not made, then each printer and publisher of such newspaper shall, on conviction, be liable to a penalty not exceeding £25, and also to be directed by a summary order to make a return within a specified time. (b)

Return in case of transfer of interest.

Any party to a transfer or transmission of or dealing with any share or interest in any newspaper, whereby any person ceases to be a proprietor, or any new proprietor is introduced, may at any time make a return to the Registry Office, according to a form given in a schedule and containing the particulars therein set forth. (c)

The following is the form given in the schedule:—

Return made pursuant to the Newspaper Label and Registration Act, 1881.

Title of Newspaper.	Names of Persons who cease to be Proprietors.	Names of Persons who become Proprietors.	Occupation of new Proprietors.	Places of Business (if any) of new Proprietors.	Places of Residence of new Proprietors.

Penalty for wilful misrepresentation or omission.

If any person knowingly and wilfully makes or causes to be made a return setting forth the name of any person as a

(a) Sect. 8.

(b) Sect. 10.

(c) Sect. 11.

proprietor who is not, or in which there is any misrepresentation, or from which there is any omission in respect of any of the particulars required by the Act, whereby the return is misleading; or if any proprietor knowingly and wilfully permits any such return to be made which shall be misleading as to any of the particulars with reference to his own name, occupation, place of business (if any), or place of residence, the offender in every case, on being convicted, is liable to a penalty not exceeding £100.(a)

Penalties may be recovered before a "Court of Summary Jurisdiction," in manner provided by the "Summary Jurisdiction Acts," and summary orders under this Act may be made by a Court of Summary Jurisdiction and enforced in manner provided by section 34 of the Summary Jurisdiction Act, 1876, which, for the purposes of this Act, is to be deemed applicable to Ireland.(b)

Mode of recovering penalties.

The expression "Court of Summary Jurisdiction" is to have in England the meanings assigned to it by the Summary Jurisdiction Act, 1879, and in Ireland means any justice or justices of the peace, stipendiary or other magistrate or magistrates having jurisdiction under the Summary Jurisdiction Acts. The expression "Summary Jurisdiction Acts" is to have, as regards England, the meanings assigned to it by the Summary Jurisdiction Act, 1879; and, as regards Ireland, means, within the police district of Dublin metropolis, the Acts regulating the powers and duties of justices of the peace for such district, or of the police of that district, and elsewhere in Ireland, the Petty Sessions (Ireland) Act, 1851, and any Act amending the same.(c)

The registrar is required to register every return made in conformity with the Act in a book to be kept for that purpose at the Registry Office, and called "The Register of Newspaper Proprietors."(d)

Duty of registrar.

All persons are to be at liberty to search and inspect the register from time to time during the hours of business at the Registry Office; and any person may require a copy of any entry in or an extract from the book to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar.(e)

Liberty to search register and obtain certified copies.

Such fees (if any) as the Board of Trade, with the approval of the Treasury, may direct(f) are to be paid in respect of the

Fees payable.

(a) Sect. 12.

(b) Sect. 16.

(c) Sect. 17.

(d) Sect. 13.

(e) *Ibid.*

(f) The Fees which the Board of Trade have, with the approval of the Treasury, directed to be paid are as follow:—

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receipt and entry of returns, and for inspection of the register, and for certified copies of entries, and in respect of any other services to be performed by the registrar, which fees are to be dealt with as the Treasury may direct.(a)

Certified copies
to be evidence.

Every copy of an entry in or extract from the register purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar, is to be received as conclusive evidence of the contents of the register, so far as the same appears in such copy or extract without proof of the signature thereto, or of the seal of office affixed thereto.(b)

Every such certified copy or extract is, in all proceedings, civil or criminal, to be accepted as sufficient *prima facie* evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown.(c)

Newspaper
belonging to
Joint Stock
Company.

The provisions of the Act as to registration of newspaper proprietors are not to apply to the case of any newspaper which belongs to a joint-stock company duly incorporated under and subject to the provisions of the Companies' Acts 1862 to 1879.(d)

The provisions of the Act relating to Libel will be dealt with in the chapters on Libel.

Stamp duties.

Previously to the passing of the Act 16 & 17 Viet. c. 63, a duty was payable on all advertisements contained in or

	£	s.	d.
For the registration for the first time of any "representative proprietor" (sect. 7)	1	0	0
On registration in other cases	0	10	0
On the rendering of subsequent Returns	0	5	0
For inspection	0	1	0
For a copy of a Return.	0	1	0

and a further fee of fourpence per folio to be charged if the copy exceeds three folios.

The following regulations have been published by the Registry Office:—

Regulations as to
"representative
proprietors."

"Where it is desired to make a return of "representative proprietors" under sect. 7 a statement should be sent to the Registrar setting forth the circumstances which render it inconvenient to register the names of all the proprietors, and giving such information as will show that the proposed representatives are well able to meet any claims that may arise for libel or otherwise in connection with the management of the Paper.

"The prescribed forms on which the Returns are to be made will be sent, either stamped with the requisite fee stamps or unstamped, on application to the Registrar, Companies' Registration Office, Somerset House, London, W.C. No charge is made for the forms; but when stamped forms are required a Postal Order for the amount of the fee must accompany the application.

"A separate Return will be required for each Paper."

(a) Sect. 14.

(b) Sect. 15.

(c) *Ibid.*

(d) Sect 18.

published along with newspapers, or periodical or other literary works. Sect. 5 of that Act repealed the duty on advertisements in all such cases. And down to the passing of the Act 18 Vict. c. 27, it was not allowable to print or publish newspapers except on stamped paper. That Act abolished the necessity of stamped paper except for the purpose of free transmission by post. The Customs and Inland Revenue Act of 1870(*a*) does away with all stamp duties on newspapers for the future.(*b*)

As to the registration of newspapers at the Post Office, the Post Office Act of 1870,^{Registration at Post-Office.}(*c*) after describing what is a newspaper within its meaning, provides (sect. 7) that the proprietor or printer of any newspaper, and the proprietor or printer of any publication which, regard being had to the proportion of advertisements to other matter therein, is not within the description aforesaid, but which was stamped as a newspaper before the passing of the Act 18 & 19 Vict. c. 27, may register it at the General Post Office in London at such time in each year and in such form and with such particulars as the Postmaster-General from time to time directs, paying on each registration such fee, not exceeding five shillings, as the Postmaster-General, with the approval of the Treasury, from time to time directs.

The Postmaster-General may from time to time revise the register and remove therefrom any publication not being a newspaper.(*d*)

The decision of the Postmaster-General on the admission to or removal from the register of a publication is final, save that the Treasury may, if they think fit, on the application of any person interested, reverse or modify the decision, and order accordingly.(*e*)

Any publication for the time being on the register is for the purposes of this Act to be deemed a registered newspaper.(*f*)

Registered newspapers, book packets, pattern or sample packets, and post cards may be sent by post between places in the United Kingdom, at the following rates of postage:—

On a registered newspaper, with or without a supplement or supplements	One halfpenny.
On each registered newspaper in a packet of two or more, with or without a supplement or supplements	One halfpenny.

(a) 33 & 34 Vict. c. 32.

(b) Sect. 12.

(c) 33 & 34 Vict. c. 79.

(d) 33 & 34 Vict. c. 79, s. 7.

(e) *Ibid.*(f) *Ibid.*

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On a book packet or pattern or sample packet : - (a)

If not exceeding two ounces in weight One halfpenny.

If exceeding two ounces in weight, for the first two ounces and for every additional two ounces or fractional part of two ounces One halfpenny.

On a post card One halfpenny.

But a packet of two or more registered newspapers with or without a supplement or supplements is not to be liable under this section to a higher rate of postage than the rate chargeable on a book packet of the same weight.(b)

The Postmaster-General may from time to time, with the approval of the Treasury, make, in relation respectively to registered newspapers, book packets, pattern or sample packets, and post cards, sent by post, such regulations as he thinks fit, for all or any of the following purposes :—

For prescribing and regulating the times and modes of posting and delivery :

For prescribing prepayment and regulating the mode thereof :

For regulating the affixing of postage stamps :

For prescribing and regulating the payment again of postage in case of redirection :

For regulating dimensions and maximum weight of packets :

For regulating the nature and form of covers :

For prohibiting or restricting the printing or writing of marks or communications or words :

For prohibiting inclosures ;

and such other regulations as from time to time seem expedient for the better execution of the Act.(c)

Any approval of the Treasury under this Act is to be deemed an order within the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), which Act is to have effect as if the Postmaster-General were mentioned in the first column, and any secretary or assistant-secretary of the Post Office were mentioned in the second column of the schedule to that Act.(d)

If any registered or other newspaper, supplement, pub-

(a) See note to sect. 9, *post*.

(b) Sect. 8. The enactments as to the postage of newspapers, contained in sects. 42 & 44 of 3 & 4 Vict. c. 96, are repealed by this Act (sect. 4, sched. 1). See now the later Act, 38 & 39 Vict. c. 22, s. 1.

(c) Sect. 9. See now as to pattern or sample packets the provisions of 34 & 35 Vict. c. 30, s. 4.

(d) Sect. 21.

lication, book packet, pattern or sample packet, or post card, is sent by post otherwise than in conformity with the Act or any Treasury warrant or Post Office regulations, it shall be either returned to the sender thereof or forwarded to its destination, in either case charged with such rate of postage, not exceeding the letter rate of postage, or without any additional charge, as the Postmaster-General, with the approval of the Treasury, from time to time directs, having been, if necessary, detained and opened in the Post Office.(a)

Under the Act of 1875.(b) further powers are given to the Treasury; amongst them being a power by warrant to revoke and alter any regulations made under previous Acts(c); and it repeals so much of the Post Office Duties Acts 1840 to 1871, as are inconsistent with it, or with any warrant made under it.

If any question arises whether any postal packet is a letter, post-card, newspaper, supplement, book packet, circular or other description of postal packet within the meaning of this Act or any warrant made under it, the decision of the Postmaster General is to be final; but the Treasury may, if they think fit, on the application of any person interested, reverse or modify the decision and order accordingly.(d)

The Postmaster-General may from time to time, with the approval of the Treasury, make such regulations as he thinks fit for preventing the sending or delivery by post of indecent or obscene prints, paintings, photographs, lithographs, engravings, books, or cards, or of other indecent or obscene articles, or of letters, newspapers, supplements, publications, packets, or post-cards, having thereon, or on the covers thereof, any words, marks, or designs of an indecent, obscene, libellous, or grossly offensive character.(e)

Any publication coming within the following description is, for the purposes of this Act, to be deemed a newspaper—any publication consisting wholly or in great part of political or other news, or of articles relating thereto, or to other

Indecent or obscene papers.

What are newspapers within the Act.

(a) Sect. 15. The enactments contained in sects. 13, 16, & 17 of 3 & 4 Vict. c. 96, as to newspapers posted without being stamped or prepaid, or sufficiently stamped, were repealed by the 33 & 34 Vict. c. 79 (sect. 4, sched. 1). So also are the enactments contained in sect. 45 of the former Act as to the examination of newspapers by the Postmaster-General.

(b) 38 & 39 Vict. c. 22.

(c) Sect. 4.

(d) 38 & 39 Vict. c. 22, s. 5.

(e) 33 & 34 Vict. c. 79 s. 20.

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current topics, with or without advertisements; subject to these conditions—

That it be printed and published in the United Kingdom;
That it be published in numbers at intervals of not more than seven days;

That it be printed on a sheet or sheets unstitched;

That it have the full title and date of publication printed at the top of the first page, and the whole or part of the title and the date of publication printed at the top of every subsequent page.(a)

The definition of a newspaper contained in 6 & 7 Will. 4, c. 76, s. 4 (not repealed by the Act of 1870), viz., "any paper containing public news, intelligence, or occurrences, printed in any part of the United Kingdom to be dispersed and made public; also any paper printed in any part of the United Kingdom weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements; and also any paper containing any public news, intelligence, or occurrences, or any remarks or observations thereon, printed in any part of the United Kingdom for sale and published periodically, or in parts, or numbers, at intervals not exceeding twenty-six days between the publication of any two such parts, papers or numbers, where any of the said papers, parts or numbers respectively shall not exceed two sheets of the dimensions"(b) specified in the Act, &c., is not to be deemed to contain or affect the definition of a newspaper for the purposes of the Act of 1870 or any other enactments regulating the sending of newspapers by post.(c)

Supplements.

And the following is, for the purposes of the Act, to be deemed a supplement to a newspaper—a publication consisting wholly or in great part of matter like that of a newspaper, or of advertisements, printed on a sheet or sheets or a piece or pieces of paper, unstitched, or consisting wholly or in part of engravings, prints, or lithographs illustrative of articles in the newspaper; such publication in every case being published with the newspaper, and having the title and date of publication of the newspaper printed at the top of every page, or at the top of every sheet or side on which any such engraving, print, or lithograph appears.(d)

If a question arises whether any publication, not being a registered newspaper, is a newspaper or a supplement, or whether any packet is a book packet or pattern or sample

(a) 33 & 34 Viet. c. 79, s. 6.

(b) See *Attorney-General v. Bradbury* (7 Exch. 97).

(c) 33 & 34 Viet. c. 79, s. 4.

(d) *Ibid.* sect. 6.

packet, within the Act or any Treasury warrant or Post Office regulations, the decision thereon of the Postmaster-General is, by the Act, made final, save that the Treasury may, if they think fit, on the application of any person interested, reverse or modify the decision, and order accordingly.(a)

The Treasury may from time to time, by Treasury warrant, allow any newspapers, British, colonial, or foreign, to be sent by post between the United Kingdom and places out of the United Kingdom, or between places out of the United Kingdom, whether through the United Kingdom or not, at such rates of postage, not exceeding threepence for each newspaper irrespectively of any colonial or foreign postage, and on such conditions, as they think fit, and according to Post Office regulations to be from time to time made in that behalf.(b)

Colonial and foreign postage.

Any Treasury warrant and Post Office regulations made in that behalf before the passing of the Act of last year, are confirmed by it, and are to continue in force unless and until altered by Treasury warrant or Post Office regulations (as the case may be).(c)

A registered newspaper is to be deemed a newspaper for the purposes of any arrangement or convention between Her Majesty's Government and any colonial or foreign government for securing advantages for newspapers sent by post.(d)

The foreign postage marked on any newspaper or letter, or printed paper brought into the United Kingdom, is to be received in all courts of justice and other places as conclusive evidence of the amount of foreign postage payable in respect of such newspaper, &c., in addition to the British postage; and such foreign postage is to be recoverable within the United Kingdom and Her Majesty's other dominions as postage due to Her Majesty.(e)

The Commissioners of Inland Revenue are from time to time to provide proper dies and other implements for denoting by adhesive or embossed or impressed stamps, or otherwise, the duties of postage payable in the United Kingdom under this Act, or any Treasury warrant thereunder; and those duties are to be deemed stamp duties, and to be under

Stamps.

(a) Sect. 14. The similar provision in sect. 46 of 3 & 4 Vict. c. 96, is repealed (sect. 4, sched. 1).

(b) Sect. 12. The provisions on this subject contained in sects. 47-51 (both inclusive) of 3 & 4 Vict. c. 96, are repealed (sect. 4, sched. 1).

(c) *Ibid.*

(d) Sect. 11.

(e) 3 & 4 Vict. c. 96, s. 32.

PART II.

the management of the Commissioners of Inland Revenue.(a)

So much of the Act, 3 & 4 Vict. c. 96, as relates to stamp duties under that Act is to apply to the stamp duties under this Act.(b)

Newspapers liable to postage, if posted in any town or place within the United Kingdom, and inclosed in stamped covers, or having a stamp or stamps affixed thereto (the stamp or stamps being in every case affixed or appearing on the outside, of the proper value, and not used before), are to pass by the post free of postage; and the amount of stamps required may be made up by affixing such a number of adhesive stamps as, alone or in combination with the stamp already impressed, may be required.(c)

Forging or
counterfeiting
stamp dies, &c.

It is a felony to forge or counterfeit, or caused to be forged or counterfeited, the dies, plates, or other instruments used for stamping, or to forge, counterfeit, or imitate, or cause or procure to be forged, counterfeited, or imitated, the stamp, mark, or impression of any such die, &c., or to have in one's possession knowingly and without lawful excuse (the proof whereof lies on the person accused) any false, forged, or counterfeited die, &c., or any part of one, or any instrument resembling or intended to resemble it, wholly or in part; or to stamp or mark, or cause or procure to be stamped or marked any paper, or other substance or material whatsoever, with any such false, forged, or counterfeited die, &c.; or to use, utter, sell or expose to sale, or cause to be used, uttered, or exposed to sale, or knowingly and without lawful excuse (the proof whereof lies on the person accused) to have in one's possession any paper, or other substance or material, having thereon the impression or any part of the impression of any such false, forged, or counterfeit die, &c., or having thereon any false, forged, or counterfeit stamp or impression, resembling or representing, either wholly or in part, or intended or liable to pass or be mistaken for the stamp, mark, or impression of any such die, &c., which has been or shall be, or may be so provided, made or used as aforesaid, knowing such false, forged, or

(a) 33 & 34 Vict. c. 79, s. 18.

(b) *Ibid.* The enactments contained in sects. 3 & 4 of 16 & 17 Vict. c. 63, as to stamp duties on newspapers and supplements, and as to the cancelling and allowing for newspaper stamps on hand, are repealed by the Act of 1870 (sect. 4, sched. 1). So is the whole of the Act of 18 & 19 Vict. c. 27, passed to amend the laws relating to the stamp duties on newspapers, and to provide for the transmission by post of printed periodical publications (*Ibid.*).

(c) 3 & 4 Vict. c. 96, s. 12.

counterfeit stamp, mark, or impression, to be false, forged, or counterfeit; or, with intent to defraud Her Majesty, her heirs, or successors, privately or fraudulently to use, or cause or procure to be privately or fraudulently used, any die, &c., so provided, made, or used, or hereafter to be provided, made, or used as aforesaid, or, with such intent, privately to stamp or mark, or cause or procure to be stamped or marked, any paper, substance, or material whatsoever with any such die, &c., as last mentioned; or knowingly and without lawful excuse (the proof whereof lies on the person accused) to have in one's possession any paper, or other substance or material, so privately or fraudulently stamped, or marked as aforesaid.(a)

Fraudulently to remove or cause to be removed from any cover or paper the stamp or impression of any such die, &c., as mentioned in the last paragraph, with intent to use it on another; or fraudulently to use a stamp or impression so removed; or fraudulently to erase, cut, &c., or cause to be erased, cut, &c., from any cover or paper, any name, date, or other matter or thing thereon written, printed, or expressed, with intent to use any stamp or mark then impressed or being upon it, or that it may be used for the purpose of defrauding Her Majesty; or to do or be concerned in any other fraudulent act, contrivance, or device whatever, with intent to defraud Her Majesty, &c., of any of the rates or duties provided by the Act, is an offence punishable by a forfeiture of £20, to be recovered with full costs of suit.(b)

It is unlawful for any person to affix to a newspaper, supplement, publication, packet, letter, or card sent by post, or to the cover thereof (if any), by way of prepayment of postage thereon, an embossed or impressed stamp cut out or otherwise separated from the cover or other paper, card, or thing on which such stamp was embossed or impressed, although such stamp has not been before sent by post or used.(c)

Pressed stamp removed from another paper not to be used.

If any newspaper, supplement, publication, &c., is sent by post with a stamp affixed thereto, or to the cover thereof (if any), that has been so cut out or separated, the postage thereof, as far as it purports to be prepaid by that stamp, is to be deemed to be not prepaid.(d)

The enactments contained in 6 & 7 Will. 4, c. 76, allowing a discount of 25 per cent. on newspaper stamps in Ireland (e)

(a) 3 & 4 Viet. c. 96, s. 22.

(b) *Ibid.* sect. 23. Cf. sect. 18 of 33 & 34 Viet. c. 79.

(c) 33 & 34 Viet. c. 79, s. 19.

(d) *Ibid.*

(e) 6 & 7 Will. 4, c. 76, s. 2.

PART II.

those relating to the cancelling of stamps rendered useless by that Act ;(a) and those providing that a separate stamp or die should be used for each newspaper, and that every newspaper should be printed on paper stamped with such appropriate die ;(b) as well as the section relating to the construction of the terms used in that Act,(c) are repealed by the Act of 1870.(d)

For the purposes of the Post-Office Act, 1870, the Channel Islands and the Isle of Man are to be deemed parts of the United Kingdom ;(e) and the Act of 11 & 12 Vict. c. 117, relating to the postage of newspapers published in the Channel Islands and the Isle of Man is repealed.(f)

Documents
falsely purport-
ing to be printed
by Government
printer.

Any person who prints any copy of any proclamation, order, or regulation which falsely purports to have been printed by the Government printer, or to be printed under the authority of the Legislature of any British colony or possession, or tenders in evidence any copy of any such proclamation, order, or regulation, which falsely purports to have been printed as aforesaid, knowing that the same was not so printed, is guilty of forgery, and on conviction is liable to be sentenced to penal servitude for such term as is prescribed by the Penal Servitude Act, 1864, as the least to which an offender can be sentenced to penal servitude, or to be imprisoned for any term not exceeding two years, with or without hard labour.(g)

For the purposes of this enactment the expression "British colony and possession" includes the Channel Islands, the Isle of Man, and such territories as may, for the time being, be vested in Her Majesty by virtue of any Act of Parliament for the Government of India, and all other Her Majesty's dominions; "Legislature" signifies any authority, other than the Imperial Parliament or Her Majesty in Council, competent to make laws for any colony or possession; and "Government printer" is to mean and include the printer to Her Majesty, and any printer purporting to be the printer authorised to print the statutes, ordinances, Acts of State, or other public Acts of the Legislature of any British colony or possession, or otherwise to be the Government printer of such colony or possession.(h)

Prohibition of
advertisements
respecting
stolen goods.

Advertisements of rewards for the return of stolen goods are prohibited under a penalty.

Sect. 102 of 24 & 25 Vict. c. 96, provides that whosoever

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|--|--------------------------------|---------------|
| (a) Sect. 34. | (b) Sect. 3. | (c) Sect. 35. |
| (d) 33 & 34 Vict. c. 79, s. 4, sched. 1. | (e) Sect. 3. | |
| (f) Sect. 4 and sched. 1. | (g) 31 & 32 Vict. c. 37, s. 4. | |
| | (h) <i>Ibid.</i> , sect. 5. | |

shall publicly advertise a reward for the return of any property whatsoever, which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property, or shall print or publish any such advertisement, shall forfeit the sum of fifty pounds for every such offence to any person who will sue for the same by action of debt, to be recovered with full costs of suit.

This provision having given occasion to many vexatious proceedings at the instance of common informers against printers and publishers of newspapers, the Legislature intervened, (a) to remedy the abuse.

The Act 33 & 34 Vict. c. 45, provides that no action shall be brought against the printer or publisher of a newspaper to recover the penalty under sect. 102 of 24 & 25 Vict. c. 96, unless the assent in writing of the Attorney or Solicitor-General for England, if the action is brought in England, or for Ireland, if the action is brought in Ireland, has been first obtained to the bringing of the action. (b)

It also limits the time for bringing the action to a period of six months after the forfeiture is incurred; (c) and contains a provision for staying proceedings in actions brought before the passing of the Act. (d)

The term "newspaper" for the purposes of this Act is to mean a newspaper as defined for the purposes of the Acts for the time being in force relating to the carriage of newspapers by post. (e)

(a) 33 & 34 Vict. c. 65.

(d) Sect. 4.

(b) Sect. 3.

(e) Sect. 2.

(c) *Ibid.*

PART III.

CONTRACTS BETWEEN AUTHORS, PUBLISHERS,
PRINTERS, &c.

Contracts in
general, between
authors, pub-
lishers, &c.

THE foundation on which contracts between publishers, authors, and others rest, is the same as that which forms the basis of all ordinary contracts, and they may be enforced either by action on the special contract, or, where a special contract does not exist, by the usual action for work and labour done.(a)

Agreement not
to be performed
within a year.

If the agreement is one "that is not to be performed within the space of one year from the making thereof" no action can be brought upon it, "unless the agreement upon which such action shall be brought or some memorandum or note thereof is in writing, and signed by the party to be charged therewith,"(b) and the word "agreement" includes the *consideration* for the promise as well as the promise itself.(c)

The following memorandum was made between the plaintiff, a law bookseller and publisher, and the defendant, the author and proprietor of the copyright in a dictionary of the practice of the Courts of King's Bench and Common Pleas, and signed with their respective initials: "Dict. of Practice. £80 per annum for five years, commencing Mich. 1828; £60 per annum for the remainder of Mr. Lee's life, if he survive the five years; payable in either case quarterly; the first payment Michaelmas 1828.

"T. L.

"S. S.

"Mr. Lee to separate the practices K. B. and C. P."

Parol evidence having been held admissible to explain the document, it was held that inasmuch as it appeared to be a memorandum of a contract that was not to be performed

(a) *Planché v. Colburn* (8 Bing. 16).

(b) Sect. 4 of Statute of Frauds (29 Car. 2, c. 3).

(c) *Wain v. Warlters* (5 East, 10); *Saunders v. Wakefield* (4 B. & Ald. 595).

within a year, and no consideration was stated on the face of it, it was not capable of being enforced by action.(a)

A contract which does not comply with the requirements of the 4th section of the Statute of Frauds is not, however, *per se*, void, though no action can be brought upon it. Therefore it was held that the plaintiff in the case last referred to, having paid the annuity for several years under the above memorandum of agreement, could not recover back the money so paid, as upon a failure of consideration.(b)

It is not necessary that a contract, required by the Statute of Frauds to be in writing, should be contained in one document. It may be collected from any number of papers,(c) provided they are, upon the face of them, sufficiently connected in sense, and do not require parol evidence to establish the connection, parol evidence being inadmissible for that purpose.

Contract may be collected from a number of papers.

Thus, where a publisher proposed to publish by subscription an illustrated edition of Shakespeare, to appear in numbers, at the price of three guineas a number, two guineas to be paid at the time of subscribing, and the remaining guinea on the delivery of each successive number; the prospectus stating "that one number, at least, should be published *annually*," and that the proprietors were confident that they should be able "to produce *two numbers* within the course of *every year*;" and the defendant, wishing to become a subscriber, wrote his name in a book kept for the purpose in the plaintiff's shop, entitled, "*Shakspeare Subscribers, their Signatures*;" printed copies of the prospectus lying at the same time in the plaintiff's shop, but neither prospectus nor book of subscribers containing any reference the one to the other, it was held that the contract of the defendant was one not to be performed within the space of a year from the making thereof, and therefore that, in order to be enforceable by action, it must be in writing.(d)

The defendant having refused to continue to take in the numbers of the book, an action was brought against him by the publisher; but it was held that the action could not be maintained for want of a written agreement or memorandum signed by the party to be charged therewith, as required by the 4th section of the Statute of Frauds. The prospectus contained the terms of the agreement, and if it

(a) *Sweet v. Lee* (4 Scott's N. R. 77; 3 M. & Gr. 452). (b) *Ibid.*

(c) *Jackson v. Lowe* (1 Bing. 9); *Phillimore v. Barry* (1 Camp. 513); *Saunderson v. Jackson* (2 B. & P. 398); *Johnson v. Dodgson* (2 M. & W. 653); &c.

(d) *Boydell v. Drummond* (11 East. 142).

PART III.

could be coupled with the book of subscribers in which the defendant had signed his name, it would be a sufficient memorandum of the agreement to satisfy the statute; but as it contained no reference to the book, nor the book to it, there was no connection in sense between them which would enable the Court to couple them together, and treat them as one document; and parol evidence to establish such a connection was inadmissible.^(a) "If," said Lo Blanc, J., "there had been anything in the book which had referred to the particular prospectus, that would have been sufficient: if the title to the book had been the same with that of the prospectus, it might perhaps have done: but as the signature now stands, without reference of any sort to the prospectus, there was nothing to prevent the plaintiff from substituting any prospectus, and saying that it was the prospectus exhibited in his shop at the time, to which the signature related: the case therefore falls directly within this branch of the Statute of Frauds."^(b)

Defective form
of agreement.

A difficulty in the interpretation of an agreement between an author and a publisher for the publication of the author's book, sometimes arises from the neglect to state distinctly in the agreement whether it is intended by the parties to operate as an assignment of the copyright, or merely as a licence to publish. The cases of *Stevens v. Benning* and *Reade v. Bentley*, already referred to (*ante*, pp. 176, 177), exemplify the difficulty; in the latter of which cases the Vice-Chancellor (Wood) refused to allow costs to either party, considering each of them to blame for the defective form of the agreement.

Fixing price
and choosing
embellishments.

Where the agreement is that the publisher shall take the whole charge and risk, and the whole duty of bringing out the work as he thinks best for the interest of both parties, it seems, according to Lord Hatherley, to be necessarily incident to the duty which the publisher has to perform, that he shall^(c) also have the right of fixing the price at which the work is to be brought out.

His Lordship considered that it was further implied in the agreement in the case before him (*vide ante*, p. 177), that the publisher was to choose the embellishments and everything else connected with the publication, and that he was to do this for all editions which should be brought out during the subsistence of the agreement.^(d)

(a) *Boydell v. Drummond* (11 East. 142).

(c) *Reade v. Bentley* (3 K. & J. 276).

(b) *Ibid.*

(d) *Ibid.*

“Several difficulties,” said his Lordship, “arising upon such a construction have been suggested. It was argued, can it be supposed that the plaintiff intended to give to the publisher the power, if he chooses, of bringing out the work with absurd embellishments beneath its character and injurious to the reputation of the author? The simple answer to that is, the author will take care of himself in that respect by going to a respectable publisher, who would not commit any such absurdity. If he employed a publisher who was in the habit of adding ridiculous illustrations to his works, he would not have reason to complain if the work were so published. The author would select a publisher who, he would presume, would bring out the work in a manner creditable and desirable. So again with regard to the price, it is suggested that the publisher might just so arrange the balance of prices as to enable himself, by an accurate calculation, to get his £10 per cent. commission, and leave nothing to pay the author. The answer is similar: it is not to be supposed that the author would deal with any publisher who was in the habit of so treating authors. If a publisher were to act in such a manner, although perhaps such conduct could not strictly be called a fraud, because it might not be a violation of the specific terms of the agreement, the result would be that the author whom he so treated would never contract with him again.”

In an agreement like the foregoing, where the work was to be brought out at the publisher's expense and the profits to be divided, the addition of a clause providing that the books sold should be “accounted for at the trade sale price, reckoning twenty-five copies as twenty-four, unless it be thought advisable to dispose of any copies, or of the remainder at a lower price, which is left to the judgment and discretion” of the publisher, does not justify an inference that the publisher has no discretion in fixing the price except in the particular case there mentioned. The meaning of such a clause is explained by Lord Hatherley (when Vice-Chancellor) in *Reade v. Bentley*.^(a) “It is quite obvious that this clause was introduced with no such view, but because Mr. Bentley is to bring out the work, and in bringing it out he is to fix a certain price to the trade; he is aware that there are persons who are in the habit of purchasing all these works for re-sale; there is a certain quantity in the first instance offered to the trade, as it is called, who

(a) 3 K. & J. 277.

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send in their orders, each buyer for a certain quantity of copies, and it is brought out to the trade at a price which is fixed upon each edition. Then it might happen that some copies would remain unsold. Mr. Bentley first agrees to account with the author for all copies at the trade price; but then, as that might be too hard upon the publisher, who has had all the expense of bringing out the work, it is agreed that, if any copies remain unsold, he is to have liberty, as regards that edition, to dispose of the unsold copies at a lower price. That is the obvious meaning of this clause, and it has no reference to the general question of fixing or not fixing the price."

Time and mode of publication.

On the same principle, the publisher is, in such a case, the proper person to fix the time and mode of publication.(a)

Agreement for division of profits after payment of expenses.

An agreement between an author and a publisher that the latter should publish, at his own risk and expense, a work belonging to the former, on the terms of an equal division of the profits after all expenses had been paid, may be regarded in the double light of a licence and a partnership—a licence for the publication of the work, and then a joint adventure between the author and publisher in the copies so to be published.(b) The publisher cannot be considered in such a case as merely the agent of the author, as a mere agent never embarks in the risk of the undertaking.(c)

Power to determine agreement.

When it is sought to put an end to such a joint adventure, a difficulty may sometimes arise in the choice of the time for making the requisite application. If the author seeks to determine the contract, and to prevent the publication of any subsequent edition by the publisher, he must take steps for the purpose before any expense is incurred by the publisher in respect to such subsequent edition. If the publisher has incurred expense of this nature, he has a right to be recouped it, and to have the benefit of all the profit, the hope of obtaining which induced him to incur such expenditure.(d) But where expense has not been incurred by the publisher in respect to a subsequent edition, the author has a right to determine the joint undertaking, and to prevent the further publication of his work by the publisher, even though the publisher has stereotyped the work previously to the publication of the last published edition.(e)

(a) *Reade v. Bentley* (4 K. & J. 665).

(b) *Stevens v. Benning* (6 D. M. & G. 231); *Reade v. Bentley* (4 K. & J. 663).

(c) 4 K. & J. 662.

(d) 3 K. & J. 279.

(e) 4 K. & J. 656.

In determining the point last referred to, Lord Hatherley stated the difficulties that beset the question, and the grounds on which his decision rested. On the one hand it might be said on behalf of the publisher that he had given to the undertaking the benefit of his talents and position as a publisher, and had incurred expenses in bringing out the first edition, in the expectation of being recouped the cost of the first by the sale of the second and subsequent editions; and that to hold the author entitled, at his own instance, to determine the agreement when the first edition had been published, would be to enable him by an arbitrary and unreasonable exercise of that power to deprive the publisher of all his profits. On the other hand, it may be urged on the part of the author that, unless he has the power of determining the agreement, the consequence would be that he may be under an obligation to the publisher during the whole of the publisher's life, while the publisher will be under no reciprocal obligation to him. The publisher could compel the author to abstain from publishing a single copy of the work so long as he expressed his readiness to continue publishing, while the author has no reciprocal power: he could never compel the publisher to publish more than a single edition of the work. Further, the publisher, in the *bonâ fide* exercise of his discretion as to the fitting time and mode of publication, might decline indefinitely to publish, but without resigning his contract; while the author might, at the same time, be of a contrary opinion, and yet for months or even years might be kept in suspense, and prevented from publishing on his own account, until his publisher should be of opinion that the time had come for the revival of the public interest in the work. His Lordship considered the position of the author, under such circumstances, to be one of so great hardship and difficulty, that unless it were clearly shown to have been contemplated by both parties to the agreement, it should not be forced upon him.(a)

Where the agreement between author and publisher states that after payment of the expenses of publication, &c., "the profits remaining of *every edition* that should be printed of the work are to be divided into two equal parts," one moiety to go to the author and the other to the publisher, this points out certain definite times for the adjustment of the accounts, and at which the author becomes entitled to terminate his agreement with the publisher.(b)

By stereotyping the work the publisher does not deprive

(a) 4 K. & J. 664-666.

(b) *Ibid.*

PART III.
 Meaning of
 "edition."

the author of this right. It was objected in *Reade v. Bentley*, that when a work has once been stereotyped the term "edition" is no longer applicable; that when a work is published in what is called "thousands," twenty thousand or thirty thousand being circulated, each thousand could not properly be called an edition. To this Lord Hatherley replied: "I apprehend that not merely in point of etymology, but having regard to what actually takes place in the publication of any work, an 'edition' of a work is the putting of it forth before the public, and if this be done in batches at successive periods, each successive batch is a new edition; and the question whether the individual copies have been printed by means of movable type or by stereotype does not seem to me to be material. If movable type is used, the type having been broken up, the new edition is prepared by setting up the type afresh, printing afresh, and repeating all the other necessary steps to obtain a new circulation of the work. In that case the contemplated break between the two editions is more complete, because, until the type is again set up, nothing further can be done. But I apprehend it makes no substantial difference, as regards the meaning of the term 'edition,' whether the new 'thousand' have been printed by a re-setting of movable type, or by stereotype, or whether they have been printed at the same time with the former thousand or subsequently. A new 'edition' is published whenever, having in his storehouse a certain number of copies, the publisher issues a fresh batch of them to the public. This, according to the practice of the trade is done, as is well known, periodically, and if, after printing 20,000 copies, a publisher should think it expedient for the purpose of keeping up the price of the work, to issue them in batches of a thousand at a time, keeping the rest under lock and key, each successive issue would be a new edition in every sense of the word." (a)

It was held by the Scotch Court of Session that a reprint of part of a book, to replace copies in the hands of the publisher which had been destroyed by an accidental fire, was not an edition entitling the editor of the work to insist on superintending the issue and receiving remuneration in pursuance of a contract by which he was to "superintend any other edition or editions of the work which should be thereafter published, for doing which he should receive" a certain remuneration. (b)

(a) 4 K. & J. 667.

(b) *Blackwood v. Brewster* (23 Scotch Sess. Cas. 2nd ser. 142, December 7th, 1860).

Where an authoress entered into a verbal agreement with a publisher that he should publish at his own expense a book written by her and pay her a royalty on each copy sold, Jessel, M.R., held that no agreement could be implied on the part of the authoress not to bring out a new edition until the whole of the first edition was sold. A bill filed by the publisher to restrain the authoress and another publisher from bringing out a second edition was dismissed with costs.(a)

"It is said," remarked his lordship, "that if you give the publisher no protection the result may be that the author may publish a new edition a day or two after the publication of the first edition, and so destroy the value of the copies of the first edition remaining unsold. That may be, and it is said that that is so unreasonable that you must infer some stipulation to prevent it. Why? No doubt partnerships at will have their inconveniences as well as conveniences. There is no reason why I should make persons take up a totally different position from that which they have agreed to take up, because it might be convenient to one of the parties after the termination of the arrangement. If you do want that protection for a term of years, or for a definite term, you must contract for it. That is all. But I cannot import such a term into the contract. If I did I should make partnerships at will involve consequences that the partners never dreamt of."(b)

Where the copyright in a work for a limited period is sold, the purchaser may continue to sell after the expiration of that period copies printed before its expiration, unless in a case of actual fraud.(c)

Selling copies after expiration of limited period of copyright.

In a case where the copyright for four years in a book was sold to a publishing firm, a motion for an injunction to restrain the selling of copies, four years after the expiration of the term, was refused. It was suggested that the effect of permitting the sale might be to destroy altogether the author's copyright, as the purchaser of the copyright for a limited period might during that period print off copies enough to last for all time. To this Wood, V.C., replied: "A nice question might arise as to the number of copies of which an edition might consist; but a publisher was not likely to incur the useless expense of printing copies enough to exhaust the demand for all time, and have them lying

(a) *Warne v. Routledge* (L. R. 18 Eq. 497).

(b) *Warne v. Routledge* (L. R. 18 Eq. 502).

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

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upon his hands unprofitably. Besides this, even if the effect of a sale for four years might operate in this way to deprive the author of all copyright in his work, the answer was, that he had not guarded himself against such a contingency. If a manifest case of fraud upon the author were established, the Court would know how to deal with it; but nothing of the sort was shown. The defendants had acted quite *bona fide*, and were making a perfectly legitimate use of their contract.”(a)

Selling copies of first edition after publication of a second.

So where the agreement between author and publishers was a mere verbal one, that the latter should publish at their own expense the book of the former, paying a royalty on each copy sold, Sir George Jessel, M.R., considered it plain that no termination of the agreement could deprive the publishers of the right of selling for their own benefit (subject to the royalty) the copies which they had printed under the arrangement.(b)

Mere licence not assignable.

Where there is a mere licence to publish, and not an assignment of the copyright, the contract is of a personal nature on both sides, and the benefit of it is not assignable by either party without the consent of the other.(c)

Where a contract in writing was entered into between an author and a firm of publishers, whereby the former agreed to give unto the latter “the exclusive right to print and publish an edition of one thousand copies of a work to be written” by the author; in consideration whereof the publishers agreed “to print and publish an edition above mentioned (one thousand copies) at their own cost and expense, and pay the author the sum of fifteen cents each for all and every copy sold;” it being further agreed that if the publishers “find a second edition called for, the said author should revise and correct a copy of the first edition ready for the press, which the said publishers agree to have stereotyped at their own cost, having the exclusive use and control of the plates, printing as many copies as they can sell, paying to the said author the sum of twenty cents for each and every copy sold; settlement to be made semi-annually from the day of publication, on their note at four months from the date of settlement;” and the publishers, with the author’s knowledge and acquiescence, had them-

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

(b) *Warne v. Routledge* (L. R. 18 Eq. 501).

(c) *Stevens v. Benning* (6 De G. M. & G. 223), followed by Fry, J., in the recent case of *Hole v. Bradbury* (L. R. 12 C. D. 886). See *Pulte v. Derby* (5 M’Lean, 335).

selves recorded as proprietors of the copyright, it was held, in America, that they had the legal title to the copyright in them, but only for the purposes of the contract. "The right," said the court, "covers their interest, and protects it so long as they shall be engaged in the publication and sale of the work. Beyond this, they are not considered as having the right. They cannot transfer it. They have no power to assign the copyright, nor to publish the work except upon the terms of the contract. In this respect the parties are bound to each other, and the contract, it is considered, covers the entire printing and publishing of the work."(a)

The first edition of the work in this case having been exhausted, the publishers stereotyped the corrected manuscript of the second edition, but printed only 1500 copies of the first impression, and when these were sold 2000 more copies were published, being called in the title-page the third edition. The author then revised a third edition, caused it to be stereotyped and printed, and took out a copyright in his own name, and filed a bill for an injunction to prevent the publishers from further printing, publishing, or selling their third edition, as contrary to his wishes and desires, and in fraud of his rights. The court held that the publishers were not limited under the contract to the number of copies which they might strike off at the first impression of the second edition, but might print any number they could sell, as they should be wanted during the existence of the copyright; and that the author had no right to print an edition for himself and take out a copyright, so long as the publishers complied with the contract.(b)

The court also held that though the publishers could not transfer their copyright to a third party, they might sell him the plates and authorise him to publish, still accounting to the author, pursuant to the contract. It was further held that the publishers were bound to keep the market supplied, and could not refuse to print if they could sell.(c)

A writer agreed with a publisher to edit a translation of Montaigne, adding notes and a biographical sketch of the author, for a particular sum, which was to be increased by other sums as further editions should be published. It was intended that the publisher should have the sole right of multiplying copies of the work, but there was no assignment to him of the copyright. After the publisher's death his widow and executrix, with the author's knowledge and assent, registered the copyright in her own name. On the publication

(a) *Pulte v. Derby* (5 M'Lean, 328, 335). (b) *Ibid.* (c) *Ibid.*

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of a fresh edition, the widow paid the author money, and gave him copies of the work on the same terms as were contained in the agreement made with her husband in his lifetime; and on three occasions, when the author claimed remuneration on those terms, she did not repudiate all liability, but disputed merely the amount. This was held by the Court of Queen's Bench to be evidence from which a jury might infer an agreement on the part of the widow to remunerate the author on the same scale as in the agreement with her husband, in consideration of the author assenting to her registering the copyright in her own name.(a)

Payment to author's representatives for unfinished work.

An author agreed with a bookseller for the publication of a work of science, to be entitled the "Elements of Mechanical Philosophy," and to be published in parts, each part to be paid for when published. After the publication of one volume, which constituted in itself a complete part, the progress of the work was interrupted by the death of the author. It was held by the Scotch Court of Session, that the representatives of the deceased author were entitled to payment of the stipulated price of the published volume. One judge dissented, thinking the contract was one for the entire work, and that the object of partial payment was the accommodation of the author, and not any qualification of the original obligation.(b)

Specific performance not decreed.

Courts of equity have no jurisdiction to decree specific performance of contracts between authors and publishers for the composition by the former of works to be published by the latter.(c)

Where a barrister agreed with a publisher to write, for a stipulated remuneration, reports of cases decided in the Court of Exchequer, to be printed and published by the publisher, Lord Eldon refused an injunction to restrain the barrister from permitting reports written by him to be published by another person. "I have no jurisdiction," said his Lordship, "to compel Mr. Price to write reports for the plaintiff. I cannot, as in *Morris v. Colman*,(d) say that I will induce him to write for the plaintiff by preventing him from writing for any other person, for that is not the nature of the agreement. The only means of enforcing the execution of this agreement would be to make an order compelling Mr. Price to write reports for the plaintiff, which I have not the

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

(b) *Constable v. Robinson's Trustees* (14 Fac. Dec. 166, 1 Jan. 1808).

(c) *Clarke v. Price* (2 Wils. Ch. Cas. 157).

(d) 18 Ves. 437. *Vide post*, p. 344.

means of doing. If there be any remedy in this case, it is at law. If I cannot compel Mr. Price to remain in the Court of Exchequer for the purpose of taking notes, I can do nothing. I cannot indirectly, and for the purpose of compelling him to perform the agreement, compel him to do something which is merely incidental to the agreement. It is also quite clear that there is no mutuality in this agreement. I am of opinion that I have no jurisdiction in this case." (a)

In the case of an agreement between an author and a publisher, that the latter should publish at his own risk and expense the work of the former, on the terms that the profits should be equally divided, and that the author should, if a subsequent edition were required, prepare it for the press, and the publisher should print it on the same terms, Knight Bruce, L.J., was of opinion that the duties on neither side were of such a nature that their performance could be specifically enforced by a court of equity. (b)

Either party may, however, in such a case be made liable in damages for breach of contract.

Damages for
breach of
contract.

Thus, where a person was employed to write a treatise on a particular subject to be published in the *Juvenile Library*, but before he had completed the treatise the *Juvenile Library* was abandoned by the defendants who had employed him, he was held entitled to recover damages for the breach of contract on the part of the defendants, without any tender or delivery of the treatise on his own part. (c)

And the publisher may maintain an action against the author for breach of contract to deliver the manuscript of a work to be published, provided the work is of an innocent character. (d)

Though the terms of the contract between author and publisher be that the latter should bring out the work at his own expense, and that the profits should be divided between both, this does not prevent the bringing of such an action as last referred to, because it is not brought to recover partnership profits from the author, but to make him liable for not contributing his labour towards the attainment of profits

(a) 2 Wils. Ch. Cas. 165.

(b) *Stevens v. Benning* (6 De G. M. & G. 229). See also the remarks of Jessel, M.R., in *Warne v. Routledge* (L. R. 18 Eq. 499, 500).

(c) *Planchè v. Colburn* (8 Bing. 14; 5 C. & P. 58); and see *Colnaghi v. Ward* (6 Jur. 969), where an action was brought for breach of contract to deliver an engraved plate to be published by the plaintiff.

(d) *Gale v. Leckie* (2 Stark. N. P. 107).

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to be subsequently divided between the parties. (a) Lord Ellenborough indicated the amount of damages to be given in such a case as that which would include the expenses of publication, and the profits which would probably have been derived from it. (b)

Agreement
between pub-
lishers not to
sell under a
certain price.

The defendant, having printed a book, sold 300 copies of it to the plaintiff, a bookseller, at 40s. a copy, and agreed by letter "only to sell to others at 48s. in quires, and single copies at 50s. until" the plaintiff's 300 copies were sold or the plaintiff should consent. The letter also contained these words: "I do not expect you to sell under 48s. and 50s.; but do as you like." The plaintiff, when he had sold part of the 300 copies, went into partnership with S., and transferred all his stock at the cost price; and also sold some copies at 45s. and 46s. An action being afterwards brought by him against the defendant for selling copies under the stipulated price, it was contended on behalf of the defendant, first, that the plaintiff was bound by implication not to sell the work himself under the price at which the defendant was to sell, and that his selling at 45s. and 46s. was an answer to the action, as being against the good faith and honour of the contract, inasmuch as it would tend to prevent the defendant from selling his copies at all; and, secondly, that the contract was put an end to by the plaintiff's going into partnership with S., and transferring his interest to a firm at 40s. a copy; because the undertaking of the defendant was only to continue in force till the 300 copies were sold by the plaintiff, and his parting with them to the firm of which he was only a partner was in fact a selling, just as much as it would be in the case of a joint-stock company. Lord Denman, C.J., held that he could not nonsuit on either ground;—upon the first ground, as the facts relied on did not appear to have been communicated to the defendant; and with respect to the second, enough did not appear of the terms on which the partnership commenced, to justify the decision that there was a parting with the books by the plaintiff, within the meaning of the agreement. His Lordship held, however, that on the question of damage it might be considered whether the plaintiff's own underselling had or had not contributed to affect the price of the work in the market. (c)

Contract to print
within a
specified time.

A contract between a publisher and a printer, whereby the latter undertakes to print a work within six months, does

(a) *Gale v. Leckie* (2 Stark. N. P. 107).

(b) *Ibid.*

(c) *Benning v. Dove* (5 Car. & P. 427).

not bind the former to furnish the materials within the six months in the absence of an express stipulation to that effect.(a) Such an engagement to print within six months is only conditional upon the copy being supplied to the printer fast enough; but it does not create by inference an engagement by the employer to furnish it within that time. It would, however, be an answer to any action that might be brought against the defendant for not printing the work within the six months, to say that the copy was not supplied fast enough.(b)

Courts of equity have jurisdiction to enforce the specific performance of a contract for the sale of a copyright; even when other matters are mixed up with it.(c) Lord Langdale, M.R., overruled a demurrer to a bill for the specific performance of a contract for the purchase of a copyright, stereotype sheets, prints, stock-in-trade, &c.(d)

It has not been decided whether, on the sale of a copyright, the law would imply a warranty of title in the absence of an express warranty.

Where the executor (who was also the son) of a deceased author, in reply to an offer from a publishing house relating to one of his father's works, replied that he would be happy to treat with them "respecting the copyright" in it; and, in another letter, said he had accepted their offer "for the exclusive right of publishing it," and gave a receipt for the money paid "for permission to publish the work so long as the copyright may endure; that right to be exclusively their [the publishers'] own for ten years from this date," it was held that this amounted to an express warranty of title; and an equitable assignment of the copyright having, unknown to the executor, been previously made to another publisher, the executor was held liable to an action for breach of the warranty.(e)

Joint owners of a copyright in a work may, no doubt, make what contract they please between themselves as to the printing and publishing of it, and neither will be permitted to set up against the other his original rights as a joint owner in violation of such contract.(f)

(a) *Mawman v. Gillett* (2 Taunt. 325).

(b) *Ibid.*

(c) *Thomblson v. Black* (1 Jur. 198).

(d) *Ibid.*

(e) *Sims v. Marryat* (17 Q. B. 281).

(f) See the American case of *Gould v. Banks* (8 Wend. 568). "There is no principle or authority," said the Court, "which will inhibit such a contract between parties, because they may be partners in the subject matter of it. They may bind themselves by a private agreement concerning the partnership business, but so far as third

Specific performance of contract for sale of copyright.

Warranty on sale of copyright.

Contracts between joint owners of copyright.

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Alteration of
work by
publisher.

If a person contracts to supply another with a composition in such a form as to enable the latter to publish it as his own, a court of equity will not restrain the publication of the manuscript in an altered or mutilated form.^(a) The late Lord Hatherley (when Vice-Chancellor Wood), expressed an opinion that, unless there is a special contract, express or implied, reserving to the author a qualified copyright, the purchaser of a manuscript is at liberty to alter and deal with it as he thinks proper.^(b)

Where the editor's salary was by way of royalty on the number of copies of the journal sold it was argued that the publishers were not authorised in making any alterations in the editor's articles. As to this Sir John Romilly, M.R., said: "It appears to me that it would lead to a great amount of difficulty if the owners of a copyright in a journal were bound to insert everything which the editor thought fit. Everyone would allow that they would not be bound to insert any libellous matter. How is the Court to draw the line and to determine how far the owners of the copyright may interfere with the discretion of the editor? . . . The matter resolves itself into this: if the defendants unduly interfere with the functions of the editor, or he improperly introduces matter which is injurious to the journal, the best course is to have it settled at law, and to leave it to a jury to determine the amount of damages."^(c)

In the same case the Court refused to restrain by injunction the publishers from omitting the editor's name from the title page. The agreement between editor and publishers was that the journal should be called the *Photographic News*, or by such other title as may be mutually agreed upon." The Master of the Rolls was of opinion that the name of the editor was not a necessary part of the title;^(d) and it was no part of the agreement that it should be such.

Edition falsely
purporting to be
by author.

But it seems that if a publisher puts forth an inaccurate edition of an author's work, purporting to be executed by him, the author may maintain an action against the publisher for injury to his reputation, even where the publisher is the owner of the copyright.^(e)

Payment of
author.

An injunction will not be granted to restrain the publication of a manuscript on the ground that the sum agreed to be paid to its author for contributing it, has not been paid;

persons may be interested, it would be inoperative as to them." See also Lindley on Partnership, 869, 870, 2nd edit.

(a) *Cox v. Cox* (11 Hare, 118).

(b) *Ibid.*

(c) *Crookes v. Petter* (6 Jur. N. S. 1133).

(d) *Ibid.*

(e) *Archbold v. Sweet* (1 M. & Rob. 162).

for such payment may be enforced at law, and the title to it is not a ground for the interposition of a court of equity.(a)

If an author has agreed with a publisher for the publication of his book, and the publisher has in consequence made advances of money, an injunction would, it seems, be granted to restrain the publication of the work by another publisher until the former had been repaid.(b)

Where a bookseller agreed with an author for an edition of a new translation of Buchanan's "History of Scotland," with a continuation to the time of the Union, to be contained in four volumes, and had obtained subscriptions for all that could fall within his edition, he was held by the Court of Session not entitled to prevent the author from publishing in a fifth volume a continuation of the history, which embraced part of the period, and also some of the matter contained in the last of the four volumes, this being repeated in order to keep up the connection.(c)

Right of author to publish a continuation of his work.

An arrangement was entered into between Dr. Brewster and Professor Jameson, on the one part, and an Edinburgh publishing firm on the other part, for the publication of a work, to be edited by the former, called *The Edinburgh Philosophical Journal*; the agreement to be binding for five years, or till the termination of the twentieth number of the journal. On the title-page the journal was stated to be "conducted by Dr. Brewster and Professor Jameson." After the twentieth number had appeared, Dr. Brewster, having differed with the firm, published a prospectus of "No. 1 of the New Series of the *Edinburgh Journal*, conducted by Dr. Brewster," whereupon the firm presented a bill of suspension and interdict of a work under this title, on the ground that they were proprietors of the original journal, the publication of which they intended to continue, and that the proposed work was an invasion of their property. The Lord Ordinary, "in respect the copyright of the publication in question is the property of the complainers," passed the bill, and granted the interdict. The Court of Session recalled this interlocutor as deciding the question to be discussed on the passed bill; but at the same time remitted to pass the bill and continue the interdict.(d)

One of the joint owners of a well-known periodical, even though he is also editor with absolute control over the literary department, has no right on a dissolution of partnership,

Title of a periodical partnership asset.

(a) *Cox v. Cox* (11 Hare, 118).

(b) *Brooke v. Wentworth* (3 Anstr. 381).

(c) *Blackie v. Aikman* (5 Scotch Sess. Cas. 719, 26 May, 1827).

(d) *Constable v. Brewster* (3 Scotch Sess. Cas. 215).

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caused by his leaving it, to advertise that the publication was "about to be discontinued." Sir John Romilly, M.R., held that the right to use the name of the periodical was part of the partnership assets, to be sold for the benefit of all the partners. He was of opinion, however, that the editor might advertise the discontinuance of the publication as regarded himself.(a)

Contract not to compose for any other than a particular theatre.

A covenant in articles of partnership, by which a dramatic writer undertakes not to compose pieces for any other than a particular theatre, is a legal covenant.(b) Such a covenant was compared in argument before Lord Eldon to contracts in restraint of trade, which are void on principles of public policy; but his Lordship said, "I cannot perceive any violation of public policy in this provision. The case of trade to which it has been compared is perfectly distinct. . . . The contract is not unreasonable upon either construction; whether it is that Mr. Colman shall not write for any other theatre without the licence of the proprietors of the Haymarket Theatre, or whether it gives to those proprietors merely a right of pre-emption."

The Court could not compel Colman to write for the Haymarket Theatre; but it did the only thing in its power—it induced him indirectly to do one thing by prohibiting him from doing another.(c)

Contract not to publish a work which would prejudice another work.

In the case of *Barfield v. Nicholson and Kelly*,(d) the defendant Nicholson had sold to the plaintiff his copyright in a work called "The Architectural Dictionary," and had covenanted for himself, his executors, and administrators, that he would not, by publishing any other work which might be prejudicial to the sale of it, or in any manner, directly or indirectly, prejudice the circulation or publication of the dictionary. The defendant Kelly, according to his affidavit, after this, and in total ignorance of the arrangement between the plaintiff and Nicholson, employed the latter in the composition of a work called "The Practical Builder," which was published by Kelly. The plaintiff charged that this work was in part pirated from "The Architectural Dictionary," and filed a bill to restrain the publication of it. Sir John Leach, V.C.—being of opinion that the plaintiff had no property in the figures and letterpress of "The Architectural Dictionary," alleged to have been pirated in

(a) *Bradbury v. Dickens* (27 Beav. 53).

(b) *Morris v. Colman* (17 Ves. 437).

(c) *Per Lord Eldon in Clarke v. Price* (2 Wils. 164).

(d) 2 Sim. & St. 1.

“The Practical Builder,” as they had [all been given to the world before either of those works appeared—dissolved an injunction which had been granted against Kelly. But the Lord Chancellor (Eldon), on appeal, ordered that an injunction should be awarded to restrain Kelly from publishing or selling in the name of Nicholson “The Practical Builder,” or any portions of it. The grounds on which the order was made are not stated; but the injunction was granted most probably on account of the covenant between Nicholson and the plaintiff, which was considered sufficient to hinder the defendant, though ignorant of its existence, from publishing, through the instrumentality of Nicholson, any book which would be detrimental to the sale of “The Architectural Dictionary.”

If an author contracts not to write or edit any other work on the subject treated in a work already written by him, a court of equity will not interfere until there is a violation of the agreement by actual printing and publication.(a)

Where the plaintiff purchased of the defendant the copyright of a treatise written by him upon the criminal law, the defendant undertaking not to write or edit any other work upon that subject, and an advertisement appeared that the defendant was about to edit “Burn’s Justice,” Lord Brougham refused a motion to restrain him from editing articles on the criminal law in that book, saying that the defendant was at liberty to write in his closet what he pleased. The Court interfered only when actual printing and publication took place.(b)

The plaintiff purchased from the defendant (a publisher) the whole of his copyright, stock-in-trade, and business property, including an annual called (from the defendant’s name) *Beeton’s Christmas Annual*. Subsequently the defendant contracted, in consideration of a yearly salary, to devote the whole of his time and attention to the developing of the plaintiff’s publishing business, not to engage in any other business without the plaintiff’s consent, to allow the plaintiff the use of his name for the purpose of their present or future publications, and not to permit the use of his name for any publications without the plaintiff’s consent. The plaintiff procured another author to prepare *Beeton’s Annual* for Christmas, 1874, and advertised it. Vice-Chancellor Malins restrained the publication by the defendant of an advertisement stating that he had no hand or concern in this annual, and that the annual devised by him, and

(a) *Brooke v. Chitty* (2 Cowp. 216).

(b) *Ibid.*

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written by the authors of the two preceding annuals, would not be issued by the plaintiffs, but by a different firm of publishers.(a)

Contract of
married woman.

On the subject of the capacity of a married woman, entitled to the copyright of a work for her separate use, to bind herself by contract with a publisher, before the Married Women's Property Act, 1882,(b) Jessel, M.R., thus expressed himself:(c) "As I understand, the mere power of contracting which a married woman has in respect of such property is not a power of entering into a personal contract in the sense of binding her personally, but a power of contracting so as to bind her property: in other words, you can enforce that contract as against the persons who, for the time being, hold that property, so far as it is a contract affecting the property. Therefore I take it that it is not impossible that a married woman may so deal with copyright to which she is entitled for her separate use as to prevent the assigns of that copyright from breaking her contract. In other words, I think it is quite possible that a married woman may put a kind of fetter upon the right to publish; that is to say, she may so far validly bind the copyright, which is a right to publish, that no person claiming under her by way of assignment or licence, with notice, would be allowed to publish."

Mortgage of a
newspaper.

There is nothing analogous to copyright in the name of a newspaper, and a mortgage of a share in a "newspaper and the copyright and right of publication thereof and all profits arising therefrom," is not an assignment of copyright which requires registration at Stationers' Hall, but merely an assignment of a chattel interest in the publishing adventure, which derives no additional efficacy from the registration. Such a registration is quite futile.(d)

The lien on the mortgaged share of any co-adventurer in the undertaking, for capital advanced by him, must first be satisfied before the mortgage can be made available by the mortgagee.(e)

A suit having been instituted between Messrs. Beeton and Hutton as to the proprietorship of the *Sporting Life* newspaper, which ultimately decided that they were entitled in equal shares, Mr. Beeton, during the progress of the suit, assigned by way of mortgage his share in the newspaper,

(a) *Ward v. Beeton* (L. R. 19 Eq. 207).

(b) 45 & 46 Vict. c. 75. (c) *Warne v. Routledge* (L. R. 18 Eq. 500).

(d) *Kelly v. Hutton* (L. Rep. 3 Ch. App. 703; 19 L. T. N. S. 228; 38 L. J. 917, Ch.).

(e) *Ibid.*

“and the copyright and right of publication thereof, and all profits arising therefrom,” to Messrs. Wrigley and Son, the assignment containing a recital of the proceedings in the suit, and a power of sale. Beeton subsequently mortgaged the same share to his partner Hutton, to secure two sums due to Hutton of £2000 and £512, with interest at 7½ per cent.; the former sum being the amount Beeton had been overpaid on a settlement of accounts with Hutton, the latter sum being the balance of Beeton’s purchase-money for his moiety of the newspaper. Messrs. Wrigley and Son registered the assignment to them at Stationers’ Hall, under the provisions of the Copyright Act, and subsequently, under their power of sale, sold the mortgaged share to the plaintiff Kelly, who filed a bill for a declaration that he was entitled to a moiety of the newspaper. Both Wrigley and Son and the plaintiff Kelly had permitted the newspaper to be carried on as formerly by Beeton and Hutton. The Lords Justices of Appeal held that the plaintiff could only take Beeton’s share in the newspaper, subject to the equities subsisting between the parties. “Many points have been raised before us,” said Lord Hatherley (then Sir W. Page Wood, L.J.), “as regards the property which was the subject of the mortgage to Wrigley and Son, of the 21st April, 1864. It appears to us that Beeton and Hutton the elder were engaged in a joint adventure, namely, the publishing of the paper in question. Capital was required for this adventure, and the co-partners or co-adventurers possessed leasehold premises and type, and other chattels necessary for carrying it on. The mortgage to Wrigley and Son assigned to them Beeton’s share in the newspaper, whatever it might be, and all profits belonging thereto or arising therefrom. In the habendum the deed speaks of the copyright of the newspaper, and the right of continuation and publication thereof. Now it appears to us that there is nothing analogous to copyright in the name of a newspaper, but that the proprietor has a right to prevent any other person from adopting the same name for any other similar publication; and that this right is a chattel interest capable of assignment was held in *Longman v. Tripp*(a) and *Ex parte Foss*(b). The mortgage, then, to Wrigley and Son, was that of Beeton’s share of a chattel, which formed the principal subject of the co-adventure between Beeton and Hutton the elder. Considerable stress has been laid in argument, on the part of

(a) 2 Bos. & P. 67.

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

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the appellants, on the necessity of notice being given of such an assignment either by direct notice to Hutton the elder, or by an entry at the Inland Revenue Office; and much controversy has arisen in evidence as to whether Hutton the elder had or had not in fact such notice prior to the 9th of March, 1866. The entry of their mortgage by Wrigley and Son at Stationers' Hall was clearly futile; but we do not pause to consider the question further, because it is clear on the face of their mortgage deed that Wrigley and Son were aware of the litigation between Beeton and Hutton the elder. They allowed the joint adventure to be worked jointly, whether with or without notice, and it is impossible that they can now take to themselves the subject of that adventure and the profits arising therefrom without being subject to every equity of the co-adventurer. A judgment creditor in execution against one partner, his debtor, takes only the interest of the debtor, subject to his co-partner's equities; and Wrigley and Son could not claim the asset without satisfying in the first place the lien of £512 for the unpaid purchase-money of Beeton's moiety, nor without satisfying the balance of account due from Beeton to his co-adventurer Hutton the elder. The lien of Hutton the elder as *quasi* partner in the adventure must be satisfied before the subject matter of the adventure can be passed over to any person claiming under an assignment from Beeton; and this lien must continue so long as Wrigley and Son, as the assigns of Beeton by way of mortgage, allow the business to be carried on in co-partnership by Beeton and Hutton the elder. Irrespective of the doctrine of notice, they cannot take the benefit of Hutton's capital in carrying on the concern (whether they have given him notice or not) and then ask to have the share of Beeton in the chattel, and still less in the profits of the concern, handed over to them without first satisfying the lien of the co-adventurer for what may be due to him on taking the accounts of the adventure. The same reasoning applies to the plaintiff as purchaser. His letter of the 27th of December, 1866, to Hutton the elder, set out in the amended bill, shows that he, at least up to that time, acquiesced in the arrangement under which the newspaper was to be carried on. In fact, having acquired the interest of Beeton in the newspaper, his mortgagees allow Beeton to conduct the business, and he must be taken to act as their agent and on their behalf. They do not advance any capital, and ask no question as to how it is to be provided. They must therefore take the business as they found it, at least up to the

time of the actual exclusion of the plaintiff by Hutton the elder from the concern, and even after that time profits cannot be claimed without making all just allowances in respect of such moiety. Hutton the elder, therefore, wholly irrespective of his mortgage of the 9th of October, 1866, would be entitled to a lien on Beeton's share in the newspaper for £512, the unpaid purchase-money. He would also, we think, be entitled to the balance on the account settled, on the 9th of March, 1866, with Beeton (which account came down to the 30th of September, 1865), and to the £2000 due to Hutton the elder as the result of that account and the arrangement subsequent on it. We think, also, that interest at the rate of $7\frac{1}{2}$ per cent. per annum must be allowed on those two sums; for Hutton the elder was clearly entitled to decline carrying on the business, whether with or without the knowledge of Wrigley and Son's mortgage, except on the terms of being allowed interest on his capital. It is in fact advanced to the plaintiff. As regards Hutton the elder's alleged sale to Hutton the younger on the 13th of September, 1866, we are of opinion that no such sale has been proved, certainly none that can be upheld against the plaintiff. As to the whole case, therefore, we conclude that the plaintiff has become entitled to the interest of Beeton in the newspaper. We see no reason why that interest should not be dealt with, as on former occasions, by directing the defendants to concur in procuring the plaintiff's name to be registered at the Office of Inland Revenue as such owner, subject to the lien before mentioned."

A novel point came before the Court of Chancery for decision in the case of *Platt v. Walter*.^(a) The defendant's grandfather had established both the *Times* and *Evening Mail* newspapers, the former in 1788, and the latter in 1789. The *Evening Mail*, as described in the answer of the defendant, consisted of "a republication, on the evenings of the Mondays, Wednesdays, and Fridays in each week, of the matter (other than the advertisements) contained in the two preceding numbers of the *Times*, with such omissions and abridgments as were considered desirable, but with the addition of a postscript containing the latest market intelligence, and also such advertisements as had been separately bespoke and paid for, for the *Evening Mail*." This mode of publishing both newspapers continued down to the year 1864, although in 1820 one fourth share in the *Evening Mail* became, by purchase from a son of the

Agreement for use by one newspaper of the matter and type of another.

(a) 17 L. T. N. S. 157.

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original founder, vested in a stranger, from whom the plaintiffs derived their title. The object of the suit instituted in Chancery was to have it declared that the arrangement which had been so long in existence gave the proprietors of the *Evening Mail* certain rights and interests in and over the *Times*, which the proprietors of the latter newspaper could not at their mere will determine, viz., the right of republishing the matter of the two last preceding numbers of the *Times*, or any selection and abridgment of it, and the right of causing to be edited, printed, and published the *Evening Mail* whenever the *Times* should from time to time be edited, printed, and published. The bill further prayed that, in case a notice given by defendant for the dissolution of the partnership had been properly given, it might be declared to be dissolved, and directions should be given for the sale as a going concern of the *Evening Mail*, and the copyright and goodwill thereof, including particularly the rights and interests in and over the *Times*, and the copyright and goodwill and other property thereof; and in case the proprietors of the *Times* should be unwilling to carry it on subject to such rights and interests of the *Evening Mail*, then that the proprietors of the latter paper should be declared entitled to have the *Times* and the copyright, &c., thereof sold, subject to such rights and interest. The Vice-Chancellor (Stuart) dismissed the plaintiffs' bill, except so much of it as prayed a dissolution of the partnership and an account; and the Lord Chancellor (Chelmsford) confirmed this decision.

It was contended for the plaintiffs that, although so long as the original founder continued to be sole proprietor of both newspapers, no rights or interests could be said to belong to the *Evening Mail* either in connection with or independently of the *Times*; yet when the original founder had made a separate grant to one of his sons of one fourth share in the *Evening Mail*, he thereby not only gave birth to rights in that paper, but also created a kind of servitude over the *Times*; i.e., he took upon himself an irrevocable obligation to allow the matter in its columns to be copied into the *Evening Mail*, and to permit it to be printed at the same place and with the same types as the *Times*. In reply to this, Lord Chelmsford says: "Suppose a covenant to this effect to be good against the grantor, who was sole proprietor and also printer of the *Times*, how could it bind the future proprietors and printers of that newspaper? The covenant relates not to the property granted, but it imposes

what may be properly described as a servitude upon the property, which is of a personal nature. It is at the utmost, therefore, a mere personal covenant, binding upon the covenantor and his personal representatives, but the burthen of it not running with the property of the *Times* against assigns."

In answer to a further argument on behalf of the plaintiffs, based on the length of time during which the arrangement had continued, the Lord Chancellor observed: "The presumption of a grant from long-continued usage arises only where the origin of the usage is unknown. But in the present case, if the right claimed by the plaintiff originated in the grant to William Walter [the founder's son], the usage is not required to establish it; and if it did not so originate, the usage is of no avail. The claim of the plaintiffs makes it necessary for them to prove that, either by the original grant of the shares in the *Evening Mail* to William Walter, or by some subsequent right obtained by the plaintiffs against the proprietors of the *Times*, a perpetual benefit to the *Evening Mail*, and a perpetual burthen on the *Times*, were established, however prejudicial it might prove to the interests of the proprietors of the *Times*; and that upon the dissolution of the partnership in the *Evening Mail*, and the consequent sale of the property in that newspaper, the proprietors of the *Times* were bound to give a value to the goodwill by continuing the arrangement for its publication as long as the *Times* should continue to be published. There is certainly no express contract to anything like this effect between John Walter, the grandfather, and his sons, when the separate interests in the *Evening Mail* were first created; and it would be a strong implication to draw from the transaction, that the burthen of such an obligation was intended to be assumed by Mr. Walter for himself and for all future proprietors of the *Times*." Finally, the Lord Chancellor said: "What are called in the bill the rights and interests of the *Evening Mail* over the *Times* appear to me to have begun in will and pleasure, and to have continued throughout upon the same footing. They could, at no time, have been enforced; and upon the dissolution of the partnership in the *Evening Mail* and its consequent sale, the court has no power to direct that they shall be included in the goodwill and property of that newspaper."

A contract by a printer to print, and find the paper for printing, a number of copies of a work, is not a contract for the sale of goods within the 17th section of the Statute of Frauds as extended by the 9 Geo. 4, c. 14, s. 7; and the printer, consequently, may recover the price in an action for work,

Contract to print is not within 17th section of Statute of Frauds.

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labour, and materials, where the contract is merely a verbal one.(a)

"In such cases," said Pollock, C.B., "it seems to me that the true criterion is, whether work is the essence of the contract, or whether it is the materials supplied. . . . I am inclined to think that it is only where the bargain is for *goods* thereafter to be made, and not where it is a mixed contract for work and materials to be found, that Lord Tenterden's Act (9 Geo. 4, c. 14) applies." "The defendant," said Martin, B., "having a manuscript, takes it to a printer to print for him. Then what does he intend shall be done? He intends that the printer shall use his type, shall set it up in a frame and impress it on paper, that the paper shall be submitted to the author, that the author having corrected it shall send it back to the printer, who shall again exercise labour and make it into a complete thing in the shape of a book. That being so, I think that the plaintiff was employed to do work and labour and supply materials, and for that he is entitled to be paid. It seems to me that the true criterion is this: Suppose there was no contract as to payment, and the printer brought an action to recover what by law he was entitled to receive, would that be the value of the book as a book? I apprehend not; for the book might not be worth half the value of the paper on which it was printed, but he would be entitled to recover for his work, labour, and materials supplied; therefore this is in strictness work, labour, and materials done and provided by the plaintiff for the defendant." In the case of *Bensley v. Bignold*,(b) where the defence was that the printer had not affixed his name to the book as required by the 39 Geo. 3, c. 79, s. 27, it was treated by Abbott, C.J., Bayley, J., and Holroyd, J., as a contract for work, labour, and materials.(c)

Printer's lien.

A printer who is employed to print certain numbers, but not all consecutive numbers of an entire work, has a lien upon the copies not delivered for his general balance due for printing the whole of those numbers.(d)

Where a printer was so employed by one Stratford, and printed 8750 copies, of which he delivered only 5987 to Stratford, the residue remaining in his own warehouse, though Stratford supplied the paper for printing the several numbers from time to time as they were to be printed, and the printer made a separate charge for each number, the

(a) *Clay v. Yates* (1 H. & N. 73).

(b) 5 B. & Ald. 335.

(c) *Clay v. Yates* (*ubi supra*).

(d) *Blake v. Nicholson* (3 M. & S. 167).

assignees of Stratford, who afterwards became bankrupt, were held not entitled to recover from the printer the copies remaining in his possession, on tendering to him so much as was due for the printing of those copies in proportion to his charge for the whole. Lord Ellenborough, C.J., said: "I think the defendant had a lien for the whole balance, the work being an entire work in the course of prosecution, upon the same principle that a tailor, who is employed to make a suit of clothes, has a lien for the whole price upon any part of them. It would be inconvenient if he was obliged to make stops in the course of the work: the nature of the work affords a reason for his general lien." And Le Blanc, J., added: "The supplying the paper from time to time did not make it the less one entire work."^(a)

It seems that a stereotype printer has not a general lien on stereotype plates not manufactured by himself, but only put into his hands for the purpose of printing from them.^(b)

To establish a general lien in such a case, the stereotype printer must show, according to Tindal, C.J., such a custom of trade that the other party to the transaction must be taken to have contracted with reference to it. "Nothing short of this," said the Chief Justice, "will dispense with an express contract; for generally that is the only mode of creating such a lien as this, which the common law does not recognise. In trades long established such a usage may not improbably have grown up; but it requires strong evidence to show its existence in a new trade like that of stereotype printing, which has sprung up within a short period,^(c) and in which it is not very probable that any such general usage has yet been established."^(d)

It seems that by the custom of trade a printer cannot recover for the printing of a work before the whole is completed and delivered.^(e)

Customs of
trade between
printers and
publishers.

And it would seem that there is a usage of trade between the printers and proprietors of newspapers, that the latter should give to the former four weeks' notice of an intention to put an end to the employment, or pay them four weeks' wages.^(f) But there does not appear to be a reciprocal obligation on the part of the printers.^(g)

It would appear that there is no general custom of trade

(a) *Blake v. Nicholson* (3 M. & S. 167).

(b) *Bleaden v. Hancock* (M. & Mal. 465; 4 C. & P. 152. *Per* Tindal, C.J.).

(c) This case was decided in 1829.

(d) *Bleaden v. Hancock* (*ubi supra*).

(e) *Gillett v. Mawman* (1 Taunt. 137). See also *Allard v. Booth* (7 C. & P. 108).

(f) *Cunningham v. Fonblanque* (6 C. & P. 44, Park, J.). (g) *Ibid.*

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binding printers to insure for booksellers the paper given for works to be printed.(a)

For many years the business of printing in London, as between the master printers and compositors, has been regulated by committees of each body, who have from time to time agreed upon rules, which, so long as they remain unaltered, are treated and acted upon as binding between master and compositor, and are imported into every engagement to which they are applicable.(b)

Payment of
compositors for
advertisements
on wrappers.

The following rules, agreed upon in 1839, relating to the payment of compositors for printing advertisements on wrappers, came before the Court of Exchequer(c) in 1858 for interpretation: "Every companionship (which means the compositors) on a magazine or review to be entitled to the first or title-page of the wrapper of the magazine or review, but not to the remaining pages of such wrapper, or to the advertising sheets which may accompany the magazine or review. Standing advertisements, or stereo blocks, forming a complete page, or, when collected together, making one or more complete pages in a wrapper or advertising sheet of a magazine or review, not to be chargeable. The compositor only to charge for his time in making them up. The remainder of the matter in such wrappers or advertising sheets, including standing advertisements or stereo blocks, not forming a complete page, to be charged by the compositor and cast up according to the 8th and 20th Articles of the scale as they may respectively apply." The interpretation given by the Court of Exchequer, whose judgment was affirmed by that of the Exchequer Chamber,(d) was as follows: "We think it clear that the paragraph or sentence of the rule beginning 'standing advertisements' has reference to the wrapper or advertisement sheet then about to be composed and printed, and that the master has the right to direct in what manner they shall be printed. He may direct that they all, as far as possible, be put into complete pages, or that they may be distributed through the wrappers or advertising sheets, as he may think fit. The first provision of the part of the rule before quoted is for the case of standing advertisements forming a complete page. This seems directed to the case of a page of the former number being reprinted in the succeeding one. The second case is of the standing advertisements collected together,

(a) *Mawman v. Gillett* (2 Taunt. 325).

(b) *Per Watson, B., Hill v. Levey* (3 H. & N. 8).

(c) *Hill v. Levey* (3 H. & N. 7).

(d) S. C. 3 H. & N. 702.

making one or more complete page or pages in the wrappers or advertising sheets. We think this refers to the case when the master shall direct that standing advertisements shall be printed in the same page or pages, so far as they will fill up. In such case, when they completely fill a page or pages, the advertisements are not to be chargeable according to the scale, but the compositor is only entitled to charge for his time for making up. But if any standing advertisements are left over, or if the master thinks fit to direct that they shall be distributed through the other pages of the advertising sheet, so that they do not form a complete page, we think that the latter part of the rule applies, and that the compositor is entitled to charge according to the scale."(a)

Where, therefore, in the November number of a monthly magazine there were composed and printed, on one page, two advertisements which occupied the entire page, and the type of which was left standing, and in the December number the same two advertisements were printed, but on different pages, each advertisement occupying about half a page, the remainder of the page being filled up by other advertisements, it was held that the compositor was entitled, under the latter part of the rule, to charge for the composing, and that the case did not come within the first part of the rule, under which the compositor would be entitled to charge only for his time in making up.(b)

A dispute, similar to that just referred to, having arisen in 1856 between a compositor and a master printer, the matter was referred, in pursuance of certain of the rules agreed upon, to the arbitration of three master printers, three journeymen, and a barrister, whose casting vote was to be decisive; the result being an award in favour of the master, the barrister having given his casting vote in favour of the view taken by the three masters. The plaintiff subsequently entered the defendant's service knowing of that decision, and also that the defendant was one of the three masters; but nothing was said as to the terms of payment, each party understanding that it was to be made according to the rules. It was held that the decision of the arbitrators was not, at the time of the employment of the plaintiff, binding between the parties as an interpretation of the rule above set out, and that, notwithstanding their decision, it was competent for the Court to entertain the question of its construction.(c)

If there is an express undertaking by the printer to insure the paper given him for a work which he contracts

Contract to insure.

(a) 3 H. & N. 12, 13.

(b) *Ibid.*

(c) 3 H. & N. 12, 13.

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to print within six months, he is liable for a loss by fire which takes place after that time, even though the completion of the work within the specified time has been prevented by the failure of his employer to supply copy fast enough.(a) If he wishes to exonerate himself from all risk after the specified time has elapsed, he must abandon the contract altogether; if, whilst complaining of the delay in supplying copy, he continues to print, his contract to insure continues.(b)

Loss by fire.

Where certain printers were employed to print a work, of which the impression was to be 750 copies, and a fire broke out on their premises before the whole number of copies had been delivered, in an action to recover the amount to be paid for the work, Tindal, C.J., held that the printers' right to recover depended on the question whether the whole 750 copies had been printed when the fire broke out, or whether the fire took place while the press was set and before the whole was printed off, in which latter case they would not be entitled to recover anything.(c)

Illegal or immoral contracts.

In the case of authors, publishers, and printers, as in all other cases, our law refuses to aid any of the parties to a contract of an illegal or immoral character.

No person who has had anything to do with the composition of an immoral or libellous work can maintain an action against the person who employed him, to recover remuneration for his labour. This applies to printers, as well as to authors and publishers.(d)

Best, C.J., in dealing with the case of a book which recounted the amours of a courtesan, said: "I have no hesitation in saying that no person who has contributed his assistance to the publication of such a work, can recover in a court of justice any compensation for labour so bestowed. The person who lends himself to the violation of the public morals and laws of the country shall not have the assistance of these laws to carry into execution such a purpose. It would be strange if a man could be fined and imprisoned for doing that for which he could maintain an action at law. Every one who gives his aid to such a work, though as a servant, is responsible for the mischief of it."(e)

A printseller cannot recover the price of libellous or immoral publications sold by him.(f)

Where the plaintiff, a printer, agreed to print for the

(a) *Mawman v. Gillett* (2 Taunt. 325).(b) *Ibid.*(c) *Adlard v. Booth* (7 C. & P. 108).(d) *Poplett v. Stockdale* (Ry. & M. 337).(e) *Ibid.* 338.(f) *Fores v. Johns* (4 Esp. 97).

defendant a certain number of copies of a treatise to which a dedication was to be prefixed, and, after the treatise was printed, and the proof sheet of the dedication was revised by the defendant and returned to the plaintiff, the latter, for the first time, discovered that it contained libellous matter, and on that account refused to complete the printing, it was held that he was justified in so refusing, and was also entitled to recover for printing the treatise. "I told the jury," said Pollock, C.B., in this case,^(a) "that if the plaintiff agreed to print the dedication and the treatise, and so undertook to print that which he knew to be libellous, and afterwards said that he would not print both; in such case he could not recover. I think his right to recover rests entirely on this ground, that he had been furnished with the treatise without the dedication. The dedication was afterwards sent, but he had no opportunity of reading it until after it was printed; he then discovered that it was libellous, and refused to permit the defendant to have it. I think that if a contract is *bond fide* entered into by a printer to print a work consisting of two parts, and at the time he enters into the contract he has no means of knowing that one part is unlawful, and he executes both, but afterwards suppresses that which is unlawful, there is an implied undertaking on the part of the person employing him to pay for so much of the work as is lawful."

Although the illegality or immorality of an intended publication would be a good defence to an action brought against the author for breach of contract to deliver his manuscript for publication, this illegality or immorality is not to be presumed where the work itself is not produced at the trial.^(b)

A printer whose name did not appear on the periodical paper printed by him, as was required by 38 Geo. 3, c. 78 (since repealed by 6 & 7 Will. 4, c. 76, s. 32), was held not entitled to maintain an action for work and labour done in printing it.^(c) And the proprietor of a newspaper, published before the filing of the affidavit required by that statute, when in force, was, on the ground of having done an act prohibited by law, nonsuited in an action brought to recover damages for breach of contract to print certain copies of his newspaper.^(d) For the same reason a printer was held not entitled to recover for labour or materials used in printing a pamphlet, on which he had not printed

(a) *Clay v. Yates* (1 H. & N. 73).

(b) *Gale v. Leckie* (2 Stark. N. P. 110).

(c) *Marchant v. Evans* (2 B. Moore, 14).

(d) *Houstoun v. Mills* (1 M. & Rob. 325).

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his name, and the name of the city or place where he dwelt, as required by sect. 27 (now repealed) of 39 Geo. 3, c. 79.(a)

But to an action by the proprietor of the copyright in a book against the defendant for having, without the proprietor's consent in writing, printed for sale copies of the work, and also for having in his possession for sale and selling copies of the work so unlawfully printed, it was held no defence to plead that the book was printed and published without the name and place of abode of the printer upon the first or last leaves thereof, as directed by 2 & 3 Vict. c. 12, s. 2.(b)

Whilst the enactment (6 & 7 Will 4, c. 76, s. 8) requiring the filing at the Stamp Office of a declaration as to the proprietorship of newspapers was still in force, it was held that where a person entered specifically into a contract with the real proprietor, who was not registered as such, a person whose name was registered could not be made liable on the contract.(c)

Co-owner of one newspaper being part-proprietor of a rival paper.

It is a fundamental principle of the law of partnership that one partner cannot, openly or secretly, lawfully carry on for his own benefit any business in rivalry with the firm to which he belongs.(d) Therefore where a firm consisting of four partners owned a newspaper (*The Morning Herald*), and three of them also owned an evening paper (*The English Chronicle*), which latter paper had, in consideration of an annual payment to the proprietors of *The Morning Herald*, the right of using its type and other effects, the three owners of the evening paper were restrained from publishing in it any information obtained at the expense of *The Morning Herald*, until it should have first been published in *The Morning Herald*.(e)

The plaintiff's application for an injunction to restrain the proprietors of the evening paper from using the type and effects of the morning paper was refused on several grounds:—viz., that the plaintiff himself had acquiesced; that the proprietors of other morning papers had adopted the same practice with respect to other evening papers; that if the practice were objectionable the parties might guard against it by their contract; that in the present case there was actually a covenant that the proprietors of the morning paper should not be concerned in any other morning paper, which indicated an intention that they might be concerned in any evening paper.

(a) *Bensley v. Bignold* (5 B. & Ald. 335).

(b) *Chappell v. Davidson* (18 C. B. 194; 25 L. J. 225, C. P.).

(c) *Holcroft v. Hoggins* (2 C. B. 488).

(d) See 1 Lind on Partnership, 579.

(e) *Glassington v. Thwaites* (1 Sim & St., 124).

PART IV.—LAW OF LIBEL.

CHAPTER I.

INTRODUCTION.

WE have been treating hitherto of the rights and privileges of the authors and proprietors of literary and artistic works. Such works, besides conferring rights and privileges, also impose duties and entail liabilities. Writing, printing, and other modes of publication furnish, unhappily, no exception to the general rule that there is nothing, however beneficial its normal tendency, which may not be perverted to the worst of uses. Those arts which have done so much to enlighten mankind, to elevate their moral, social, and political condition, and to diffuse innocent gratification and amusement, have also been made the instruments of wanton and insulting attack upon religion and morals, upon the government and constitution of the State, and upon all that is most dear in private life. Of injuries thus caused either to the community at large or to its individual members the law takes cognizance, and those injurious publications which it punishes are designated *libels*.^(a)

Libel's in general.

There is no satisfactory definition of libels in general—which really explains what they are and fully describes their various species; nor is it of importance to endeavour to obtain such a definition, since its very wide generality would render it practically valueless.^(b) A

(a) The word libel is derived from the *libellus* (dim. of *liber*, a book) *famosus* of the Roman law.

(b) Lord Lyndhurst, in his evidence before the Committee of the House of Lords, on whose report the Act of 6 & 7 Vict. c. 96 was framed, says on this subject: "A definition, in order to satisfy the requisites of a good logical definition, ought not only to be sufficiently precise so that it shall take in nothing except what was intended to be specified, but also sufficiently comprehensive to omit nothing which ought to be included. I have never yet seen, nor been able myself to hit upon anything like a definition of libel, or even of sedition, which possessed those requisites of a definition; and I cannot help thinking that the difficulty is not accidental, but essentially inherent in the nature of the subject-matter."

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definition may with more profit be attempted of each of the different classes of libels which are embraced under the general head.(a)

How expressed.

It need here be only added, in general, that a libel may be expressed in a variety of ways, and not only by means of writing or printing, whether in the form of book, pamphlet, placard, letter, &c., but also by means of pictures, drawings, photographs, or other signs.(b)

Division of libels.

Libels may, for the purposes of the present work, be conveniently divided into two great classes—public and private; and public libels may be subdivided into those (1) which are of a blasphemous or irreligious character; (2) those which offend against decency and morality; and (3) those directed against the Sovereign, the Government, or the law.

Of the various kinds of public libels we shall treat in order, before proceeding to deal with the subject of private libels or libels on individuals.

CHAPTER II.

BLASPHEMOUS LIBELS.

Grounds of legal interference.

It is not with a view to avenging any insults offered to the Deity that our law professes to punish blasphemy, but on account of the temporal consequences to society which it tends to produce. Society, said our older authorities, cannot exist without those religious and moral restraints which blasphemous attacks on natural or revealed religion weaken, if not destroy; the sanction of an oath in all proceedings connected with the administration of justice is rendered of no

(a) Of what little utility, for the purpose of conveying any precise knowledge of a practical character, a definition must be which attempts to describe at once all kinds of libels, may be seen from the two following examples taken from standard writers. "*Libelli famosi*," says Blackstone, "taken in their largest and most extensive sense, signify any writings, pictures, or the like of an immoral or illegal tendency" (4 Com. 150). "Considering the offence in its relation as well to the public as to individuals," says Starkie, "libels may not inconveniently or improperly be defined to be 'any writings, pictures, or other signs which immediately tend to injure the character of an individual, or to occasion mischief to the public'" (Law of Slander and Libel, Commentary).

(b) Bacon's Abridg. tit. Libel; Salk. 418; 3 Bl. Com. 125; *Austen v. Culpepper* (Skin. 123; Show. 314).

avail, if the belief in a moral governor of the universe who punishes vice and rewards virtue is shaken; and where Christianity, as is the case with us, is the religion of almost the entire nation, unseemly attacks on its doctrines provoke to the commission of acts of violence.(a) It is on these grounds that the right of the State to prohibit and punish blasphemous libels has been based, though there can be little doubt that our judges have often been influenced, in their decisions, by those purely theological considerations which in words they professed to ignore.

An American writer, Bishop,(b) thus speaks as to the grounds on which the legal doctrine is based: "Whether the principle on which this doctrine rests is that they [blasphemy and profane swearing] tend to undermine Christianity, which is a part of our law, or that they disturb the peace and corrupt the morals of the community, is a question not fully settled. Perhaps we may even take another view, namely, that reverence towards God and religion—Christianity being our form of religion—is essential to man, who is injured in his nature and being when this reverence is impaired; or still another view, that these offences so shock his purer and higher sensibilities as to create an injury to him against which he needs protection, precisely as against an assault. Probably these several considerations, and some others also, may each be deemed to enter more or less into the policy of the law."(c)

(a) This view of the matter is put broadly by Michaelis, quoted 2 Stark. (2nd edit.) 131. He says: "On God's account, then, punishments for blasphemies are not necessary; but perhaps they are necessary for the sake of our neighbour, who, if he believes in a God, or holds his religion, whether true or false, to be true, always feels himself extremely scandalised by them. Nor is it only blasphemy against the true God that ought to be punished, but even that against false gods, supposed saints, and fictitious religion, whenever they happen to be the gods, saints, and religion of the people."

(b) Crim. Law. vol. ii. sect. 87.

(c) The Commissioners on Criminal Law,* in their Sixth Report (p. 80), thus state their view of the reasons by which laws against blasphemy may be defended: "Laws for the punishment of offences against religion generally are justifiable, on mere temporal grounds, upon two principles. In the first place, religion, by enforcing moral conduct and applying to that object some of the strongest motives that operate on human nature, is so effectual an assistant in securing a general obedience to social laws, that actions tending directly to expose it to ridicule and contempt, and thus to weaken its authority with the ignorant and unthinking, are mischievous to the com-

* Thomas Starkie, Henry Bellenden Ker, William Wightman (afterwards Justice of the Queen's Bench), Andrew Amos and David Jardine, Esquires.

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CHAPTER II.
Blackstone's
view.

Blackstone^(a) describes the offence of blasphemy as consisting in a denial of the being or providence of the Almighty; or in contumelious reproaches of our Lord and Saviour Christ, or in profane scoffing at the Holy Scripture, or exposing it to contempt and ridicule, for Christianity is part of the laws of England.

Spoken words, equally with written, may subject the utterer to the penalties imposed by law for blasphemy. Some of the earlier cases on the subject are referred to in the note;^(b) but the doctrines laid down in them would probably now be applied with considerable limitations, though none of the decisions have ever been overruled.

Per Lord Hale.

In one of those cases where the words were "that Jesus Christ was a bastard and a whoremaster; that religion was a cheat; that he feared neither God, the devil or man,"^(c) Lord Hale said, "That such kind of wicked blasphemous words were not only an offence to God and Religion, but a crime against the Laws, State and Government. For to say religion is a cheat is to dissolve all those obligations whereby civil societies are preserved. Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law."^(d)

Common law
decisions.

In a subsequent case,^(e) relating to a book designed to show that the Christian miracles were not to be taken in a literal sense, and that the whole New Testament account of the life and miracles of Christ was but an allegory, the Court would not suffer it to be debated whether to write against Christianity *in general* was not an offence punishable in the temporal courts at common law. They laid stress on the word "general," and stated that they did not intend to in-

munity, and on that account may properly be repressed by penal enactments. Secondly, as the great mass of the inhabitants of civilised countries regard religious faith, in one form or other, as of vital interest and importance, the criminal law may properly be employed to protect the feelings and opinions of the community on this subject from wanton insult. Upon these two principles, as it appears to us, the interference of the penal law in matters of religion is to be justified; and we think that rules framed strictly with reference to these principles neither invade the rights of opinion and legitimate discussion, nor endanger any general or particular interests which can properly be protected by the criminal law."

(a) 4 St. Black. 287.

(b) *Atwood's case* (Cr. J. 421); *Rex v. Taylor* (Vent. 293; 3 Keb. Rep. 607); *Rex v. Clendon* (cited Str. 789); *Rex v. Hall* (1 Str. 416).

(c) *Rex v. Taylor* (*ubi supra*).

(d) Lord Coleridge, C.J., in *Reg. v. Foote and others* (*post*, p. 374), though refusing to be bound by the unnecessary dicta of Lord Hale in this case, fully agrees with what Lord Hale held—viz., "that such kind of blasphemous words" as had been there used were a crime.

(e) *Rex v. Woolston* (Fitz. Rep. 64; Str. 834); 2 Geo. 2.

clude disputes between learned men upon particular controverted points. Raymond, C.J., in delivering the judgment of the Court, said: "I would have it taken notice of that we do not meddle with any differences of opinion, and that we interpose only where the very root of Christianity^(a) itself is struck at, as it plainly is by this allegorical scheme, the New Testament and the whole relation of the life and miracles of Christ being denied."^(b)

The same doctrine was laid down in *Rex v. Williams*,^(c) where the defendant was convicted of having published an impious and blasphemous libel, called "Paine's Age of Reason," which denied the authority of the Old and New

(a) How vague is such a test! Who is to determine, and by what criterion, when the "root" of Christianity is struck at, or when a "fundamental" part is attacked. Are the miracles, as most believe, an essential root, or, as others think, an accidental and hurtful excrescence? The cultured author of *Literature and Dogma*, and *St. Paul and Protestantism*, considers that he holds to the very "root" of the matter, whilst discarding most of what Convocation would hold "fundamental." To the ordinary orthodox mind the Divinity of Christ and his resurrection from the dead are probably two of the most essential parts of the Christian religion. Yet a creed (the Jewish) which denies both—which, in the language of Lord Raymond, denies "the New Testament and the whole relation of the life and miracles of Christ"—does not, in the opinion of a most learned judge of our own day (Stephen, J.), strike at the root of Christianity (see *Fortnightly Review*, for March, 1884, p. 399). In his opinion the Christianity of which Lord Raymond spoke was "rather that part of the Christian religion which has an immediate bearing upon conduct than a theological system," a view of the matter liberal enough to satisfy the author above mentioned. But this removes the difficulty only one step backwards. Who is to determine, and how, what part has and what part has not an immediate bearing upon conduct? In the opinion of many, only its ethical teaching possesses this character; the miraculous incidents being for them but a hindrance and a stumbling-block. In the opinion of others the entire efficacy of the faith is dependent upon Christ having been raised from the dead (1 Cor. 15 ch. 16 & 17 verses) in the literal sense of those words. Is this the kind of question which can safely be left to the decision of a tribunal consisting of twelve men drawn from every religious denomination in the kingdom? The plain common sense of a jury (now, though not in Lord Raymond's time, the sole judges of what is or is not a libel), may not be unequal to the task of pronouncing upon the *manner* of a publication—whether it is on the one hand scurrilous and wanton, or on the other hand serious and decent. But how is such a body to decide what is or is not a fundamental part of Christianity; what part has and what has not an immediate bearing upon conduct. Is the question one of fact as to which witnesses may be examined on the one side and on the other? If so, who may be considered experts?

(b) "Of much which Lord Raymond says, and of many of the expressions in his judgment, I think that time and change have destroyed the authority." (Per Lord Coleridge, C.J., *Reg. v. Foote and others*, Summing Up, p. 20).

(c) In 1797. See Holt on Libel, 69, note (e).

Testament, asserted that reason was the only guide by which the conduct of men ought to be directed, and ridiculed the prophets, Jesus Christ, his disciples, and the Scriptures. The judgment of Ashurst, J., in that case exhibits a union of the different reasons which have influenced the determination of cases of blasphemy. He remarked that "although the Almighty did not require the aid of human tribunals to vindicate his precepts, it was nevertheless fit to show our abhorrence of such wicked doctrines, which were not only an offence against God, but against all law and government, from their direct tendency to dissolve all the bonds and obligations of civil society. It was upon this ground that the Christian religion constituted part of the law of the land. But if the name of our Redeemer was suffered to be traduced, and his holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the law be stripped of one of its principal sanctions—the dread of future punishment."

It was held a blasphemous libel to represent by a published writing that Jesus Christ is an impostor, the Christian religion a mere fable, and those who believe in it infidels to God.(a)

In *Reg. v. Waddington*,(b) tried before Lord Tenterden, C.J., in 1822 the effect of the libel set out in the information was to impugn the authenticity of the Scriptures; and one part of it stated that Jesus Christ was an impostor and a murderer in principle and a fanatic. Before the verdict was pronounced, one of the jury asked the Chief Justice whether a work which denied the divinity of our Saviour was a libel; to which the Lord Chief Justice answered that "a work speaking of Jesus Christ in the language used in the publication in question was a libel, this being a part of the law of the land." On motion by the defendant for a new trial on the ground of misdirection, the Lord Chief Justice repeated, in equally cautious language, the interpretation of the law which he had given to the juryman, omitting, however, the old commonplace as to Christianity being part of the law of the land. "There cannot be any doubt that a work which does not merely deny the Godhead of Jesus Christ, but which states him to be an impostor and a murderer in principle, was, at common law, and still is, a libel." Holroyd, J., used equally cautious language: "I have no doubt whatever that any publication in which our Saviour is spoken of in the language used in the work which was the subject of the prosecution is

(a) *Rex v. Eaton* (31 Howell's St. Tr., 927, *et seq.*)

(b) 1 B. & C. 26.

a libel. The direction of the Lord Chief Justice was therefore right in point of law." Best, J., added: "It is not necessary for me to say whether it be libellous to argue *from the Scriptures* against the divinity of Christ. That is not what the defendant professes to do. He argues against the divinity of Christ by denying the truth of the Scriptures. A work containing such arguments *published maliciously (which the jury in this case have found)* is by the common law a libel."

This is certainly (as remarked by Lord Coleridge in his summing up in *Reg. v. Foote*, p. 21) no authority for the proposition, in support of which it is often cited, that any attack upon Christian doctrine, however respectful and decent in language, is by law a blasphemous libel.

In *Reg. v. Hetherington*,^(a) where it was held that an attack on the Old Testament alone was a blasphemous libel, on the ground that the Old Testament is so connected with the New, that a reflection on the one was a reflection on the other also, the report tells us nothing of the nature of the publication or the terms in which it was couched.^(b) Yet something must have turned on this, for Lord Denman, C.J., said: "Though in most of the cases, I believe not in all, the libel has been against the New Testament, yet the Old Testament is so connected with the New that it is impossible that *such a publication as this* could be uttered without reflecting upon Christianity in general; and therefore I think an attack upon the Old Testament of *the nature described in the indictment* is clearly indictable."

In 1841 Mr. Moxon was indicted for publishing the poems of Shelley,^(c) a work described in the indictment as a

Shelley's
"Queen Mab."

(a) 5 Jur. 529.

(b) Since the above was written Stephen, J. (in an article on "Blasphemy and Blasphemous Libel," published in the *Fortnightly Review*, for March, 1884), sets forth certain extracts from the indictment, made from the original at the Crown Office, the first beginning thus: "What wretched stuff this Bible [meaning that part of the Holy Bible called the Old Testament] is, to be sure! What a random idiot its author must be!" Part of the passage set out in the second count was this: "I not only assert that it is not the Word of God, but that it is a book containing more blunders, more ignorance, and more nonsense than any book to be found in the universe." The third count was founded on a passage in which the author stated his object to be "to expose this book [meaning the Old Testament] in such a manner that the children of the Stockport Sunday School will reject it with contempt," &c.

(c) 2 Mod. State Trials, 356. The prosecutor in this case was Hetherington, who had, a short time before, been found guilty of publishing certain libels on the Old Testament (see *Reg. v. Hetherington. ante*, p. 364), and his object in instituting the prosecution against Mr. Moxon is not very clear. His counsel concluded his opening speech by expressing the satisfaction he should feel if the result of the

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“scandalous, impious, profane, and malicious libel of and concerning the Christian religion, and of and concerning the Holy Scriptures, and of and concerning Almighty God,” in which were contained certain passages charged as blasphemous, the indictment setting out some passages from the poem of “Queen Mab” and a passage in prose from the notes. After Serjeant (afterwards Mr. Justice) Talfourd, himself a poet, had addressed the jury, for the defence in a speech of great eloquence, Lord Denman, C.J., told the jury that he and they “were bound to take the law as it had been handed down to them. The only question for their consideration was, whether in their opinion the work, which had been made the subject of prosecution, deserved the imputations that were cast upon it by the indictment, and whether the publisher had sent it forth deliberately into the world, knowing its character to be such. The purpose of the passage cited from ‘Queen Mab’ was, he thought, to cast reproach and insult upon what in Christian minds were the peculiar objects of veneration; it was not, however, sufficient that mere passages of such an offensive character should exist in a work in order to render the publication of it an act of criminality; it must appear that no condemnation of such passages appeared in the context. It had been said that the extraordinary poem in question was the production of a mere youth. Were the lines indicted calculated to shock the feelings of any Christian reader? Were their points of offence explained, or was their virus neutralized by any remarks in the margin, by any note of explanation or apology? If not, they were libels on God, and indictable.” The jury returned a verdict of guilty; but the prosecutor abandoned all further proceedings on payment of his costs.(a)

trial were to establish that no publication on religion should be a subject for prosecutions in future (2 Mod. State Trials, 365); but Mr. Moxon’s counsel treated the prosecution as one prompted solely by an indiscriminate desire, on the part of the prosecutor, of retaliating on some other person the punishment which he had himself suffered. And Blackburn, J., says of it: “I believe, as everybody knows, that it was a prosecution instituted merely for the purpose of vexation and annoyance” (*Reg. v. Hicklin*, L. Rep. 3 Q. B. 374; S. C. 37 L. J. 89, M. C.; 18 L. T. N. S. 395, *nom. Reg. v. The Recorder of Wolverhampton*).

(a) 2 Mod. State Trials, 362. Blackburn, J., alluding to this case in *Reg. v. Hicklin* (L. Rep. 3 Q. B. 374), says: “I hope I may not be understood to agree with what the jury found, that the publication of ‘Queen Mab’ was sufficient to make it an indictable offence.” For Lord Lyndhurst’s view of the prosecution see Parl. Debates in the House of Lords for 13th July, 1857.

In addition to the doctrines of the common law relating to blasphemous libels, there are some express enactments of the Legislature on the subject. Several of the old statutory provisions have been repealed, but the following still remain in force:

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Legislative enactments.

1 Edw. 6, c. 1, enacts that persons reviling the Sacrament of the Lord's Supper by contemptuous words or otherwise, shall be punished by fine and imprisonment.

1 Eliz. c. 2, enacts that if any *minister* shall speak anything in derogation of the Book of Common Prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second; and if he be beneficed, shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice; for the second, shall be deprived and suffer one year's imprisonment; and for the third, shall in like manner be deprived and suffer imprisonment for life. And that if any person whatsoever shall in plays, songs, or other open words, speak anything in derogation, depraving, or despising of the said book, &c., he shall forfeit for the first offence, 100 marks; for the second, 400; and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life.

The most important of the statutes now in force is the 9 & 10 Will. 3, c. 35. (a) It enacts that if any person educated in or having made profession of the Christian religion, shall by writing, printing, teaching, or advised speaking, deny any one of the persons of the Holy Trinity to be God [repealed by 53 Geo. 3, c. 160, s. 2, "so far as the same relates to persons denying as therein mentioned respecting the Holy Trinity"], or assert or maintain that there are more gods than one, or deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, (b) he shall, upon the first offence, be rendered incapable to hold any office or place of trust; and for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer imprisonment without bail for three years. But the person convicted for a first offence is to be discharged from all penalties and disabilities for that offence, if he renounces his error in open

(a) Chap. 32 in Ruffhead's edition of the Statutes.

(b) The Privy Council has held that a clergyman of the Church of England, who declares in effect "That the Scriptures of the Old and New Testament were not written under the inspiration of the Holy Spirit, and that they were not necessarily at all, and certainly not in parts the word of God," does not contravene the Articles, the Formularies, or the Nicene Creed. (*Williams v. Bishop of Salisbury*, 2 Moore, P.C.C. N. S. 377.)

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Court within four months after conviction.(a) Information of an offence against the Act must be given within four days after it has been committed, and the prosecution must be within three months after such information.(b)

No instance of a prosecution under this Act has been found recorded.

Effect of
statutes.

The statute has not altered the common law on the subject of blasphemous libels, but has only introduced certain peculiar disabilities cumulative upon the penalties previously inflicted by the common law ;(c) for it is a general rule that, where an offence is already punishable by a common law proceeding, a statute providing a particular punishment for it does not exclude the common law punishment, but only supplies an alternative or a cumulative one.(d)

53 Geo. 3, c. 160.

Neither, according to Best, J., does the 53 Geo. 3, c. 160, alter the common law doctrine as to blasphemous libels: it only removes the penalties imposed by 9 & 10 Will. 3, c. 32, upon persons denying the Trinity, and extends to them the benefits of the Toleration Act of 1 Will. & M. sess. 1, c. 18.

In *Rex v. Waddington*(e) the defendant, in moving for a new trial, urged that the Lord Chief Justice had misdirected the jury by stating that any publication in which the divinity of Jesus Christ was denied was an unlawful libel(f); and he argued that, since the 53 Geo. 3, c. 160, the denying one of the persons of the Trinity to be God was no offence, and consequently that a publication in support of such a position was not a libel. The Court of Queen's Bench unanimously refused a rule for a new trial, and held that the publication was a blasphemous libel. Best, J., said: "The 53 Geo. 3, c. 160, has made no alteration in the common law relative to libel. If, previous to the passing of that statute, it would have been a libel to deny, in any printed work, the divinity of the second person in the Trinity, the same publication would be a libel now. The 53 Geo. 3, c. 160, as its title expresses, is an Act to relieve persons who impugn the doctrine of the Trinity from certain penalties. If we look at the body of the Act to see from what penalties such persons are relieved, we find that they are the penalties from which the 1 Will. & M.

(a) Sect. 3.

(b) Sect. 2.

(c) *Rex v. Carlile* (3 B. & Ald. 161); *Rex v. Williams* (26 Howell's St. Tr. 656; 2 Str. 884; Barnard, K.B. (162).

(d) *Rex v. Robinson* (Burr. 799); *Rex v. Carlile* (3 B. & Ald. 163).

(e) 1 B. & C. 26; compare the remarks of Bramwell, B., in *Cowan v. Milbourn* (L. Rep. 2 Ex. 233; 36 L. J. 124, Ex.; 16 L. T. N. S. 290.)

(f) This was incorrect. For what the Chief Justice did tell the jury, *vide ante*, p. 364.

sess. 1, c. 18, exempted all Protestant Dissenters, except such as denied the Trinity, and the penalties or disabilities which the 9 & 10 Will. 3, c. 32, imposed on those who denied the Trinity. The 1 Will. & M. sess. 1, c. 18, is, as it has been usually called, an Act of Toleration, or one which allows Dissenters to worship God in the mode that is agreeable to their religious opinions, and exempts them from punishment for non-attendance at the Established Church, and nonconformity to its rights. The Legislature, in passing that Act, only thought of easing the consciences of Dissenters, and not of allowing them to attempt to weaken the faith of the members of the Church."

This also seems to have been the opinion of Lord Eldon in *The Attorney General v. Pearson*,^(a) though, sitting as a judge in equity, he said he had "no office to determine what is or is not an offence or crime," except where the civil rights of the parties imperatively required such a decision.

A person accused of wickedly and feloniously publishing, vending, and exposing for sale certain blasphemous books containing a denial of the truth and authority of the Holy Scriptures and the Christian religion, and devised, contrived, and intended to asperse, vilify, ridicule, and bring them into contempt, was not allowed in his speech to the jury to quote passages from the Bible for the purpose of justifying his opinion of it.^(b) "No animadversions," said the Lord Justice Clerk, "can have the slightest effect in making the Court swerve from its duty. We tell you what the law is, that the publication of works tending to vilify the Christian religion is an offence in law; and it is no answer to say that, in your opinion, the passages contained in those works are true, and that the Bible deserves the character ascribed to it. If you can show that the Lord Advocate has mistaken the meaning of these passages, that they do not deny the truth of the Bible, that they do not vilify it, that is a point of which the jury will judge." In charging the jury, his Lordship thus stated the law: "The Holy Scriptures and Christian religion are part of the statute law of the land; and whatever vilifies them is therefore an infringement of the law. There can be no controversy in a court of justice as to the merits or demerits of a law. Our duty is to interpret and explain the law as established, while it is yours to apply it. Now the law of Scotland, apart from all questions of Church Establishment,

Cases in
Scotland.

(a) 3 Meriv. pp. 407. 408.

(b) *Paterson's case* (1 Brown 629). See also *Robinson's case* (*ibid.* 643).

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or Church government, has declared that the Holy Scriptures are of supreme authority. It gives every man the right of regulating his faith or not by the standard of the Holy Scriptures, and gives full scope to private judgment, regarding the doctrines contained therein; but it expressly provides that all 'blasphemies shall be suppressed,' and that they who publish opinions 'contrary to the known principles of Christianity,' may be lawfully called to account, and proceeded against by the civil magistrate. This law does not impose upon individuals any obligation as to their belief. It leaves free and independent the right of private belief, but it carefully protects that which was established as part of the law from being brought into contempt."

What forms
of religion
may be attacked.

From the fact that a particular form of the Christian religion is established here by law, this consequence follows—that a person may, without being liable to prosecution for it, attack Judaism, or Mahomedanism, or even any sect of the Christian religion, except the established religion of the country; and the only reason, says Alderson, B.,^(a) why the latter is in a different situation from the others is "because it is *the form established by law*, and is therefore a part of the constitution of the country. In like manner, and for the same reason, any general attack on *Christianity* is the subject of criminal prosecution, because Christianity is the established^(b) religion of the country."

Liberty of
discussion.

How far, then, is liberty of discussion allowed on questions relating to the fundamental doctrines of religion? or, is the expression of all views adverse to those now received prohibited and punishable? Would the law now make no distinction in favour of the fair and temperate expression of opinions sincerely entertained? Before *Reg. v. Foote and others*, and the luminous charge delivered by Lord Coleridge, C.J., in that case, the question has not, in any reported case, been distinctly stated or broadly dealt with.

American law.

In America the question has been more fully discussed than with us, and the doctrines laid down by the Courts of that country are much more consonant to the tolerant views of the present day than any which can be extracted from the English authorities hitherto cited. In *The People v. Ruggles*,^(c) after a verdict and sentence for blasphemous words spoken against Jesus Christ, Kent, C.J., on appeal, said: "After conviction we must intend that the words were uttered

(a) *Reg. v. Gathercole* (2 Lewin, 254).

(b) It is obvious that the learned Judge uses the word "established" in two different senses.

(c) 8 Johns. 292.

in a wanton manner and, as they evidently import, with a wicked and malicious disposition, and not in a serious discussion upon any controverted point in religion. The language was blasphemous, not only in a popular, but in a legal sense; for blasphemy, according to the most precise definitions, consists in maliciously reviling God or religion, and this was reviling Christianity through its Author. The jury have passed upon the intent or *quo animo*, and if those words spoken, in any case, will amount to a misdemeanour the indictment is good. . . . The free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, are granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right." Another American judge speaks still more plainly. "No author or printer," says Duncan, J.,^(a) "who fairly and conscientiously promulgates opinions with whose truth he is impressed, for the benefit of others, is answerable as a criminal. A malicious and mischievous intention is, in such a case, the broad boundary between right and wrong; it is to be collected from the offensive levity, scurrilous and opprobrious language, and other circumstances, whether the act of the party was malicious." And the criminal code of New York speaks in a similar tone. Art. 31, extracting a definition from existing common law decisions, describes blasphemy as consisting in "wantonly uttering or publishing words, casting contumacious reproach or profane ridicule upon God, Jesus Christ, the Holy Ghost, the Holy Scriptures, or the Christian religion;" and Art. 32 adds—"If it appears beyond reasonable doubt that the words complained of were used in the course of serious discussion, and with intent to make known or recommend opinions entertained by the accused, such words are not blasphemy."

American
definition of
blasphemy.

A law against blasphemy, based on such grounds as the foregoing, is rational as well as intelligible; for no good man will attack, in a wanton, offensive, or scurrilous manner, the religious opinions which are sincerely entertained by the vast majority of the inhabitants of the country where he lives; and, on the other hand, no man who fairly and temperately seeks to spread the views which he himself conscientiously holds, should be subjected to any penalty for doing so.

(a) *Updegraph v. Commonwealth* (11 S. & R. 394, 405, 406), quoted 2 Bish. Crim. Law, 93.

No such explicit exception as obtains in America in favour of the honest and temperate expression of opinions opposed to the received doctrines of religion, is made by any of our older authorities. Mr. Starkie, indeed, in a well-known passage of his book on Libel^(a) states the rule with a liberality not inferior to that of American law; but the soundness of his view has been denied by an eminent authority. Mr. Starkie says: "The very absurdity and folly of an ignorant man who professes to teach and enlighten the rest of mankind are usually so gross as to render his errors harmless; but be this as it may, the law interferes not with his blunders, so long as they are honest ones. . . . It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law as well as morals—a state of apathy and indifference to the interests of society—is the broad boundary between right and wrong. If it can be collected from the circumstances of the publication, from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons or subjects, that the design of the author was to occasion that mischief to which the matter which he publishes immediately tends, to destroy or even weaken men's sense of religious or moral obligations, to insult those who believe, by casting contumelious abuse and ridicule upon their doctrines, or to bring the established religion and form of worship into disgrace and contempt, the offence against society is complete." Of this view of the law Sir J. F. Stephen says: "The weight of authority appears to me to be opposed to it. The cases cited all proceed upon the plain principle that the public importance of the Christian religion is so great that no one is to be allowed to deny its truth. . . . To say that the crime lies in the manner and not in the matter appears to be an attempt to evade and explain away a law which has no doubt ceased to be in harmony with the temper of the times."^(b) On the other hand, Lord Coleridge, C.J., in *Reg. v. Foote and others*, read the passage to the jury as in his opinion a correct statement of the law.

The liberty allowed in *Rev. v. Woolston*,^(c) is only in the case

(a) Vol. ii., pp. 146, 147 (3rd edit. p. 590). Ed. by Folkard, p. 599.

(b) Hist. Crim. Law, vol. ii., p. 475.

(c) Str. 834; Fitzgib. 66, ante, p. 362.

of "disputes between learned men upon particular controverted points:" an attack on Christianity *in general* was considered to be clearly a punishable offence. The exception admitted by Blackstone does not extend beyond "rational and dispassionate discussions of the rectitude and propriety of the established mode of worship."^(a) There is, indeed, a dictum of Best, J., in *Ree v. Burdett*^(b)—"Every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country;" and the same judge, in *Ree v. Waddington*,^(c) dealing with a libel which contained a very gross and offensive attack on the character of Christ, speaks as if he considered *express malice* a necessary ingredient in the offence. "A work," he says, "containing such arguments *published maliciously* (which the jury in this case have found) is by the common law a libel." But in the comparatively recent case of *Cowan v. Milbourn*,^(d) the old doctrine was asserted in stringent terms. There a breach of contract to let rooms for the purposes of delivering lectures was justified on the ground that the lectures to be delivered were of a blasphemous and illegal nature, some of them being advertised as follows: "The Character and Teachings of Christ: the former defective, the latter misleading;" "The Bible shown to be no more inspired than any other book." Counsel for the intending lecturer argued that the test of blasphemy lies rather in the manner than the matter of what is said, and that, according to the current of opinion in modern times, to support a prosecution for blasphemy, there must be a scurrilous and indecent attack upon commonly received opinions, or a maintenance of views flagrantly opposed to ordinary morality. But the Court of Exchequer, without any reference to the motives which might prompt the delivery of the lectures, held that the publication of the doctrines stated in the advertisements referred to was blasphemy, and that, therefore, the breach of contract was justifiable. "It would be a violation of duty," said Kelly, C.B., "to allow the question raised to remain in any doubt. . . . There is abundant authority for saying that Christianity is part and parcel of the law of the land; and that, therefore, to support and maintain publicly the proposition I have above mentioned [that Christ's character was defective, and His teaching misleading] is a violation of the first principles of the law, and

(a) 4 St. Black. 289. (b) 4 B. & Ald. 132. (c) 1 B. & C. 26.

(d) L. Rep. 2 Ex. 230; 36 L. J. 124, Ex.; 16 L. T. N. S. 290; 15 W. R. 750.

cannot be done without blasphemy. I therefore do not hesitate to say that the defendant was not only entitled, but was called on and bound by the law to refuse his sanction to this use of his rooms." The more cautious judgment of Lord Bramwell was based on the language of the statute of Will. 3; and he pointed out that "a thing might be unlawful in the sense that the law will not aid it, and yet the law will not immediately punish it."

In the case last referred to the question of the blasphemous nature of the lectures intended to be delivered arose only incidentally, in dealing with a civil contract; and it is more than doubtful whether a criminal prosecution could, with the tolerant views now prevailing, be successfully maintained for the *bona fide* publication of opinions sincerely entertained and temperately expressed, though hostile to the doctrines of Christianity. In no reported case has the point ever come before any of our Courts for express decision. The question, therefore, is still an open one; and should a Court or judge ever be called on to determine a case necessarily involving it, there is no insuperable difficulty in the way of declaring the law to be such as is required by the views now held by the bulk of the community as to liberty of discussion. Opposing dicta, not necessary to the decision of the cases in which they are found reported, are obstacles of a kind which our Courts never find much difficulty in surmounting.

In a very recent case the present Lord Chief Justice of England grappled boldly with the question, and in clear and precise language states the rule of law in the only manner which (it is submitted) would not be an anachronism in the age in which we live.

Per Lord Coleridge, C.J.

"You have heard with truth," said Lord Coleridge, C.J., to the jury, in *Reg. v. Foote and others*, a prosecution for blasphemous libel^(a) "that these things are, according to the old law, if the dicta of old judges, dicta often not necessary

(a) In the case of *Reg. v. Bradlaugh* (15 Cox C. C. 217) tried immediately before, a similar view of the law was expressed by his Lordship. We quote from the charge in the later case, as a more elaborate exposition of the subject, and one published by his Lordship himself. The publications, which were of a very ribald character, are set forth in the report of the case (nom. *Reg. v. Ramsey and others*) in *Cab. & El.* 126. At the trial of *Foote and Ramsay*, a month previously at the Central Criminal Court, before North, J., that learned judge put the question to the jury thus: "Is there any contumelious or profane scoffing against Scripture, or anything exposing the Scripture or Christian religion to ridicule, contempt or derision?" 15 Cox. C.C. 225, note (a).

Previously to this case, according to Stephen, J. (*Hist. of Crim. Law*, vol. ii., p. 173), at the trial of a man named Pooley, at Bodmin, in 1857, Coleridge, J., laid down the law to the jury in terms

for the decisions, are to be taken as of absolute and unqualified authority,—that these things, I say, are undoubtedly blasphemous libels, simply and without more, because they question the truth of Christianity. But, for reasons which I will presently explain, these dicta cannot be taken to be a true statement of the law, as the law is now. It is no longer true, in the sense in which it was true when these dicta were uttered, that Christianity is part of the law of the land. In the times when these dicta were uttered, Jews, Roman Catholics, Nonconformists of all sorts were under heavy disabilities for religion, were regarded as hardly having civil rights. Everything almost, short of the punishment of death, was enacted against them. The epithet ‘ferocious,’ which has been applied to the statute of William III., to which so much reference has been made, is hardly stronger than that statute deserves. Jews, it is true, were excluded from Parliament in a sense by accident, for the oath which excluded them was not pointed at them; but no one can doubt that at that time, if it had occurred to any one that they were not excluded, a law would have been forthwith passed to exclude them. Historically and as matter of fact, such was the state of things when these dicta were pronounced. But now, so far as I know the law, a Jew might be Lord Chancellor, most certainly he might be Master of the Rolls. The great and illustrious lawyer^(a) whose loss the whole profession is deploring, and in whom his friends know that they lost a warm friend and a loyal colleague; he, but for the accident of taking his office before the Judicature Act came into operation, might have had to go circuit, might have sat in a criminal court to try such a case as this, might have been called upon, if the law really be that ‘Christianity is part of the law of the land’ in the sense contended for, to lay it down as law to a jury, amongst whom might have been Jews—that it was an offence against the law, as blasphemy, to deny that Jesus Christ was the Messiah, a thing which he himself did deny, which Parliament had allowed him to deny,

apparently founded upon the passage of Starkie (cited *ante*, p. 374), Stephen, J., adds: “No judge who ever sat on the bench was less likely to understate the law relating to blasphemous libel than Mr. Justice Coleridge, and indeed the sentence which he passed upon Pooley was regarded as over severe, and was afterwards mitigated; and this circumstance gives special weight to his decision.” The writer further informs us, in a note, that in the course of the discussion to which this case gave rise, Mr. Justice Coleridge told him that he pointed out to the jury “that one of the offensive remarks made by Pooley upon the character of Jesus Christ might possibly have been intended as an argument and not as mere railing, and that if they took that view of it they might acquit him on the count founded upon it.”

(a) The late Sir George Jessel, Master of the Rolls.

and which it is just as much part of the law that any one may deny, as it is your right and mine, if we believe it, to assert. Therefore, to base the prosecution of a bare denial of the truth of Christianity, *simpliciter* and *per se* on the ground that Christianity is part of the law of the land, in the sense in which it was said to be so by Lord Hale, and Lord Raymond, and Lord Tenterden, is in my judgment a mistake. It is to forget that law grows; and that though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times. Some persons may call this retrogression; I call it progression of human opinion. Therefore, to take up a book or a paper, to discover merely that in it the truth of Christianity is denied without more, and thereupon to say that now a man may be indicted upon such denial as for a blasphemous libel is, as I venture to think, absolutely untrue. I for one positively refuse to lay that down as law, unless it is authoritatively so declared by some tribunal I am bound by. Historically, I cannot doubt I should be justified in so doing; for Parliament, which is supreme and binds us all, has enacted statutes which make that old view of the law no longer applicable. Nor is it any great disrespect whatever to the great men of elder days, to hold that what they said in one state of things is not applicable under another. . . . It is clear to my mind, that the mere denial of the truth of the Christian religion is not enough alone to constitute the offence of blasphemy. What, then, is enough?"

In answer to this question, his lordship read, as what he believed a correct statement of the law, the passage from Starkie (cited *ante*, p. 372), adding: "Such study as I have made of the cases has not satisfied me that the law ever was laid down differently^(a) from the law as laid down by Mr. Starkie." Then after a review of the cases, his Lordship proceeded: "But whether this is so or not, Parliament at least has altered the law on these subjects; it is no longer the law that none but professors of Christianity can take part or have rights in the State; others have now just as much right in civil matters as any member of the Church of England has. The condition of things is no longer what it was when these great judges pronounced the judgments which I think have been misunderstood and strained to a meaning they do not warrant. . . . If the decencies of controversy are observed,

(a) Meaning, doubtless, by express decision not going beyond the point actually requiring determination. As to unnecessary dicta, see his lordship's language cited at the top of p. 375, and compare the author's remarks in note (a) on pp. 379, 380.

even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel." (a)

As this view of the law is opposed to that laid down by so eminent an authority as Mr. Justice Stephen, in his *History of the Criminal Law*, (b) after a review of all the decisions, and as the subject is one of increasing interest at the present day, let us inquire more particularly: What, besides the offensive manner of the libels, are the reasons for the old decisions, and the more frequent *dicta*, not necessary to the determination of the cases in which they are found? Do they still exist in equal force? Do they still exist at all?

The reasons given are three in number; (1) Lord Hale's famous dictum that "Christianity is parcel of the law of England; therefore to reproach the Christian religion is to speak in subversion of the law;" (c) (2) that "if the name of our Redeemer was suffered to be traduced, and His holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the law be stripped of one of its principal sanctions—the dread of future punishment;" (d) (3) that blasphemous publications tend to acts of outrage and violence, by wounding the feelings of those who believe in the doctrines attacked.

How far
are the older
decisions now
applicable?

(1.) As to Lord Hale's dictum, Archbishop Whately says,

(a) 'The jury being unable to agree were discharged. The accused having been convicted of a similar offence before the case came on again for trial, the prosecutor obtained leave to enter a *nolle prosequi*.

Lord Coleridge has been criticised (*Fortnightly Review* for March, 1884, pp. 295, 296) for not having held that the publications of the defendants in this case were blasphemous libels, and for having directed the jury that "it was for them to say" whether they were permissible attacks on the religion of the country. But what is the proper function of the judge since Fox's Act? His duty is to explain, as best he can, what, in general, a blasphemous libel is. It is for the jury to determine whether the publication in question is or is not a libel. As to what Lord Coleridge's own opinion was, the concluding portion of his charge to the jury leaves little room for doubt: "Look at them and judge for yourselves whether they do or do not come within the widest limits of the law. If they do, then, as with the libels, find the defendants not guilty. But if you think that they do not come within the most liberal and largest view that any one can give of the law as it exists now, then find them guilty. Whatever may be the consequences—you may think the prosecution unwise, you may think the law undesirable, you may think no publications of this sort should ever be made the subject of criminal attack, it matters not—your duty is to obey the law; not to strain it in favour of the defendants, because you do not like the prosecution; not to strain it against them, because you do not yourselves agree with the statements they advocate, as you are certain entirely to disapprove of the manner in which they advocate them" (Summing Up, p. 32, 1 Cab. and El. 149).

(b) Vol. ii., pp. 464, *seq.*

(c) *Rex v. Taylor*, *ante*, p. 362.

(d) *Per Ashurst, J., Reg. v. Williams*, Holt on Libel, 69.

in the preface to his "Elements of Rhetoric," that he never met with any one who could explain the precise meaning of it. If we adopt Alderson, B.'s, explanation of it (*ante*, p. 370) as applicable only to attacks on the established religion "because it is the form established by law, and is therefore a part of the constitution of the country," we have the following curious result, that a written attack on any of the doctrinal points which distinguish the Established Church from the other religious denominations of the country, is a blasphemous libel in England; that it was but is no longer so in Ireland; it neither being nor ever having been so in Scotland. It follows also, as pointed out by Lord Coleridge,^(a) that a written attack on any part of the Constitution as now established, must be a (seditious) libel; which, in our days at any rate, is a *reductio ad absurdum* of the proposition.

(2.) That the solemnity of an oath is necessary to the due administration of justice is a notion now repudiated by the legislature itself, which has (32 and 33 Vict. c. 68. 3, 4.) allowed a solemn declaration to be substituted for it in all cases where the judge is satisfied that an oath would have no binding effect on the conscience of the witness.

(3.) As to the tendency of such publications to provoke to acts of outrage and revenge, it is no doubt true, as observed by Michaelis, that, "were I in Turkey to blaspheme Mahomet, or in a heathen city its gods, nothing would be more natural than for the people, instead of suffering it, to avenge the insult in their usual way, that is to say, tumultuously, passionately, and immoderately"—a state of things which every State is justified in preventing. If, however, in this country, a written attack upon any part of the established religion, couched in decent language, would no longer have the effect of producing such a result, the last reason ceases to exist for holding that the matter and not the manner of a publication is to be the legal criterion of its blasphemous character.

On this last point it should be borne in mind that what might have a tendency to shock the sense and wound the feelings of a community at one period of its career, at a more advanced stage of its development may but slightly ruffle or possibly only languidly and very partially excite. At a time when neither Atheist, Quaker, nor Moravian was a competent witness in a court of justice, when no Jew or Roman Catholic could sit in Parliament or hold judicial office, the so-called religious feelings of those who professed the dominant creed were naturally more easily hurt by any attacks upon

(a) *Reg. v. Foote and others.* Summing-up, p. 12. 1 Cab. & El. 136.

its truth than can possibly be the case now, after long years of no more than equality in all matters legal and political, with the old religious pariahs, have taught a less proud spirit and a wider tolerance. When Roman Catholic, Unitarian, Jew and Agnostic, sitting side by side with the professors of the State religion, equally take part in making the laws and in administering them; when in all the relations of life they are in the habit of meeting daily on altogether equal terms, it is of necessity that the ears of orthodoxy should have become less sensitive to sounds that in olden times would have grated harshly upon them, its feelings less easily outraged by the expression of opinions with which use and contact have made them less unfamiliar. Further, an age accustomed to the most thorough-going criticism of all the philosophic, scientific, political, and social opinions of the present, as well as the past, and which has come to look upon such criticism favourably, must inevitably have learned to extend a larger tolerance also to similar researches into questions of theology. That might well have shocked the entire community of a century ago which now would seriously disturb no moderately cultivated member of it, however strict his orthodoxy. Where so much has changed, it would be strange if our common law, in all other matters expansive and sympathetic with the growing needs and ever widening views of an advancing community, should in this alone remain harsh and rigid.(a)

(a) The distinguished writer of the article in the *Fortnightly Review*, already referred to, says: "It seems to me that where a definite rule of law has once been laid down by the judges and has long been acquiesced in by the public, it acquires the force of law, and can be altered only by Parliament, even if the state of things which caused it to be laid down has altogether altered" (pp. 310, 311). This is undoubtedly true; but has it ever definitely been laid down in any case, in which the point arose for decision, that the matter, irrespectively of the manner of a publication was the criterion of its blasphemous character? The learned judge makes an admission on p. 314 of his article, which, it is submitted, is fatal to his contention on this point. He there says: "It is certainly true that no case can be produced in which a man has been convicted of a blasphemous libel merely for a perfectly decent denial of the truth of Christianity." In other words, no Court or judge has up to the present ever been called on to determine the question; the question, therefore, has never been judicially determined, and the matter remains *res integra*. If any observations on the subject are to be found in cases in which it was wholly unnecessary to decide this particular point, such observations are, so far as this point is concerned, merely *obiter dicta*, and therefore, according to the well-established principles of our common law, not of binding authority.

Strictly speaking, the law itself is not altered or modified when a judge declines to apply old cases to a vastly altered state of

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CHAPTER II.

Statement of the law as it now is.

It is submitted, then, that on a prosecution for the common law offence of blasphemy in our day the language of the older cases does not express the rule of law now properly applicable, and that the true criterion of criminality is the manner and not the matter of the publication.

On the other hand, on the prosecution of any person educated in or who has made profession of the Christian religion, for an offence against the statute 9 & 10 Will. 3, c. 35 (*ante*, p. 367), no decency of manner will furnish a defence, if the subject matter of the publication maintains that there are more gods than one, or denies the Christian religion to be true or the Holy Scriptures to be of divine authority.

Criminal Code Bill, 1879.

By the Criminal Code Bill (being the Draft Code of 1878 revised by a commission consisting of Lord Blackburn, Mr. Justice Barry, the late Lord Justice Lush and Mr. Justice

society. The rationale of a common law decision is this: a particular case—that is, a particular group of facts, being brought before the Court, the Court pronounces what is the law applicable to it. The Court does not profess to determine what is the law applicable to a group of facts differing in any material respect from that before it. So far as it goes beyond the requirements of the particular case, and enunciates a principle wider than they demand, its decision is a mere *obiter dictum*, not binding upon any other Court. Now, what was the group of facts presented to the Courts in olden days on a prosecution for blasphemous libel? It was this: a publication of some sort (1) attacking that which was considered a fundamental part of the law of the land, (2) when no attack on any part of the law was permitted, (3) which also tended to destroy that which was held to be a necessary requisite to the due administration of justice, and (4) from which outrage or tumult might naturally be expected to result: in other words, a publication forming one of a class, the whole of which were forbidden, producing one ill effect of vital consequence to the administration of justice, and likely to be followed by another detrimental to the public peace. Is a decision strictly applicable only to a publication of which all this could truthfully be said, an authority binding on a Court or a judge dealing nowadays with a publication which, if it attacks a fundamental part of the law of the land in any intelligible sense, (1) does so after such attacks have become freely permitted, (2) when the assumed necessary requisite to the administration of justice which was thought to be endangered has ceased, by Act of the Legislature itself, to be regarded as a necessary requisite, and (3) where there is not the least probability of tumult or disorder being caused by the publication? If a case, differing from the old cases in any one of these respects now presented itself for determination, he would not be a very bold judge who refused to apply to it the old common law decisions; if the case differed in most if not all of the foregoing respects the judge would, it is submitted, be bound to hold the old decisions inapplicable.

As to the disabilities imposed by the statute 9 & 10 Will. 3, c. 32, they, of course, can only be removed by an Act of the Legislature.

Stephen) introduced in 1879, and destined, possibly, some day to become law; "It shall be a question of fact whether any particular published matter is or is not a blasphemous libel; provided that no one shall be liable to be convicted upon any indictment for a blasphemous libel only for expressing in good faith and in decent language, or attempting to establish by arguments used in good faith, and conveyed in decent language any opinion whatever upon any religious subject;" (a) the punishment being liability to one year's imprisonment. (b)

Blasphemous publications are punishable either by indictment at common law (c) or by criminal information. Persons convicted were formerly compelled to stand in the pillory (d) besides suffering other punishments. The Act of 56 Geo. 3, c. 138 which abolished the punishment of the pillory in most cases, provides (sect. 2) that the Court may in all cases where it was formerly used, pass such sentence of fine or imprisonment, or of both, in lieu of the sentence of pillory, as to it shall seem most proper.

The punishment by banishment was abolished by 11 Geo. 4 & 1 Will. 4, c. 73, s. 1.

The Act 60 Geo. 3 & 1 Geo. 4, c. 9, contained various provisions for securing (by recognisance or bond with sureties) the payment of fines inflicted for the publication of blasphemous and other libels in newspapers; but this Act is now repealed by 32 & 33 Vict. c. 24.

The Scotch law is not different from the English as laid down in our older authorities. (e) The Act of 6 Geo. 4, c. 47, still remains in force with the exception of the provisions as to punishment by banishment, which are repealed by 7 Will. 4 & 1 Vict. c. 5.

The provision in Lord Campbell's Act (6 & 7 Vict. c. 96, s. 6), enabling a defendant to give evidence of the truth of the libel, and that it was for the public benefit that it should be published, does not apply to libels of a blasphemous or seditious character. (f)

(a) Sect. 141. The name of Mr. Justice Stephen can not now be cited in support of this projected legislation. At p. 315 of the article already referred to, he expresses the opinion that a law permitting decent and serious attacks on Christianity, but requiring that the decencies of controversy should be observed, would never work, adding "You cannot really distinguish between substance and style. You must either forbid or permit all attacks on Christianity."

(b) Sect. 141. (c) *Reg. v. Hetherington* (5 Jur. 529).

(d) *Reg. v. Taylor* (Vent. 293; 3 Keb. 607); *Reg. v. Waddington* (1 B. & C. 26); *Reg. v. Carlile* (3 B. & Ald. 161).

(e) See the direction given to the jury in *Paterson's case*, *ante*, p. 369.

(f) *Reg. v. Duffy* (9 Ir. L. Rep. 329), followed in *Es parte O'Brien*, 15 Cox. C. C. 180.

CHAPTER III.

OBSCENE LIBELS.

Jurisdiction of
courts.

THE jurisdiction of our common law courts in cases of publications of an immoral nature, though now unquestioned, was for some time not free from doubt. After the abolition of the Star Chamber, it seems that the Court of King's Bench came to be regarded as the *custos morum* of the nation, having cognisance of all offences against the public morals.^(a) But, though one Hill was indicted in Michaelmas, 10 Will. 3,^(b) for printing and publishing some obscene poems of Lord Rochester tending to the corruption of youth, and on going abroad was outlawed for the offence; yet in Easter, 6 Anne, in the case of Read,^(c) who was indicted and convicted for publishing a lascivious and obscene libel, Holt, C.J., and Powell, J., on a motion in arrest of judgment, were so strongly of opinion that the offence was only punishable in the ecclesiastical courts, that no judgment was pronounced against the defendant. However, the case of *Bev v. Curl*,^(d) in 1 Geo. 2, settled the question in favour of the jurisdiction of the temporal courts. An information was filed against the defendant in that case for having published a base and obscene libel entitled "Venus in the Cloister, or the Nun in her Smock," and he was found guilty. An argument took place on a motion in arrest of judgment, and the preceding cases were referred to, the Attorney-General urging, in defence of the temporal jurisdiction, that to destroy morality was to destroy the peace of the government, since government is no more than public order, which is morality; and that although every immoral act is not indictable, such as telling a lie, &c., yet if it is destructive of morality in general, and does, or may, affect all the subjects of the realm, it then becomes an offence of a public nature. The Court, dissenting from the opinions expressed in Read's case, upheld the temporal jurisdiction, and Curl was pilloried for his offence. Since this decision the temporal character of the offence of publishing obscene and immoral works has not been questioned.

Wilkes was convicted in 1764, imprisoned, and heavily fined

(a) *Sir Charles Sedley's case*, 1663 (Keb. 720, 2 Str. 790).

(b) 2 Str. 790; Dig. L. L. 60.

(c) Fort. 98.

(d) 2 Str. 789. One of the members of the Court when this case first came before it, Fortescue, J., was of opinion that the offence, though great, was not punishable by law. *Ibid.* 790.

for publishing an obscene and impious libel called "An Essay on Woman;"(a) and very many unreported cases of convictions for a similar offence have since taken place.(b)

The test of obscenity in any publication, according to Cockburn, C.J.,(c) is this: "Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of the sort may fall."

Test of obscenity.

"Preserving and keeping in one's possession" obscene works for the purpose of uttering and selling them is not an indictable offence. But "obtaining and procuring" them for that purpose is an indictable misdemeanour at common law.(d) With reference to counts charging the former as an offence, Lord Campbell, C.J., said: "We must hold them bad, because they are consistent with the possibility that the plaintiff in error may have had the pictures in his possession with an innocent intention; and there is no act shown to be done which can be considered as the first step in the prosecution of a misdemeanour. . . . Procuring is an overt act, an unlawful step taken in pursuance of the abominable offence of circulating obscene prints to deprave and corrupt the public morals."

Having possession of obscene works for purpose of selling.

By 14 & 15 Vict. 100, s. 29, it is enacted that, "whenever any person shall be convicted of any public selling, or exposing for public sale, or to public view, of any obscene book, print, picture, or other indecent exhibition, it shall be lawful for the Court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment."

Selling obscene works.

In 1857 a Bill was introduced into Parliament by Lord Campbell for more effectually preventing the sale of obscene books, pictures, prints, and other articles, by giving power to magistrates to issue warrants to search for and seize them. The Bill, on its second reading in the House of Lords, was opposed by several learned lords as unnecessary, vexatious, and likely to be inoperative with respect to the class of works aimed at. The absence of any definition of the word

(a) 4 Burr. 2527.

(b) As to other forms of obscene or indecent publication, see *Sir Charles Sedley's case* (*ubi supra*); *Reg. v. Crunden* (2 Camp. 89); *R. v. Rouverard* (cited 1 Den. C. C. 338; 2 Car. & K. 933); *Reg. v. Webb* (1 Den. C. C. 338); *Reg. v. Watson* (2 Cox Crim. Cas. 376); *Reg. v. Holmes* (1 Dears. C. C. 207).

(c) *Reg. v. Hicklin* (L. Rep. 3 Q. B. 371; 18 L. T. N. S. 398; 36 L. 9, J. S. M. C.).

(d) *Dugdale's case* (1 Dears. C. C. 64).

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"obscene" was warmly animadverted upon by Lord Lyndhurst, in a speech pointing out that copies of some of the pictures of the greatest masters, and the writings of many of the greatest dramatists and novelists, might be included under the operation of the Act. Alterations were made by Lord Campbell to meet the objections raised, and the Bill became law the same year.^(a)

Power to search
for obscene
books, pictures,
&c.

Sect. 1 of this Act (20 & 21 Vict. c. 83) provides that, "it shall be lawful for any metropolitan police magistrate, or other stipendiary magistrate, or for any two justices of the peace, upon complaint made before him or them upon oath that the complainant has reason to believe and does believe, that any obscene *books, papers, writings, prints, pictures, drawings, or other representations* are kept in any house, shop, room, or other place within the limits of the jurisdiction of any such magistrate or justices, *for the purpose of sale or distribution, exhibition for purposes of gain, lending upon hire, or being otherwise published for purposes of gain,* which complainant shall also state upon oath that one or more articles of the like character have been sold, distributed, exhibited, lent, or otherwise published as aforesaid, at or in connection with such place, so as to satisfy such magistrate or justices that the belief of the said complainant is well founded; and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanour, and proper to be prosecuted as such, to give authority by special warrant

(a) "The Bill, as it originally stood," said Lord Campbell in committee, "only required an affidavit that the person making it had reasonable ground to suspect that these books were kept for sale and exhibition. The Bill, as now amended, required that the complainant should swear that he had reason to believe, and did believe, that these books or prints were kept in store for sale or exhibition. Another amendment enacted that the complainant should set forth the facts on which he entertained that belief, and if the justice were satisfied on these facts that the books and prints were kept as alleged, he might issue his search warrant, with this additional guard, that he must be satisfied they were such books and prints as that their publication would constitute a misdemeanour by the common law. There was also this further security, that the magistrate must not only be satisfied that the publication of these books and prints was a misdemeanour, but a misdemeanour which ought to be prosecuted by indictment" (Parliamentary Debates, July 3rd, 1857).

"The Bill, as originally introduced, contained a clause empowering the Chief Commissioner of Police, where he had reasonable information that obscene works were kept, to grant a warrant in the same manner as a magistrate or justices: but the clause, being objected to, was omitted" (*Ibid.*).

to any constable or police officer into such house, shop, room, or other place, with such assistance as may be necessary, to enter in the daytime, and, if necessary, to use force by breaking open doors or otherwise, and to search for and seize all such books, papers, writings, prints, pictures, drawings, or other representations as aforesaid found in such house, shop, room, or other place, and to carry all the articles so seized before the magistrate or justices issuing the said warrant, or some other magistrate or justices exercising the same jurisdiction; and such magistrate or justices shall thereupon issue a summons, calling upon the occupier of the house or other place which may have been so entered by virtue of the said warrant, to appear within seven days before such police stipendiary magistrate or any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed; and if such occupier or some other person claiming to be the owner of the said articles shall not appear within the time aforesaid, or shall appear, and such magistrate or justices shall be satisfied that such articles, or any of them, are of the character stated in the warrant, and that such, or any of them, have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices, and he or they are hereby required to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal, unless notice of appeal as hereinafter mentioned be given, and such articles shall be in the meantime impounded; and if such magistrate or justices shall be satisfied that the articles seized are not of the character stated in the warrant, or have not been kept for any of the purposes aforesaid, he or they shall forthwith direct them to be restored to the occupier of the house or other place in which they were seized."

The magistrate or justices, before ordering a search and seizure under this section, are to be satisfied of three things: first, that the belief of the complainant is well founded; secondly, that any of the articles published for any of the purposes mentioned are of such a character and description that the publication of them would be a misdemeanour; and thirdly, that the publication in the manner alleged would be proper to be prosecuted.^(a) And the justices in petty sessions

Three things
of which justices
must be satisfied.

(a) See *per* Blackburn, J., *Reg. v. Hicklin* (L. Rep. 3 Q. B. 373; 18 L. T. N. S. 398; 37 L. J. 89, M. C.).

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are also in effect to be satisfied of the same three things. Before ordering the works seized to be destroyed, they must be satisfied that the articles complained of have been kept for any of the purposes mentioned, that they are of such a character that it would be a misdemeanour to publish them, and that it would not only be a misdemeanour to publish them, but that it would be proper to be prosecuted as such.^(a)

The words "and proper to be prosecuted as such," were, according to Blackburn, J.,^(b) inserted in the section with the object of guarding against the vexatious prosecution of publishers of old and recognised standard works, in which there may be some obscene or mischievous matter, *e.g.*, the works of Dryden.

Where the order made by a magistrate under this Act for the destruction of obscene books, stated merely that he was satisfied that the books were obscene, but did not state that "the publication of them would be a misdemeanour, and proper to be prosecuted as such," the order was held bad.^(c)

Death of
complainant.

If after the issuing of the summons, but before it is heard, the complainant dies, an order for the destruction of the obscene works may still be made.^(d)

To the argument against this view based on the provision in sect. 4 as to awarding costs to the party appealing or appealed against, Lush, J., replied: "I cannot see why, if upon the death of the complainant some other person takes up the prosecution, he should not be liable to pay costs if the appeal should be successful. It could readily be ascertained as a matter of fact who was the party virtually prosecuting the appeal."^(e)

Intention of
publisher
immaterial.

If a work be in itself obscene, however innocent may be the motive of its publisher, the publication of it is an indictable misdemeanour, and the work may be seized by a magistrate or justices under sect. 1 of 20 & 21 Vict. c. 83.^(f)

Where a pamphlet called "The Confessional Unmasked;

(a) *Per* Blackburn, J., *Ibid.*

(b) *Ibid.* "The magistrate," said Lord Lyndhurst, on the third reading of the Bill in the House of Lords, "must also be satisfied that the case is a proper one for a prosecution, so that if indecent passages were taken out of such authors as Dryden or Pope, he would say—'Although these are very indecent passages, and ought never to have been inserted in these works, yet this is not a case for a prosecution'" (Parliamentary Debates, July 13, 1857).

(c) *Ex pte. Braulough* (L. R. 3 Q. B. D. 509).

(d) *R. v. Truelove* (L. R. 5, Q. B. D. 536).

(e) *Ibid.* p. 540.

(f) *Reg. v. Hicklin* (L. Rep. 3 Q. B. 373; 37 L. J. 39, M. C.; 18 L. T. N. S. 398).

showing the depravity of the Romish priesthood, the iniquity of the confessional, and the questions put to females in confession," containing extracts in Latin, with translations of the same, from various writers, half the pamphlet relating to controversial matters, and the other half being grossly obscene as relating to impure and filthy acts, words, and deeds, was circulated by the appellant, a member of "The Protestant Electoral Union," not for profit or gain, but for the purpose of exposing what he deemed to be the errors of the Church of Rome, and particularly the immorality of the confessional, the pamphlet in fact containing a preface and notes condemnatory of the tenets and principles of the writers cited from, the Court of Queen's Bench held that the justices were right in ordering a number of copies of the pamphlet to be seized in the appellant's house and destroyed as obscene books within this section.^(a) "I take it," said Cockburn, C. J., "that, apart from the ulterior object which the publisher of this work had in view, the work itself is, in every sense of the term, an obscene publication, and that consequently, as the law of England does not allow of any obscene publication, such publication is indictable. We have it therefore that the publication itself is a breach of the law. But then it is said for the appellant, 'Yes, but his purpose was not to deprave the public mind; his purpose was to expose the errors of the Roman Catholic religion, especially in the matter of the confessional.' Be it so. The question then presents itself in this simple form: May you commit an offence against the law in order that thereby you may effect some ulterior object which you have in view, which may be an honest and even a laudable one? My answer is, emphatically, no. The law says, you shall not publish an obscene work. An obscene work is here published, and a work the obscenity of which is so clear and decided that it is impossible to suppose that the man who published it must not have known and seen that the effect upon the minds of many of those into whose hands it would come would be of a mischievous and demoralizing character. . . . I think the old sound and honest maxim that you shall not do evil that good may come, is applicable in law as well as in morals; and here we have a certain and positive evil produced for the purpose of effecting an uncertain, remote, and very doubtful good. I think, therefore, the case for the order is made out; and although I quite concur in thinking that the motive of the parties who published

(a) *Reg. v. Hicklin* (L. Rep. 3 Q. B. 373; 37 L. J. 89, M. C.; 18 L. T. N. S. 398).

this work, however mistaken, was an honest one, yet I cannot suppose but what they had that intention which constitutes the criminality of the act: at any rate, that they knew perfectly well that this work must have the tendency which in point of law makes it an obscene publication—namely, the tendency to corrupt the minds and morals of those into whose hands it might come. The mischief of it, I think, cannot be exaggerated. But it is not upon that I take my stand in the judgment I pronounce. I am of opinion, as the learned recorder has found, that this is an obscene publication. I hold that where a man publishes a work manifestly obscene he must be taken to have had the intention which is implied from that act; and that, as soon as you have an illegal act thus established, *quoad* the intention and *quoad* the act, it does not lie in the mouth of the man who does it to say, ‘Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose.’ The law does not allow that. You must abide by the law, and if you would accomplish your object, you must do it in a legal manner, or let it alone; you must not do it in a manner which is illegal.”

Report of judicial proceedings.

It is no defence that the obscene libel is a correct report of what took place in a court of justice^(a). This was so held as to a book containing a full report of the trial of one Mackay for selling “The Confessional Unmasked,” which set forth the whole of that work. “If,” said Grove, J.,^(b) “it were permissible to publish a report of a trial in which the question was whether certain matter was obscene and the publication of it a misdemeanour, and to reproduce the whole of such disgusting matter under the cover of such report, the result would be that the person publishing an obscene work would only have to be brought before a court of justice for such publication, in order to entitle him to republish the same matter with perfect impunity.”

Appeal from act of magistrates or justices.

Any person aggrieved by any act or determination of the magistrate or justices in or concerning the execution of the above Act may appeal to the next general or quarter sessions for the county, riding, division, city, borough, or place in and for which such magistrate or justices shall have so acted, giving to the magistrate or justices of the peace whose act or determination shall be appealed against notice in writing of such appeal, and of the grounds thereof, within seven days after such act or determination, and before the next general or quarter sessions, and entering

(a) *Steele*, appellant; *Brauman*, respondent (L. R. 7 C. P. 261).

(b) *Ibid.* p. 271.

within such seven days into a recognisance with sufficient surety, before a justice of the peace for the county, city, borough, or place in which such act or determination shall have taken place, personally to appear and prosecute such appeal, and to abide the order of and pay such costs as shall be awarded by such court of quarter sessions, or any adjournment thereof; and the court at such general or quarter sessions shall hear and determine the matter of such appeal, and shall make such order therein as shall to the said court seem meet; and such court upon hearing and finally determining such appeal shall, and may, according to their discretion, award such costs to the party appealing or appealed against, as they shall think proper; and if such appeal be dismissed or decided against the appellant, or be not prosecuted, such court may order the articles seized forthwith to be destroyed: provided always that it shall not be lawful for the appellant on the hearing of any such appeal to go into or give evidence of any other grounds of appeal against any such order, act, or determination, than those set forth in such notice of appeal.(a)

Sect. 2 enacts that "no plaintiff shall recover in any action for any irregularity, trespass, or other wrongful proceeding made or committed in the execution of this Act, or in, under, or by virtue of any authority hereby given, if tender of sufficient amends shall have been made by or on behalf of the party who shall have committed such irregularity, trespass, or other wrongful proceeding, before such action brought; and in case no tender shall have been made, it shall be lawful for the defendant in any such action by leave of the Court where such action shall depend, at any time before issue joined, to pay into Court such sum of money as he shall think fit, whereupon such proceeding, order, and adjudication shall be had and made in and by such Court as in other actions where defendants are allowed to pay money into Court."

Wrongful acts,
done in execu-
tion of the Act.

No action, suit, or information, or any other proceeding, of what nature soever, is to be brought against any person for anything done or omitted to be done in pursuance of this Act, or in the execution of the authorities under this Act, unless notice in writing has been given by the party intending to prosecute such action, suit, information, or other proceeding to the intended defendant, one calendar month at least before prosecuting the same.(b) Such action, suit, information, or other proceeding must be brought or

(a) 20 & 21 Vict. c. 83, s. 4.

(b) *Ibid.*

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commenced within three calendar months next after the act or omission complained of, or in case there shall be a continuation of damage, then within three calendar months next after the doing such damage shall have ceased.(a)

Form of indictment.

As to the manner in which an obscene libel must be set out in the indictment, see *Bradlaugh v. The Queen*(b) referred to in the chapter on Criminal Prosecutions, *post*.

Ecclesiastical jurisdiction abolished.

The stats. 18 & 19 Vict. c. 41, and 23 & 24 Vict. c. 32, have taken away the jurisdiction in suits for defamation which the Ecclesiastical Courts formerly possessed in England, Wales, and Ireland.

CHAPTER IV.

SEDITIONOUS LIBELS.

Summary of history of freedom of the press.

DURING a long period of our history the press of the country was under a rigorous censorship. The number of printers(c) and of the presses used by them, was strictly limited, and the publication of new works was prohibited unless previously authorised by licensers. The censorship of the press was part of the prerogative of the Crown, exercised chiefly through the tribunal of the Star Chamber. On the abolition of the Star Chamber, in 1641, the Long Parliament assumed to itself the jurisdiction exercised by that Court in matters relating to the press, and passed many severe ordinances in restraint of printing. The restraints of the press were continued after the Restoration by the Licensing Act of 13 & 14 Car. 2, c. 33 ("An Act for preventing the frequent abuses in printing seditious, treasonable, and unlicensed books and pamphlets, and for regulating of printing and printing presses"). This Act interdicted the printing of pamphlets and books except in London, York, and the Universities; limited the number of master printers to twenty; regulated the number of their presses and apprentices; appointed licensers, and imposed severe penalties on offenders against its provisions. Many cruel punishments were inflicted under this Act.(d) It continued in force till 1679, and in 1685

(a) 20 & 21 Vict. c. 83, s. 3.

(b) L. R. 3 Q. B. D. 607.

(c) Queen Elizabeth prohibited printing except in London, Oxford, and Cambridge (1 St. Tr. 1263).

(d) In 1680, when the Licensing Act had ceased for a time to operate, the opinion of the judges on the subject of unlicensed printing

was revived (by 1 Jac. 2, c. 17) for seven years. In 1692 it was continued (by 4 Will. & M. c. 24) until the end of the session of 1693, since when its operation has ceased, notwithstanding several attempts to revive it.^(a) The liberty of the press dates from that year.

The liberty of the press, according to Blackstone,^(b) when rightly understood, consists in laying no *previous* restraints upon publications; not in freedom from censure for criminal matter when published.^(c) Though this is true, it cannot

Liberty of press.

was expressed by Chief Justice Scroggs in the following manner. At the trial of Benjamin Harris, a bookseller, for the publication of a libel entitled, "An Appeal from the Country to the City for the Preservation of His Majesty's Person, Liberty, Property, and the Protestant Religion," the Chief Justice said: "It is not long since that all the judges met by the King's command—as they did some time before, too—and they both times declared unanimously that all persons that do write or print or sell any pamphlet that is either scandalous to public or private persons, such books may be seized and the person punished by law; that all books which are scandalous to the Government may be seized, and all persons so exposing them may be punished; and, further, that all writers of news, though not scandalous, seditious, or reflective upon the Government or the State, yet if they are writers (as there are few others) of false news, they are indictable and punishable upon that account" (7 St. Tr. 929).

(a) "While the Abbey was hanging with black for the funeral of the Queen, the Commons came to a vote which at the time attracted little attention, which produced no excitement, which has been left unnoticed by voluminous annalists, and of which the history can be but imperfectly traced in the archives of Parliament, but which has done more for liberty and for civilization than the Great Charter or the Bill of Rights. Early in the session a select committee had been appointed to ascertain what temporary statutes were about to expire, and to consider which of those statutes it might be expedient to continue. The report was made; and all the recommendations contained in that report were adopted, with one exception. Among the laws which the committee advised the House to renew was the law which subjected the press to a censorship. The question was put 'that the House do agree with the committee in the resolution that the Act entitled An Act for preventing abuses in printing seditious, treasonable, and unlicensed pamphlets, and for regulating of printing and printing presses be continued.' The Speaker pronounced that the 'noes' had it; and the 'ayes' did not think fit to divide" (Macaulay, Hist. of Eng. vol. iv. p. 540). As to the reasons which induced Parliament to discontinue the Licensing Act, see p. 541 of the volume last referred to.

(b) 4 Steph. Com. 346.

(c) To the same effect, Lord Mansfield: "The liberty of the press consists in printing without any previous licence, subject to the consequence of law" (*The King v. Dean of St. Asaph*, 3 T. R. 429). Lord Ellenborough: "The law of England is a law of liberty, and, consistently with this liberty, we have not what is called an *imprimatur*; there is no such preliminary licence necessary; but if a man publish a paper he is exposed to the penal consequences, as he is in every other

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as Hallam remarks,^(a) be said to exist in any security, or sufficiently for its principal ends, where discussions of a political or religious nature, whether general or particular, are restrained by too narrow and severe limitations. What the actual limitations are in matters political will be discussed in this chapter, in treating of libellous attacks on the Sovereign, on the Administration, and on the Constitution generally.

Form of publication.

It is to be observed, in the first place, with respect to seditious as well as other libels, that pictures, engravings, or woodcuts may be libellous as well as written or printed words.^(b)

Function of jury.

It is also to be observed that in these, as in other cases of libel, the jury are the sole judges of both law and fact: they are to determine not only the fact of publication, but also whether the libel was published with the seditious intention charged in the indictment or information.

"You," said Fitzgerald, J., to the jury in a case of this sort, "are the sole judges of the guilt or innocence of the defendant. The judges are here to give any help they can, but the jury are the judges of law and fact, and on them rests the whole responsibility. In this sense the jury are the true guardians of the liberty of the press."^(c) "The questions of law are usually for the judge, and on them the jury are bound to take his direction; the questions of fact are solely for their determination. In this peculiar case of libel the law of the land says that the jury shall determine the whole question, whether the publication is a libel or a seditious libel."^(d)

The fact that the House of Commons has resolved a particular publication to be a malicious, scandalous, and seditious libel, tending to create jealousies and divisions amongst the liege subjects of the Sovereign, and to alienate the affections of the people of this country from the constitution, does not deprive the jury of their right to determine whether the

act if it be illegal" (*Ree v. Cobb* 11, 29 Howell's St. Tr. 49). And Fitzgerald, J.: "By liberty of the press I mean complete freedom to write and publish without censorship and without restriction, save such as was absolutely necessary for the preservation of society" (11 Cox Cr. Cas. 49) (a) Const. Hist. vol. iii., p. 227 (edit. 1832).

(b) See *Reg. v. Sullivan* (11 Cox Crim. Cas. 51, 53-55).

(c) *Ibid.* p. 50; see also *per Deasy, B.*, *Ibid.* p. 60. Lord Kenyon thus gives the substance of all that has been said on this subject: "That a man may publish anything which twelve of his countrymen think is not blameable, but that he ought to be punished if he publishes that which is blameable" (*Ree v. Cutbell*, 27 Howell's St. Tr. 675).

(d) *Ibid.* p. 52.

publication is really a seditious libel or not.(a) In a case of this sort, Lord Kenyon, C.J., told the jury that in this country a defendant could never be crushed by the name of his prosecutor, however great that name might be; this was not the first prosecution commenced under the direction of the House of Commons which had failed: in *The King v. Stockdale* the House of Commons were also the prosecutors, but the defendant in that case was not weighed down by the weight of the prosecution, nor did the jury hold themselves bound to find the publication a libel because the House of Commons had voted it to be such.(b)

The criminal intention is the gist of the offence. "The crime laid," said Fitzgerald, J., to a grand jury.(c) "is the intent, and you can only find a bill against the accused when you come conscientiously to the conclusion—assuming you find the articles to be seditious—that they were published with the intent laid in the indictment, namely, to spread, stir up, and excite disaffection and sedition against the Queen's subjects, to excite hatred and contempt towards Her Majesty's Government and Administration," &c.

On a prosecution for a seditious libel (notwithstanding 44 & 45 Vict. c. 60, s. 4), evidence cannot be given of the truth of the libel, and that it was for the public benefit that it should be published.(d)

LIBELS AGAINST THE SOVEREIGN PERSONALLY.

The old law on the subject of words spoken or written against the Sovereign personally has undergone considerable alteration in more recent times.

The following statutory enactments on the subject are still in force:—

An Act of 3 Edw. I, c. 34, provides "that from henceforth none be so hardy to tell or publish any false news or tales whereby discord or occasion of discord or slander may

(a) *The King v. Reeves* (2 Peake's N. P. Cas. 84).

(b) 2 Peake's N. P. Cas. 86, 87. The jury in this case returned a verdict of not guilty. *Ree v. Stockdale* was the case of a criminal information filed against the defendant, in accordance with a vote of the House of Commons, for publishing a review of the articles of impeachment against Warren Hastings. The jury found the defendant not guilty.

(c) See *Reg. v. Sullivan* (11 Cox Crim. Cas. 47). See also *The King v. Reeves* (*ubi supra*).

(d) *Ex parte O'Brien* (15 Cox Cr. Cas. 180), following *Reg. v. Duffy* (9 Ir. L. R. 329).

grow between the king and his people, or the great men of this realm.”

Sect. 1 of 6 Anne, c. 41, made it high treason for any person maliciously, advisedly, and directly, by writing or printing to maintain and affirm that the then Sovereign was not the lawful and rightful queen of these realms, or that the Pretender had any right or title to the Crown, or that any other person or persons has or have any right or title to the same, otherwise than according to the Bill of Rights,^(a) the Act of Settlement,^(b) and the Acts for the Union of England and Scotland; or that the kings or queens of this realm, with and by the authority of Parliament, are not able to make laws or statutes of sufficient force and validity to limit and bind the Crown, and the descent, limitation, inheritance, and government thereof.

Spoken words not treason.

Words spoken against the king were in more than one case, before the time of Charles I., held to be treasonable. To accuse the king of having committed murder,^(c) or to say that a king *de facto* and not *de jure* was the rightful king,^(d) was held to amount to high treason.^(e) But in the case of Hugh Pine ^(f) who was accused of having spoken several disparaging words concerning the king (Charles I.), all the judges having been commanded to assemble themselves, to consider and resolve what offence the speaking of those words was, it was resolved by them “that the speaking of the words before mentioned, though they were as wicked as might be, were not treason; that, unless it were by some particular statute, no words will be treason.”

To charge the king with a personal vice was held by the judges, upon debate of Peacham’s case, not to be treason.^(g)

Unpublished writing.

The law as to words spoken, one would have imagined, ought to have been held equally applicable to unpublished writings. Nevertheless, a clergyman named Peacham was found guilty of treason, in the reign of James I., for certain passages in a sermon found in his study, which was never preached or intended to be preached. Many of the judges, however, were of opinion that this was not treason, and Peacham was not executed.^(h) “This case,” says Sir Michael Foster,⁽ⁱ⁾ “therefore weigheth very little; and no great

(a) 1 Will. & M. sess. 2, c. 2.

(b) 12 & 13 Will. 3, c. 2. (c) *Juliana Quick’s case* (21 Hen. 6).

(d) *Germaine’s case* (2 Edw. 4).

(e) See also *Challerecomb’s case*, cited Cro. Car. 125.

(f) Cro. Car. 117, 126.

(g) *Ibid.* 126.

(h) *Ibid.* 125.

(i) First Discourse of High Treason, chap. i. 199.

regard has been paid to it ever since.”(a) In the case of Algernon Sidney, an unpublished paper, forming part of a theoretical work on Government, found in his house, was given in evidence against him, and the Chief Justice (Jefferies) in his charge to the jury, insinuated that the doctrines contained in the paper were treasonable in themselves and without reference to other evidence.(b) If this paper had related to the treasonable practices charged in the indictment, it would no doubt have been admissible in evidence against the accused, though unpublished; “but papers not capable of such connection, while they remain in the hands of the author unpublished, as Mr. Sidney’s did, will not make a man a traitor.”(c) The judgment in Sidney’s case was reversed by Act of Parliament in 1689.(d)

Though neither words spoken nor an unpublished writing will amount to an overt act of treason, to make good an indictment of compassing the death of the Sovereign, under 25 Edw. 3, c. 2, yet a writing which imports such a compassing, if it be published, will amount to an overt act of treason under that statute.(e)

Apart from statute, all contempts against the Sovereign’s person or Government, are, according to the textbooks, very highly criminal, and punishable with fine and imprisonment, by the discretion of the judges, upon consideration of all the circumstances of the case.(f) Under this head is ranked contemptuously speaking of the Sovereign, as by cursing him, &c., or giving out that he wants wisdom, valour, or steadiness; or in general, doing anything which may lessen

(a) The King (James I.) instructed the Attorney-General (Bacon) as to the best measures to be taken for the defendant’s examination, and the judges were sounded separately before they could have an opportunity of conferring together, the Attorney-General himself undertaking to practise upon the Chief Justice (Coke), of whom some doubt was entertained. A conviction procured by such means is of little value as a precedent.

(b) 9 St. Tr. 889, 893. He said: “In the next place I am to tell you, that though some judges have been of opinion that words of themselves were not an overt act, but my Lord Hale, nor my Lord Coke, nor any other of the sages of the law, ever questioned but that a letter would be an overt act, sufficient to prove a man guilty of high treason; for *scribere est agere*.” “If you believe that that was Colonel Sidney’s book, writ by him, no man can doubt but it is a sufficient evidence that he is guilty of compassing and imagining the death of the king.”

(c) Foster, chap. i. p. 198.

(d) See the Act (a private one) in 9 St. Tr. 996.

(e) Hale’s P. C. 118; Foster’s First Discourse on Treason, chap. i. 198; *Williams’s case* (2 Roll. Rep. 88; 3 Inst. 121).

(f) Hawk. P. C., book 1, c. 6.

him in the esteem of his subjects, weaken his government, or raise jealousies between him and his people.(a) Stating or insinuating that he acts from partial or corrupt motives, or with an intention to favour or oppress any individual, or class of men, would be a seditious libel; but not the imputation of honest error without moral blame.(b)

It is a criminal libel to publish falsely of the Sovereign, as of any other person, that he is insane.(c)

Lord Ellenborough's exposition of law as to attacks on Sovereign personally.

A leading case on the subject of seditious libels is that of *The King v. Lambert and Perry*,(d) in which the law relating to seditious libels which attack the Sovereign personally is fully stated by Lord Ellenborough, C.J., in his summing up to the jury. The defendants were the printer and the proprietor of the *Morning Chronicle*, and the libel for the publication of which the criminal information was filed was the following: "What a crowd of blessings rush upon one's mind that might be bestowed upon the country in the event of a total change of system! Of all monarchs, indeed, since the Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular."(e)

Lord Ellenborough said: "The fair meaning of the expression 'change of system,' I think, is a change of political system—and not a change in the frame of the established government—but in the measures of policy which have been for some time pursued. By total change of system is certainly not meant *subversion* or *demolition*; for the descent of the Crown to the successor of his Majesty is mentioned immediately after. The writer goes on to speak of the blessings that may be enjoyed upon the accession of the Prince of

(a) Hawk. P. C., book 1, c. 6.

(b) *Per* Lord Ellenborough, *Ree v. Lambert and Perry* (2 Camp. 402, 403).

(c) *Ree v. Harvey* (2 B. & C. 257).

(d) 2 Camp. 398.

(e) The information charged that the defendants, "being seditious, malicious, and ill-disposed persons, and being greatly disaffected to our present Sovereign Lord George the Third, &c., and to his administration of the government of this kingdom, and most unlawfully, wickedly, and maliciously devising, designing, and intending as much as in them lay, to bring our said Lord the King and his administration of the government of this kingdom, and the persons employed by him in the administration of the government of this kingdom into great and public hatred and contempt among all his liege subjects, and to alienate and withdraw from our said Lord the King the cordial love and affection, true and due obedience, fidelity, and allegiance of the subjects of our said Lord the King, did unlawfully, seditiously and maliciously print and publish, and cause, &c., a certain scandalous, malicious, and seditious libel of and concerning our said Lord the King and his administration of the government of this kingdom, to the tenor and effect following," &c.

Wales; and therefore cannot be understood to allude to a change inconsistent with the full vigour of the monarchical part of the constitution. Now, I do not know that merely saying that there would be blessings from a change of system, without reference to the period at which they may be expected, is expressing a wish or a sentiment that may not be innocently expressed in reviewing the political condition of the country. The information treats this as a libel on the person of his Majesty and his personal administration of the government of the country. But there may be error in the present system, without any vicious motives, and with the greatest virtues, on the part of the reigning sovereign. He may be misled by the Ministers he employs, and a change of system may be desirable from their faults. He may himself, notwithstanding the utmost solicitude for the happiness of his people, take an erroneous view of some great question of policy, either foreign or domestic. I know but of ONE BEING to whom error may not be imputed. If a person who admits the wisdom and the virtues of his Majesty, laments that in the exercise of these he has taken an unfortunate and erroneous view of the interests of his dominions, I am not prepared to say that this tends to degrade his Majesty, or to alienate the affections of his subjects. I am not prepared to say that this is libellous. But it must be with perfect decency and respect, and without any imputation of bad motives. Go one step farther, and say or insinuate that his Majesty acts from any partial or corrupt view, or with an intention to favour or oppress any individual or class of men, and it would become most libellous. However, merely to represent that an erroneous system of government obtains under his Majesty's reign, I am not prepared to say exceeds the freedom of discussion on political subjects which the law permits. Then comes the next sentence: 'Of all monarchs, indeed, since the Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular.' This is more equivocal; and it will be for you, gentlemen of the jury, to determine what is the fair import of the words employed. Formerly it was the practice to say, that words were to be taken in the more lenient sense; but that doctrine is now exploded; they are not to be taken in the more lenient or more severe sense; but in the sense which fairly belongs to them, and which they were intended to convey. Now, do these words mean that his Majesty is actuated by improper motives, or that his successor may render himself nobly popular by taking a more lively interest in the welfare of

his subjects? Such sentiments, as it would be most mischievous, so it would be most criminal, to propagate. But if the passage only means that his Majesty, during his reign, or at any length of time, may have taken an imperfect view of the interests of the country, either respecting our foreign relations or the system of our internal policy, if it imputes nothing but honest error without moral blame, I am not prepared to say that it is a libel. The extract read at the request of the defendants^(a) does seem to me too remote in point of situation in the newspaper to have any material bearing on the paragraph in question. If it had formed a part of the same discussion, it must certainly have tended strongly to show the innocence of the whole. It speaks of that which everybody in his Majesty's dominions knows, his Majesty's solicitude for the happiness of his people; and it expresses a respectful regard for his paternal virtues. What connection it has with the passage set out in the information, it is for you to determine. Taking that passage substantively and by itself, it is a matter, I think, somewhat doubtful, whether the writer meant to calumniate the person and character of our august Sovereign. If you are satisfied that this was his intention, by the application of your understandings honestly and fairly to the words complained of, and you think they cannot properly be interpreted by the extract which has been read from the same paper, you will find the defendants *guilty*. But if, looking at the obnoxious paragraph by itself, you are persuaded that it betrays no such intention, or if, feeling yourselves warranted to import into your consideration of it a passage connected with the subject, though considerably distant in place and disjointed by other matter, you infer from that connexion that this was written without any purpose to calumniate the personal government of his Majesty and render it odious to his people, you will find the defendants not guilty. The question of intention is for your consideration. You will not distort the words, but give them their application and meaning as they impress your minds. What appears to me most material is the substantive paragraph itself; and if you consider it as meant to represent that the reign of his Majesty is the only thing interposed between the subjects of this country and the possession of great blessings, which are likely to be enjoyed in the reign of his successor, and thus to render his Majesty's

(a) The defendant was allowed to read another paragraph from the same newspaper, at a considerable distance from the alleged libel and printed in a different type, for the purpose of explaining it.

administration of his government odious, it is a calumnious paragraph, and to be dealt with as a libel. If, on the contrary, you do not see that it means distinctly, according to your reasoning, to impute any purposed maladministration to his Majesty, or those acting under him, but may be fairly construed as an expression of regret that an erroneous view has been taken of public affairs, I am not prepared to say that it is a libel." (a) This direction of Lord Ellenborough has been quoted at length, as being at once the most recent and the fullest authoritative exposition of the law relating to this branch of our subject.

In 1729 an information was filed against John Clerk, charging him with printing and publishing an infamous libel called *Mist's Weekly Journal*, wherein the King's title to the Crown was openly struck at, his legitimacy called in question, and the persons of several of the royal family scandalously traduced under borrowed names, by representing the late King (George I.) under the name of Merewits, his present Majesty under that of Esrell, the Queen under that of Sultana; and at the same time drawing a beautiful character of the Pretender by the name of the Young Sophi, and setting forth the tyranny and subjection all Englishmen lay under, by representing them under the name of the Persians. The charge against the defendant was for maliciously and traitorously printing off one of these papers in particular; but, according to the report, the evidence produced at the trial was that he acted merely as a servant to the printer, and that his business was only to clap down the press; and few or no circumstances were offered of his knowing the import of the paper, or being conscious of doing anything illegal. It was objected, by the counsel for the defendant, that the paper ought not to be thought a libel upon the royal family, because the characters drawn in it were by no means agreeable to the persons supposed to be represented; but, if anything related to them it was entirely opposite to what each was known to deserve; and, secondly, that the evidence did not come up to the charge, the fact of printing being charged to be attended with a malicious and traitorous design, whereas it was only proved that it was done through ignorance and in obedience to his master's authority. It was answered by the counsel for the Crown that they were only called on to show that the construction they put upon the paper was such as the generality of readers would put upon it, according to its obvious and natural sense; and,

Liability of
printers.

(a) The jury returned a verdict of not guilty.

secondly, that if they could have given evidence of express malice, that fact would have been treason within the statute of 6 Anne, c. 7; but, the charge being only for printing and publishing a seditious libel, the circumstance of malice was entirely immaterial; and the Lord Chief Justice (Raymond) having agreed the law to be so, the jury found the defendant guilty.(a)

A similar information was filed against a compositor named Knell, one of two servants of Mist, for printing and publishing the same work. The evidence being that the defendant and his fellow-servant set up the type, and that one took one column of it downwards and the other the other column, the Chief Justice directed the jury to acquit the defendant as to the publication; but, if they believed the evidence, to find him guilty of the printing; and the jury did so.(b) An old bed-ridden woman was indicted for publishing the same libel; the only evidence being that she kept a pamphlet shop at which the libel was sold, the shop being shown to be a mile distant from the house in which she had for a long time lain bedridden. The jury refused to do anything else than find specially the circumstances given in evidence before them, and the Attorney-General at length consented to withdraw a juror.(c)

The North Briton.

In 1763, an information was filed against John Wilkes, for printing and publishing a certain malicious, seditious, and scandalous libel, intituled, "*The North Briton*, number 45," tending to vilify and traduce the King and his Government, to impeach and disparage his veracity and honour, and to represent and make it to be believed that his Majesty's most gracious speech delivered from his throne to the Parliament, on the 19th day of April, 1763, contained many falsities and gross impositions upon the public, and that his Majesty had suffered the honour of his Crown to be sunk and prostituted, and the interests of his subjects and allies to be treacherously betrayed; and also to render the King and his Government contemptible and odious, and to excite tumults, commotions, and insurrections; and to violate and disturb the public tranquillity, good order, and peace of the kingdom. He was found guilty, and sentenced to be fined and imprisoned. George Kearsley was convicted of printing and publishing, and John Williams of publishing, the same number of *The North Briton*.(d)

(a) 1 Barnardiston's Rep. 304.

(b) *Ibid.* 305.

(c) *Reg v. Nutt* (*Ibid.* 306).

(d) Dig. L. L. 69, K. B. MSS., Easter Term, 3 Geo. 3, and Hilary Term, 4 Geo. 3. See also the cases of *Reg v. Woodfall* (5 Burr. 2661),

The condition of Ireland in 1848 induced the Government of that time to introduce a Bill into Parliament for the better security of the Crown and Government of the United Kingdom, by making it treason-felony to publish or utter for the future such seditious writings or language as then incited the people to disaffection and rebellion.^(a) The Bill became law the same year (11 & 12 Viet. c. 12).

Sect. 3 enacts "that if any person whatsoever after the passing of this Act shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most gracious lady the Queen, her heirs or successors from the style, honour, or royal name of

and *Ree v. Almon* (*Ibid.* 2686), where the defendants were convicted of publishing certain letters of "Junius."

(a) Previously to the passing of this Act, the law on the subject stood thus: The only statute relating to treason, which beyond doubt extended to Ireland, was that of the 25 Edw. 3, c. 2, by which any person compassing or imagining the death of the Sovereign, levying war against him, or being adherent to the king's enemies in his realm, giving to them aid or comfort in the realm or elsewhere, is guilty of high treason. An Act of 36 Geo. 3, c. 7, made perpetual by 57 Geo. 3, c. 6, extended the law of treason by making it applicable to persons who should, within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of his Majesty, his heirs or successors, or to deprive or depose him or them from the style, honour, or kingly name of the Imperial Crown of this realm, or of any other of His Majesty's dominions or countries, or to levy war against His said Majesty, his heirs and successors within this realm, in order by force or constraint to compel him or them to change his or their measures or counsels, or in order to put any force or constraint upon or to intimidate or overawe both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade this realm, or any other of His said Majesty's dominions, or countries under the obedience of his said Majesty, his heirs and successors, and such compassings, imaginations, inventions, devices, or intentions, or any of them, should express, utter, or declare by *publishing any printing or writing*, or by any overt act or deed. The punishment for the offence was death. The preponderance of legal opinion was in favour of the view that the statute of 36 Geo. 3, c. 7, as made perpetual by 57 Geo. 3, c. 6, did not extend to Ireland. The present Act (11 & 12 Viet. c. 12) was passed to make the law on the subject uniform throughout the United Kingdom, by extending to Ireland (sect. 2) all the provisions of the former Act which are not by the present Act repealed. Sect. 1 repeals all the provisions of 57 Geo. 3, c. 6, on this subject, except such as relate to the compassing, imagining, inventing, devising, or intending death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the *person* of the Sovereign, and the expressing, uttering, or declaring of such compassings, imaginations, inventions, devices, or intentions, or any of them.

the Imperial Crown of the United Kingdom, or of any other of Her Majesty's dominions and countries, or to levy war against Her Majesty, her heirs, or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe, both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other Her Majesty's dominions or countries, under the obedience of Her Majesty, her heirs or successors, and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare *by publishing any printing or writing*, or by open and advised speaking, or by any overt act or deed, every person so offending shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported^(a) beyond the seas for the term of his or her natural life, or for any term not less than seven years, or to be imprisoned for any term not exceeding two years, with or without hard labour, as the Court shall direct."

Sect. 8 provides that in the case of every felony punishable under this Act, every principal in the second degree and every accessory before the fact shall be punishable in the same manner as the principal in the first degree is by the Act punishable; and every accessory after the fact to any such felony shall, on conviction, be liable to be imprisoned, with or without hard labour, for any term not exceeding two years.

In an indictment under this Act, the offender may be charged with any number of the matters, acts, or deeds by which such compassings, &c., as aforesaid, or any of them, shall have been expressed, uttered, or declared.^(b) If the facts or matters alleged in the indictment shall amount in law to treason, the indictment is not by reason thereof to be deemed void, erroneous, or defective; neither, if the facts or matters proved on the trial of any person indicted for felony under the Act amount in law to treason, is the person tried to be entitled by reason thereof to be acquitted of the felony;

(a) The punishment by transportation beyond the seas has been abolished by the Acts 16 & 17 Vict. c. 99, and 20 & 21 Vict. c. 3, and that by penal servitude substituted for it. By 27 & 28 Vict. c. 47, no person is in any case to be sentenced to penal servitude for a shorter period than five years, or, if previously convicted for felony (either on indictment or by way of summary conviction) for less than seven years.

(b) Sect. 5.

but no person tried for such felony is afterwards to be prosecuted for treason upon the same facts.(a)

Nothing in this Act contained is to lessen the force of, or in any manner to affect anything enacted by, the statute of 25 Edw. 3, c. 2.(b)

LIBELS ON THE ADMINISTRATION.

Everybody may, with impunity, criticise the conduct of the Government, provided he does it fairly and honestly; but imputations of corrupt motives in the administration of affairs, or other writings calculated to alienate the affections of the people by bringing the Government into disesteem,(c) or likely to excite sedition,(d) whether such be the writer's intention or not,(e) come within the denomination of seditious libels, and are punishable as such.

How far criticisms on Government are allowed.

“It is certain,” says Hawkins,(f) “that it is a very high aggravation of a libel that it tends to scandalise the Government by reflecting on those who are entrusted with the administration of public affairs, which doth not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned in it to acts of revenge, but also has a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition.”

“It has been observed,” said Lord Ellenborough,(g) “that it is the right of the British subject to exhibit the folly or imbecility of the members of the Government. . . . If, in so doing, individual feelings are violated, there the line of interdiction begins, and the offence becomes the subject of penal legislation.”

“A writer,” says Fitzgerald, J.,(h) “may criticise or censure the conduct of the servants of the Crown or the acts of the Government; he can do it freely and liberally, but it must be without malignity, and not imputing corrupt or malicious motives. With the same motives a writer may freely criticise the proceedings of courts of justice and of individual judges—nay, he is invited to do so, and to do so

(a) Sect. 7.

(b) Sect. 6.

(c) See per Lord Ellenborough in *Rex v. Cobbett* (29 Howell's St. Tr. 49).

(d) See per Best, J., in *Rex v. Burdett* (4 B. & Ald. 131).

(e) *Ibid.* See also per Littledale, J., in *Rex v. Lovett* (9 C. & P. 466).

(f) P. C., book i. chap. 28, “Libels.” s. 7.

(g) *Rex v. Cobbett* (29 Howell's St. Tr. 53).

(h) *Reg. v. Sullivan & Pigott*, 11 Cox Crim. Cas. 49, 50.

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in a free and fair and liberal spirit. The law does not seek to put any narrow construction on the expressions used, and only interferes when plainly and deliberately the limits are passed of frank and candid and honest discussion. . . . There is no sedition in censuring the servants of the Crown, or in just criticism on the administration of the law, or in seeking redress of grievances, or in the fair discussion of all party questions."

Test of seditious libel.

Many cases have been decided under this head of the law of libel, but no finer test of what constitutes the offence can be deduced from them than the following—the plain intrinsic tendency of the particular publication to produce public disorder, and the malicious intention of its author.(a)

Cases decided.

In *Ree v. Tutchin*(b) the defendant was charged with having falsely, seditiously, and scandalously written, composed, and published a certain false, malicious, seditious, and scandalous libel, intitled "The Observer." The information set forth several passages from "The Observer," some of which lamented the sad state of the country owing to the influence of French gold on those who had the conduct of affairs; whilst others complained of the mismanagement of the navy, attributing ignorance and incapacity to those who had the management of it. It having been contended on behalf of the defendant that the publications could not be libels, because they did not reflect upon particular persons, Lord Holt, C.J., said to the jury:(c) "This is a very strange doctrine, to say it is not a libel reflecting on the Government, endeavouring to possess the people that the Government is maladministered by corrupt persons that are employed in such or such stations either in the navy or army. To say that corrupt officers are appointed to administer affairs is certainly a reflection on the Government. If people should not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist; for it is very necessary for all Governments that the people should have a good opinion of it (*sic*). And nothing can be worse to any Government than to endeavour to procure animosities as to the mismanagement of it: this has been always looked upon as a crime, and no Government can be safe without it be punished. Now you

Per Lord Holt.

(a) Starkie on Libel, 617, 3rd edit.; Holt's Rep. 424. *Ree v. Beere* (12 Mod. Rep. 219; Holt's Rep. 422); *Ree v. Laurence* (12 Mod. 311); and *Ree v. Bliss* (Dig. L. L. 122) are cases, amongst others, in which publications of this nature have been punished; but they throw no additional light on the principle above stated.

(b) 14 Howell's St. Tr. 1095.

(c) *Ibid.* 1127.

are to consider whether these words I have read to you do not tend to beget an ill opinion of the administration of the Government." (a)

Richard Francklin was tried and convicted in 1731 for printing and publishing in *The Craftsman* a seditious libel, intituled "A Letter from the Hague," (b) wickedly, maliciously, and seditiously contriving and intending to disturb and disquiet the public peace and tranquillity of the kingdom, and to bring the treaty of peace into contempt and disgrace, and also to detract, scandalise, traduce, and vilify the administration of His Majesty's present Government of this kingdom and his principal officers and Ministers of State, and to represent his said officers and Ministers of State as persons of no integrity and ability, and as enemies to the public good of this kingdom, and to cause it to be believed that His Majesty by the advice of his said principal officers and Ministers intended to break and violate the said treaty last mentioned, &c. "Even a private man's character," said Lord Raymond, C.J., (c) "is not to be scandalised, either directly or indirectly, because there are remedies appointed by the law in case he has injured any person, without maliciously scandalising him in his character; and much less is a magistrate's, Minister of State, or other public person's character to be stained either directly or indirectly, because the law hath pointed out another remedy than publishing libels, if they have injured any person either in a public or private capacity. And the law always punishes libels even among private persons, because they flow from malice and tend to create disturbance, quarrels, and revenge between them, their families and kindred, and disturb the public peace; and the law reckons it a greater offence when the libel is pointed at persons in a public capacity, as it is a reproach to the Government to have corrupt magistrates, &c., substituted by his Majesty, and tends to sow sedition and disturb the peace of the kingdom." And his lordship refused to allow the admission of any evidence to prove that the matters charged in the libels were true. (d)

Per Lord
Raymond.

In 1777 an information was filed against John Horne, charging that the defendant wickedly, maliciously, and seditiously intending, devising, and contriving to stir up and

(a) Tutchin was convicted; but a new trial was afterwards granted on a technical point, and he was not tried again.

(b) 9 St. Tr. 255 (17 Howell's St Tr. 626). The "Letter from the Hague" was said to have been written by Bolingbroke.

(c) P. 659.

(d) Francklin was sentenced to pay a fine of £100, to be imprisoned for a year, and to find security for his good behaviour for seven years.

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excite discontents and seditious amongst his Majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of his Majesty's subjects from his said Majesty, and to insinuate and cause it to be believed that divers of his Majesty's innocent and deserving subjects had been inhumanly murdered by his said Majesty's troops in the province, colony, or plantation of the Massachusetts Bay, in New England, in America, belonging to the Crown of Great Britain, and unlawfully and wickedly to seduce and encourage his said Majesty's subjects in the said province, colony, or plantation to resist and oppose his Majesty's Government, &c., did wickedly, maliciously, and seditiously write and publish a certain false, wicked, malicious, scandalous, and seditious libel of and concerning his said Majesty's Government and the employment of his troops.^(a) The information was tried before the Earl of Mansfield by a special jury, and the defendant was found guilty and sentenced to pay a fine of £200 to the king, to be imprisoned for twelve months and until the fine should be paid, and to find sureties for his good behaviour for three years.^(b)

Per Lord
Ellenborough.

In 1804 an information was filed against William Cobbett for a libel upon the administration of the Irish Government, and upon the public conduct and character of the Lord Lieutenant and Lord Chancellor of Ireland. The libel was contained in a letter signed "Juverna," published in the *Weekly Register*; and the information charged that the defendant, unlawfully and maliciously devising and intending to move and incite the liege subjects of the King to hatred and dislike of his Majesty's administration and Government of this kingdom, and to insinuate and cause it to be believed that the people of that part of the United Kingdom of Great

(a) The seditious libel set out in the information was as follows:—
"King's Arms Tavern, Cornhill, June 7, 1775.—At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed that a subscription should be immediately entered into (by such of the members present as should approve the purpose) for raising the sum of £100, to be applied to the relief of the widows, orphans, and aged parents of our beloved *American* fellow subjects, who, faithful to the character of Englishmen, preferring death to slavery, were for that reason only inhumanly murdered by the king's troops at or near Lexington and Concord, in the Province of Massachuset, on the 19th of last April, which sum being immediately collected, it was thereupon resolved, that Mr. Horne do pay to-morrow into the hands of Messrs. Brownes and Collison, on the account of Dr. Franklin, the said sum of £100, and that Dr. Franklin be requested to apply the same to the above mentioned purpose."

(b) 11 St. Tr. 264 (20 How. St. Tr. 651); Cowp. Rep. 672.

Britain and Ireland called Ireland were oppressed, aggrieved, and injured by our said lord the King's Government of the said part of the United Kingdom, and to traduce, defame, and vilify the persons employed by our said lord the King, in the administration of the Government of the said part of the said United Kingdom, &c., did unlawfully and maliciously print and publish the said libel. Mr. Cobbett was not the author, but only the publisher of the letter. Lord Ellenborough, C.J., in his summing up to the jury, said: "It is no new doctrine that if a publication be calculated to alienate the affections of the people, by bringing the Government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime. It has ever been considered as a crime, whether it be wrapped in one form or in another. The case of *The King v. Tutchin*, decided in the time of Lord Chief Justice Holt,^(a) has removed all ambiguity from this question; and although, at the period when that case was decided, great political contentions existed, the matter was not again brought before the judges of the Court by any application for a new trial. . . . If you are of opinion that the publications are hurtful to the individuals or to the Government, you will find the defendant guilty; if on the contrary you consider them neither destructive of the peace of the one or the other, you will acquit him of the charges under this information."^(b)

An information was filed in 1811 against John Hunt and John Leigh Hunt for printing and publishing in *The Examiner* a libel tending to create disaffection in the army. "The information," said Lord Ellenborough to the jury, "states that the defendants, being malicious, seditious, and ill-disposed persons, and unlawfully and maliciously devising and intending to injure the military service of our lord the King, and to insinuate and cause it to be believed that an improper and cruel method of punishment was practised in the army of our said lord the King, and that persons belonging to the said army were punished according to such method with great and excessive severity, and thereby to raise and excite discontent and disaffection in the minds of the persons

(a) 14 Howell's St. Tr. 1095.

(b) Mr. Cobbett was found guilty, but was not called up for judgment, having redeemed himself by giving up the author of the letter (the Hon. Robert Johnson, one of the judges of the Court of Common Pleas in Ireland), who was subsequently prosecuted and convicted (See *Rex v. Johnson*, in the same volume of Howell's St. Tr. and 7 East. 65).